IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)

CASE NO: 345/2020

In the matter between:

MOBILITY INSURANCE UNDERWRITING MANAGERS (PTY) LTD	**1ST PLAINTIFF**
STOP LOSS INSURANCE BROKERS (PTY) LTD	**2ND PLAINTIFF**
SYNCHRONY INTERGRATED SOLUTIONS (PTY) LTD t/a "DIGIT SYNC"	**3RD PLAINTIFF**
CONSTANTIA INSURANCE COMPANY LIMITED	**4TH PLAINTIFF**

and

SPECTRUM ALERT (PTY) LTD	**DEFENDANT**

JUDGMENT

GQAMANA J:

[1] This is an application brought in terms of rule 28(4) of the Uniform Rules of Court, wherein the Plaintiffs seek leave to amend their particulars of claim. For convenience, the parties shall be referred to as they are in the main action. The application is opposed by the Defendant on the bases that the proposed

amendments will render the particulars of claim expiable due to the fact that they do not carry sufficient facts to sustain a cause of action, alternatively, they are vague ad embarrassing.

[2] The underlying facts which underpins the issues herein are as follows. The Plaintiffs caused summons to be issued against the Defendant on 13 February 2020.[1] The Plaintiffs' claim is that of the breach of contract and agreements entered between them and the Defendant, namely, the appointment agreement, the insurance contract and the tracking agreement. The relevant agreements and contract are attached as annexures to the original particulars of claim. It is alleged that the First and Second Plaintiffs entered into a written agreement, wherein they were appointed as the underwriting manager and risk management consultant respectively by the Defendant. The material terms of tracking appointments are spelled out in the appointment agreement which is annexed marked "A" in the original particulars of claim. It is further pleaded that, the First and Fourth Plaintiffs entered into a binder agreement wherein, they had to arrange insurance cover for the minibus feeder taxis and buses on behalf of the Defendant. Further, it is also alleged that in terms of the appointment agreement the First and Second Plaintiffs had to arrange for the vehicle tracking solutions for the buses and taxis which was arranged with the Third Plaintiff. In addition, it is pleaded that the Third Plaintiff and the Defendant concluded on 28 November 2018, a written tracking agreement as per annexure "F" to the original particulars of claim. The material terms of the such agreement are set out in annexure "F". The Plaintiffs contend that the Defendant failed to perform its obligation in terms of the aforesaid agreements and contract in that, it failed to pay the composite monthly premium for the month of September 2019 and the Defendant purported to

[1] Pleadings index p117.

cancel the aforesaid agreement and contract. Accordingly, on the Plaintiffs version, such conduct by the Defendant amounts to repudiation of the relevant agreements and contract which, the Plaintiffs have accepted.

[3] After the summons was duly served on 6 May 2020, the Plaintiffs' attorneys were served with a notice of bar. In response thereto, the Defendant filed a notice of exception on 13 May 2020.

[4] Thereafter the Plaintiffs served a notice of intention to amend on the Defendant, on 15 June 2020. The latter in response served a notice of objection on 1 July 2020.

[5] On 30 July 2020, the Plaintiffs filed a substantial notice of amendment seeking to delete the particulars of claim *in toto* and replacing it with the new proposed particulars of claim. That notice attracted another objection from the Defendant which was filed on 12 August 2020, in accordance with sub-rule (3). That then necessitated the Plaintiffs to file a substantive application in accordance with sub-rule (4) for leave to amend. It is this application which is the subject matter of the adjudication hereto.

[6] The Plaintiffs' proposed amendment as indicated in the preceding paragraph seeks to replace *in toto* the particulars of claim and to substitute it with the new proposed one. It is vital to be mentioned that, the litigation between the parties hereto has not progressed at all. There was no plea filed by the Defendant on the original particulars of claim. For all practical purposes, if leave to amend the particulars of claim as proposed in the notice of intention to amend is granted, the Defendant will not be in a worse or different position than it was before the proposed amendments. The latter could either file its

plea, or take any other steps contemplated in rules 23 or 30 of the Uniform Rules.

[7] The principles applicable to applications of this nature have been summarised by the court in numerous cases dating back more than half century ago. In *Moolman v Estate Moolman and Another*,[2] Watermeyer J (then) said:

> "The question of amendment of pleadings has been considered in a number of English cases. See for example : *Tildesley v Harper* (10 Ch.D. 393); *Stuart v North Met, Tramways Co.* (16 QBD 556): and the practical rule adopted seems to be that amendments will always be allowed unless the application to amend is *mala fide* or unless such amendment would cause an injustice to the other side which cannot be compensated by costs, or in other words unless the parties cannot be put back for purposes of justice in the same position as they were when the pleading it is sought to amend was filed".

[8] Also in *Rosenberg v Bitcom*,[3] Greenberg J (then) stated:

> "Although it has been stated that the granting of the amendment is an indulgence to the parties asking for it, it seems to me that at any rate the modern tendency of the Courts lies in favour of an amendment whenever such an amendment facilitates the proper ventilation of the dispute between the parties."

[9] But, under certain circumstances a court may refuse to grant an amendment. In *Benjamin v Sobac South African Building and Construction (Pty) Ltd*,[4] Selikowitz J, (then) said:

> "Where a proposed amendment will not contribute to the real issues between the parties being settled by the Court, it is, I think, clear that an amendment ought not to be granted. To grant such amendment will simply prolong and complicate the proceedings for all concerned and must, in particular, cause prejudice to the opposing party who will have to devote his energy and expand both time and money in dealing with an issue, the resolution of which may satisfy the needs (or curiosity) of the other party promoting it, but which will not contribute towards the adjudication of the genuine dispute between the parties. ..... It is, in my view, necessary in this application that I consider whether or not the claim for relief under s 32(2) is competent before I grant the amendment. If the claim is, in the circumstances of this case, not in law a viable claim I would be doing not only the respondent but also the applicant an injustice by granting the amendment."

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[2] 1927 (CPD) 27 at 29.
[3] 1935 (WLD) 115 at 117.
[4] 1989 (4) SA 940 (C) at 958 B.

[10] In the instant matter the proposed amendments are to replace the particulars of claim *in toto* and substitute them with the new one and to align them with the evidence which will, *inter alia*, show the Plaintiffs performance of their obligations in terms of the relevant agreement and contract as well as the Defendant's breach or repudiation which gave rise to the cause of action. As indicated herein above, the Defendant if leave is granted, will still be in the same position it was even before the amendments. In resisting and objecting to the amendments, the Defendant contends that the proposed amendments will be expiable.

[11] There are authorities that support the proposition that an amendment should be refused if it is clear that the amended pleading will (not may) be expiable.[5] From the above authorities, the amendment should be refused if it will render the pleading expiable, however in my view this is not such a case. My assessment of the objections raised by the Defendant is on the formulation of the cause of action, not its validity. There is no dispute that the relevant agreements and contract were concluded and signed by the Plaintiffs and the Defendant. The Defendant knows adequately what the Plaintiffs' case is and it also knows which claim it is called upon to meet. In any event, if the proposed amendments is granted, the Defendant will not be left without a recourse. It may either file its plea or take any other steps contemplated in rule 23 or 30 in accordance with sub-rule (8) of the Uniform Rules.

[12] In the circumstances, I am inclined to exercise my discretion in favour of the Plaintiffs and to grant the application for leave to amend.

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[5] *Krischke v Road Accident Fund* 2004 (4) SA 358 (W) at 363 A–D and the authorities referred therein.

[13] On the issue of costs, the Plaintiffs seek an indulgence and under ordinary circumstances they should bear the costs of this application. However, in the instant matter, the litigation between the parties is for all intend and purposes at its initial phase and it will be fair and in the interest of justice not to award a costs order at this early stage of litigation as that may also discourage the parties from fully engaging on the merits of matter with the view of reaching an amicable solution.

[14] Accordingly, the following order is issued:

1. The Plaintiffs are granted leave to amend the particulars of claim as set out in the proposed amendment dated 28 July 2020, which is annexed to the founding affidavit as annexure "FA1".
2. The Defendant is ordered to deliver, within 15 days after the service of the amended particulars of claim its plea, or to take any steps contemplated in rules 23 and 30, if so advised.
3. Each party to bear their own costs.

N GQAMANA
JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel for the Plaintiff(s)	:	L Ellis
Instructed by	:	Logan Naidoo Attorneys
		C/O Annali Erasmus Inc.
		PORT ELIZABETH
Counsel for the Defendant	:	I Lambrechts
Instructed by	:	Joubert Galpin & Searle Inc.
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Heard on	:	18 February 2021
Delivered on	:	23 February 2021