



IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	NO
Of Interest to other Judges:	NO
Circulate to Magistrates:	NO

Case no: 2673/2022

In the matter between:

JOHN DOUGLAS JANSEN KNIPE

Applicant

and

CHAVONNNES BADENHORST ST CLAIRE COOPER N.O.

1st Respondent

SIMON MALEBO RAMPORORO N.O.

2nd Respondent

In re:

JOHN DOUGLAS JANSEN KNIPE

Plaintiff

and

CHAVONNNES BADENHORST ST CLAIRE COOPER N.O.

1st Defendant

SIMON MALEBO RAMPORORO N.O.

2nd Defendant

FREDERICK JACOBUS SENEKAL

3rd Defendant

TMS AUCTIONEERS

4th Defendant

CAROL JESSIE KATHLEEN LOTS N.O.

5th Defendant

ROBERT PETRUS JANSEN KNIPE

6th Defendant

ANDRE BAZZET JANSEN KNIPE

7th Defendant

JAQUELINE MOIRA DEBORA VIGNE

8th Defendant

THE MASTER OF THE HIGH COURT, BLOEMFONTEIN

9th Defendant

STANDARD BANK OF SOUTH AFRICA LTD

10th Defendant

KRAMER WEIHMANN INC

11th Defendant

HEARD ON:

27 July 2023

REASONS BY:

MTHIMUNYE, AJ

DELIVERED ON: Delivered by email to the parties' legal representatives and by release on SAFLII. The reasons shall be deemed to have been handed down at 11:00 on 22 August 2023

- [1] The applicant, John Knipe, is the plaintiff in the main action which he instituted against the eleven defendants listed above on 09 June 2022 seeking a number of orders. The first and second respondents ('the respondents') are first and second defendants in the main action and joint liquidators of Kameelhoek (Pty) Ltd (in liquidation), Master Reference Number B111/2012("Kameelhoek") and Schaapplaats 978 (Pty) Ltd (in liquidation) Master Reference Number B110/2012 ("Schaapplaats"). On 10 August 2022, the first and second defendants filed an exception on the basis that the plaintiff's particulars of claim did not disclose any cause of action. On 23 September 2022, the applicant filed a notice of intention to amend his particulars of claim to which the respondents objected. It is that objection that prompted this application for leave to amend particulars of claim. The other 9 defendants are not part of this application and will be referred to, if need be, as the defendants in the chronology in which they are cited in the main action.
- [2] The Applicant and the 5th to 8th Defendants are each 20% shareholders of Kameelhoek and Schaapplaats, the two companies in liquidation for which the first and second defendants are joint liquidators. The dispute between the Plaintiff and the eleven Defendants arises mainly out of an alleged fraudulent appointment of the First Defendant as a final liquidator of the above companies.

The setting aside of this appointment is one of the orders the Plaintiff seeks in the main action, which setting aside will then have a spiralling effect as articulated in the subsequent prayers, one of which will be the nullification of the arbitration agreement between the Plaintiff and the Defendants, which agreement came as a result of the said alleged fraudulent appointment of the First Respondent. This court is however not called upon to determine that dispute and for that reason, I will not go into further details thereon.

[3] What is before this court to determine is whether the Plaintiff has made out a case to be granted leave to amend its particulars. The core of the Respondents' objection is that the Applicant's proposed amendment does not cure the exception, does not disclose any cause of action and does not raise any triable issues and as such remains excipiable. The Plaintiff avers that the amendment was not done on the basis of the exception having any merit but only to amplify the particulars of claim in certain respects even though, if granted, it will render the exception moot. The exception was, on 4th November 2022, removed from the roll by agreement between the parties.

[4] The paragraphs in the particulars of claim that the plaintiff seeks to amend read as follows:

" CLAIM 1

13.

...

14.

The Plaintiff and the 5th to 8th Defendants are each 20% shareholders of Kameelhoek and Schaapplaats.

15.

Due to various litigious matters between the Shareholders of Kameelhoek and Schaapplaats, and the First and Second Defendants, the first meeting of the creditors was only convened for 26 July 2017"

16.

Ms Lotz, as an alleged creditor of Kameelhoek and Schaapplaats, both in her personal capacity and in her capacity as the duly appointed executrix of the

estate of the Late HBLJ Knipe, Masters reference 1728/2007, and of the late Moira Elizabeth Knipe, Master's reference 6165/2015, instructed Mr Senekal to prepare claims on her behalf and on behalf of the two deceased estates, to be proven at the first meeting of creditors against the estates of Kameelhoek and Schaapplaats.

17.

Mr Senekal advised Ms Lotz to provide a power of attorney to one Chris Edeling, to prove her claims at the first meeting of creditors of Kameelhoek and Schaapplaats.

18.

In Appointing Mr Chris Edeling as her agent to attend the first meeting of creditors and to prove her claims, Ms Lotz was unaware that the proven claims will be utilised to nominate or requisite the First Defendant as a final liquidator of Kameelhoek and Schaapplaats.

19.

Mr Senekal Instructed Mr Edeling, to nominate or requisite the First Defendant as final liquidator with the power of attorney provided by Ms Lotz.

20.

The said instruction and actions of Mr Senekal was fraudulent insofar as it was made without the knowledge and consent and/or authority of Ms Lotz to nominate or requisite the First Defendant as final liquidator of Kameelhoek and Schaapplaats.

21.

The said fraudulent conduct of Mr Senekal in collaboration with the First and Second Defendants only came to knowledge of the Plaintiff or about 13 July 2020 when the said Ms Lotz testified during the arbitration proceedings between the Plaintiff and Defendants.

22.

The said fraudulent conduct of Mr Senekal and the liquidators was to the detriment of the Plaintiff, in that the Plaintiff was induced to believe that the nomination and appointment of the First Defendant was valid.

23.

At the time when Mr Senekal prepared the claims on behalf of Ms Lotz and on behalf of the two deceased estate supra, Mr Senekal was aware that the claims were false in that any such claims that may have existed, have already become prescribed in terms of section 11(d) of the Prescription Act, Act 68 of 1969, and that the said claims will be expunged in terms of section 45 of the Insolvency Act, Act 24 of 1936.

24.

Mr Senekal instructed Mr Edeling to prove the false claims of Ms Lotz and the estate of the late HBLJ Knipe at the First Meeting of creditors of Kameelhoek and Schaapplaats on 26 July 2017 and to utilise the false claims to nominate the First and Second Defendants as final liquidators of Kameelhoek and Schaapplaats, and they were appointed as final liquidators of Kameelhoek and Schaapplaats on 28 August 2017.

25.

The Second Defendant did not participate actively in the administration of the estate of Kameelhoek and Schaapplaats, but delegated all his powers as provisional liquidator to Mr Luke Bernard Saffy, of Honey Inc., Bloemfontein, on 6 September 2012, and as final liquidator, from 28 August 2017, who made all decisions and took all steps in the administration of the estates, in the collaboration with First Defendant.

26.

The First Defendant, instructed Mr Chris Edeling to investigate the false claims of Ms Lotz, which were proven at the first meeting of creditors, and Mr Edeling's expungement report dated 24 May 2018 and 8 August 2018 were submitted to the Master by the First Defendant on 29 August 2018.

27.

As a result of the reports of Mr Edeling, as submitted to the Master, the Master expunged the false claims of Ms Lotz and the estates of the late HBLJ Knipe and the Late ME Knipe on 29 August 2019.

28.

As a result of the fraudulent nomination and appointment of the First Defendant the Plaintiff is entitled to an order declaring the nomination and appointment of the First Defendant as final Liquidator of Kameelhoek and Schaapplaats null and void ab initio and an order that the First Defendant's nomination and appointment to be set aside.

29.

WHEREFORE the plaintiff prays for the following order:

- 29.1 That the nomination and appointment of the First Defendant as final liquidator of Kameelhoek be declared null and void ab initio and be set aside;*
- 29.2 That the nomination and appointment of the First Defendant as final liquidator of Schaapplaats be declared null and void ab initio and be set aside;*
- 29.3 That the costs of the action be paid by the First and Third Defendants, jointly and severally, the one paying the other to be absolved;*
- 29.4 Further and/or alternative relief.*

CLAIM 2:

30.

As a result of the fraudulent nomination and appointment of the First Defendant, Plaintiff and the 5th to 8th Defendant were induced by the First and Second Defendants to enter into an arbitration agreement on or about 19 September 2019, which is annexed hereto as Annexure "JDJ1".

31.

If the Plaintiff was aware of the fraudulent appointment of the First Defendant, the Plaintiff and the 5th to 8th Defendants would not have entered into the arbitration agreement with the First and Second Defendants and is therefore entitled to an order declaring that the arbitration agreement is null and void ab initio and an order setting aside the arbitration agreement.

32.

WHEREFORE the Plaintiff prays for the following order:

- 32.1 *That the Arbitration agreement annexed as annexure "JDJ1" entered into between the Plaintiff and the Defendants be declared null and void ab initio be set aside;*
- 32.2 *That the costs of the action be paid by the First and Third Defendants, jointly and severally, the one paying the other to be absolved;*
- 32.3 *Further and/or alternative relief.*

CLAIM 3:

33.

The Second Defendant, as co-liquidator with First Defendant, was aware, alternatively should have been aware, that the First Defendant's nomination was a result of the fraudulent misrepresentation by the First and Third Defendants, and that the arbitration proceedings that was conducted in terms

of the arbitration agreement and the awards made in terms thereof stands to be declared null and void and be set aside.

34.

WHEREFORE the Plaintiff prays for the following order:

34.1 *That the Arbitration agreement between the parties be declared null and void and be set aside;*

34.2 *That the arbitration proceedings and all awards made by the presiding officer be declared null and void and be set aside;*

34.3 *That the costs of the action be paid by the First and Third Defendants, jointly and severally, the one paying the other to be absolved;*

34.4 *Further and/or alternative relief."*

[5] The proposed amendments in terms of the notice of intention to amend reads as follows:

"

14.

The plaintiff and the Fifth to Eighth Defendants are each 20% shareholders of Kameelhoek and Schaapplaats and as such have a real and substantial interest in the liquidation proceedings of Kameelhoek and Schaapplaats, in so far as they have a residual interest in the free residue of the estates.

15.

At all material times the Third Defendant acted as attorney of record on behalf of the First and Second Defendants, in their official capacities as liquidators of Kameelhoek and Schaapplaats.

16.

At all material times the Third Defendant also acted as attorney of record on behalf of the Fifth Defendant, in her personal capacity as shareholder of

Kameelhoek and Schaapplaats, as well as in her official capacity as executrix of the Estates of the late ME Knipe and HBLJ Knipe.

17.

During August 2017 the Fifth Defendant instructed the Third Defendant, on advice from her counsel, Adv Leon Halgryn SC, to take the necessary steps to remove the First Defendant, Second Defendant and Mr Noordman as Provisional Liquidators of Kameelhoek and Schaapplaats.

18.

The Third Defendant at all material times was aware that the Fifth Defendant did not support the First and Second Defendants as liquidators and would not exercise any right vesting in her as a creditor to nominate them for appointment as liquidators, or vote for their appointment as final liquidators at a Meeting of Creditors of Kameelhoek and Schaapplaats.

CLAIM 1:

19.

*Due to various litigious matters between the Shareholders of Kameelhoek and Schaapplaats, and the First and Second Defendants, the first meeting of creditors was only convened for **26 July 2017**.*

20.

Fifth Defendant was advised by Third Defendant that Fifth Defendant, as an alleged creditor of Kameelhoek and Schaapplaats, both in her personal capacity and in her capacity as the duly appointed executrix of the estate of the Late HBLJ Knipe, Master's reference 1728/2007, and the estate of the Late Moira Elizabeth Knipe, Master's reference 6165/2015, must submit claims as a creditor in the liquidation process of Kameelhoek and Schaapplaats, and Fifth Defendant instructed the Third Defendant to prepare claims on her behalf and on behalf of the two deceased estates, to be proven at the first meeting of creditors in the liquidation process of Kameelhoek and Schaapplaats.

21.

When Fifth Defendant instructed the Third Defendant to prepare the claims against Kameelhoek and Schaapplaats, both the Third Defendant and the Fifth Defendant knew that the claims were unsustainable, due to the fact that the alleged claims had become prescribed before the date of liquidation of Kameelhoek and Schaapplaats, in terms of section 11(d) of the Prescription Act, Act 68 of 1969, and that the said claims will be expunged in terms of section 45 of the Insolvency Act, Act 24 of 1936.

22.

Fifth Defendant instructed Third Defendant to draft the Powers of Attorney, and Third Defendant advised Fifth Defendant to sign the Powers of Attorney, in terms whereof Chris Edeling would be authorized to prove her Purported claims at the first meeting of creditors of Kameelhoek and Schaapplaats.

23.

Third Defendant knew when he prepared the Powers of Attorney that the Fifth Defendant was opposed to the appointment of the First Defendant as final liquidator and that she did not intend to authorize anyone to exercise such vote as she might purportedly have as a creditor, in favour of his appointment. The Third Defendant was accordingly aware that such Powers of Attorney would not entitle him to instruct Chris Edeling, and could not be relied upon to nominate and vote for the appointment of First Defendant as a final Liquidator at the First Meeting of Creditors, or at any subsequent Meeting of Creditors.

24.

Third Defendant Proceeded to instruct Chris Edeling to prove the said claims, and to nominate and vote for the appointment of the First Defendant as final liquidator, despite the fact that he knew that Fifth Defendant did not intend to authorize anyone to vote in favour of the First Defendant's appointment as final liquidator, and would never have signed the Powers of Attorney had she known that Chris Edeling would use them to vote on her behalf as purported creditor, to nominate and appoint the First Defendant as final liquidator.

25.

The Fifth Defendant was induced to sign the said Powers of Attorney by the fraudulent misrepresentation by the Third Defendant that the purpose for which the Powers of Attorney were required was only for the proof of her purported claims as a creditor, and the fraudulent non-disclosure that the Powers of Attorney would be used by Chris Edeling to exercise her vote as proven creditor to appoint the First Defendant as final Liquidator of both Kameelhoek and Schaapplaats.

26.

The said instruction and actions of Third Defendant were fraudulent insofar as they were given and made without the knowledge and consent and/or authority of Fifth Defendant to nominate or requisition the First Defendant as final liquidator of Kameelhoek and Schaapplaats.

27.

The First Defendant at all material times was aware that the Fifth Defendant on advice from Adv Halgryn, had instructed the Third Defendant to initiate a process of removing the provisional liquidators, and First Defendant knew that the Fifth Defendant would not exercise a vote as a creditor in favour of their appointment as final liquidators at the Meeting of Creditors.

28.

In accepting the appointment as final liquidator of the two companies, the First Defendant knew, or ought to have known, that the Powers of Attorney signed by the Fifth Defendant, and which were relied upon to nominate and vote for the First Defendant as final liquidator, could not properly and validly be relied upon by Chris Edeling to vote in favour of the appointment of the First Defendant as final liquidator of the two companies, and that the purported exercise of the First Defendant's vote as creditor was invalid, and the First Defendant should accordingly have declined the appointment.

29.

*The said fraudulent conduct of Third Defendant in collaboration with the First Defendant in causing the First Defendant to be appointed as final liquidator on the purported proof and exercise of a vote on the Fifth Defendant's proven claims only came to the knowledge of the Plaintiff during or about **13 July 2020** when the Fifth Defendant testified during the arbitration proceedings between the Plaintiff and Defendants.*

30.

The said fraudulent conduct of Fifth Defendant and the First Defendant was to the detriment of the Plaintiff, in that the Plaintiff was induced to believe that the nomination and appointment of the First Defendant was valid.

31.

*Third Defendant instructed Chris Edeling to prove the claims of Ms Lotz and the estate of the Late HBLJ Knipe at the First Meeting of creditors of Kameelhoek and Schaapplaats on **26 July 2017** and to utilise the unsustainable claims to nominate the First Defendant as final liquidator of Kameelhoek and Schaapplaats, and First Defendant was appointed with Second Defendant as final liquidators of Kameelhoek and Schaapplaats on **28 August 2017**.*

32.

*The Second defendant was appointed by the Master, but did not participate actively in the administration of the estates of Kameelhoek and Schaapplaats, but delegated all his powers as provisional liquidator to Mr Luke Bernard Saffy, of Honey Inc., Bloemfontein, on **06 September 2012**, and as final liquidator, from **28 August 2017**, who made all decisions and took all steps in the administration of the estates, in collaboration with First Defendant.*

33.

*The First and Second Defendant instructed Chris Edeling to investigate the claims of Fifth Defendant, which were proven at the first meeting of creditors, and Chris Edeling's expungement reports dated **24 May 2018** and **8 August 2018** were submitted to the Master by the First Defendant on **29 August 2018**.*

34.

*As a result of the reports of Chris Edeling, as submitted to the Master, the Master expunged the unsustainable claims of Fifth Defendant and the estates of the Late HBLJ Knipe and the Late ME Knipe on **29 August 2019**.*

35.

At the time of his nomination and appointment as final liquidators of Kameelhoek and Schaaplaats the First Defendant knew that the claims of Fifth Defendant and the estates of HBLJ Knipe and the Late ME Knipe were unsustainable, and will be utilised to nominate and appoint him as final liquidator of the said estates, but that the said claims will be expunged, in terms of section 45 of the Insolvency Act, Act 24 of 1936.

36.

Under circumstances where the First Defendant knew that his appointment was done on the unsustainable claims of Fifth Defendant, in her personal as well as her official capacities, and that the said claims will be expunged, the First Defendant should not have accepted the appointment as final liquidator of Kameelhoek and Schaaplaats.

37.

As a result of the aforesaid conduct of Fifth Defendant, First Defendant, Third Defendant and Edeling, the Plaintiff is entitled to an order declaring the nomination and appointment of the First Defendant as final liquidator of Kameelhoek and Schaaplaats null and void ab initio, alternatively an order that First Defendant's appointment to be set aside.

38.

WHEREFORE the Plaintiff prays for the following order:

- 38.1 *That the nomination and appointment of the First Defendant as final liquidator of Kameelhoek be declared null and void ab initio and be set aside;*
- 38.2 *That the nomination and appointment of the First Defendant as final liquidator of Schaapplaats be declared null and void ab initio and be set aside;*
- 38.3 *That the costs of the action be paid by the First and Third Defendants, and Fifth Defendants, jointly and severally, the one paying the other to be absolved;*
- 38.4 *Further and/or alternative relief.*

CLAIM 2:

39.

*The Plaintiff, believing that the final liquidators had been properly nominated and voted for at a meeting of creditors and were validly and properly appointed, entered into an arbitration agreement on or about **19 September 2019**, which is annexed hereto as Annexure “JDJ1”.*

40.

The First Defendant and Third Defendant were under a legal duty to have disclosed to the Plaintiff the aforesaid irregularities in the voting for and appointment of the First Defendant as final liquidator before the arbitration agreement was entered into, but wrongfully and intentionally alternatively negligently, failed to do so.

41.

Had the Plaintiff been aware of the true facts and the aforesaid irregularities in the voting in favour of the appointment of the First Defendant, and in his appointment as final liquidator, the Plaintiff would not have entered into the arbitration agreement.

42.

The Plaintiff is therefore entitled to repudiate the Arbitration Agreement, which he hereby does, alternatively Plaintiff is entitled to an order declaring the arbitration agreement to be null and void ab initio, and is entitled to an order setting aside the Arbitration agreement.

43.

WHEREFORE the Plaintiff prays for the following order:

- 43.1 *That the Arbitration agreement annexed as annexure "JDJ1" entered I into between the Plaintiff and the Defendants is unenforceable, alternatively be declared null and void ab initio, and be set aside;*
- 43.2 *That the costs of the action be paid by the First and Third Defendants, jointly and severally, the one paying the other to be absolved;*
- 43.3 *Further and/or alternative relief.*

CLAIM 3:

44.

Having regard to what is set out under claim 2 supra, and if the Arbitration agreement is set aside, the appointment of the First Defendant and Second Defendant emanated from a vote by Edeling, on claims of Fifth Defendant which were not valid.

45.

The First Defendant and Second Defendants, as co-liquidators of Kameelhoek and Schaapplaats, were aware, alternatively should have been aware, that the First Defendant nomination was a result of the fraudulent misrepresentation by the Third and Fifth Defendants, and that the arbitration agreement and the awards made in terms thereof stand to be declared null and void and be set aside.

46.

As a result of the irregular appointment of First Defendant and the Second Defendant could not act alone as liquidator of Kameelhoek and Schaapplaats in contravention of section 382 of the Companies Act, Act 61 of 1973, and rely on the Arbitration Agreement or the awards made pursuant thereto.

47.

WHEREFORE the Plaintiff prays for the following order:

- 47.1 *That the arbitration proceedings and all awards made by the presiding officer be declared and void and be set aside;*
- 47.2 *That the costs of the action be paid by the First and Third Defendants and Fifth Defendants, jointly and severally, the one paying the other to be absolved;*
- 47.3 *Further and/or alternative relief.*

CLAIM 4:

48.

The First Defendant and Second Defendants made the Arbitration Award and Settlement an order of the Free State High Court under Case number 3933/2021;

49.

The order of Court was made iustus error, and pursuant to what is stated supra, and in the event that the Court grants the relief sought in Claim 1 to claim 3 supra, the Plaintiff is entitled to an order setting aside the Court order dated 24 June 2021.

50.

WHEREFORE the Plaintiff prays for the following order:

- 50.1 *That the arbitration proceedings and all awards made by the presiding officer be declared and void and be set aside;*
- 50.2 *That the costs of the action be paid by the First and Third Defendants and Fifth Defendants, jointly and severally, the one paying the other to be absolved;*
- 50.3 *Further and/or alternative relief.*

By replacing Annexure “JDJ1” with the document marked “JDJ1” attached hereto.”

- [6] The First and Second Defendants objects to the amendments on the following basis:
- (a) That, in respect of all the 3 claims from the particulars of the claim sought to be amended, the conduct that is the basis of the Plaintiff's claims, is fraudulent only towards the fifth defendant and not the Plaintiff and the respondents have raised this in an exception raised against the Plaintiff's particulars of claim. Further, that the fifth defendant elected not to act on the alleged fraudulent conduct.
 - (b) That the sought amendment does not remove the cause of complaint as set out in the exception.
 - (c) The entire basis of the amendment is still rooted in a misrepresentation i.e. the breach of mandate made by the third defendant to the fifth defendant, and not to the plaintiff.

(d) That the plaintiff has pleaded no facts in respect of claim 4 in the intended amendments.

- [7] The Applicant has first raised a point *in limine* to the respondents' Answering affidavit that there was no confirmatory affidavit from the second respondent as a joint liquidator and this is in violation of section 382 of the Companies Act 61 of 1973 which stipulates that liquidators must act and take decisions jointly. For this reason, the applicants submit that the Answering affidavit is not properly before court and must be disallowed. The Respondents argue firstly that section 382 only requires joint action in respect of liquidation matters whereas in litigation and does not require one or others to depose to confirmatory affidavits in legal proceedings. Secondly, the Respondents argued, that this is an issue of the Power of Attorney validly appointed the first respondent to act herein. Secondly that administrative actions are valid until set aside by an order of court. I am inclined in this respect, to agree with the Respondents in this regard and the contention by the Applicant stands to be rejected.
- [8] The amendment of pleadings is governed by **Rule 28 of the Uniform Rules of Court** which reads:

"28 Amendment of Pleadings and Documents

- (1) Any party desiring to amend a pleading or document other than a sworn statement, filed in connection with any proceedings, shall notify all other parties of his intention to amend and shall furnish particulars of the amendment.
- (2) The notice referred to in subrule (1) shall state that unless written objection to the proposed amendment is delivered within 10 days of delivery of the notice, the amendment will be effected.
- (3) An objection to a proposed amendment shall clearly and concisely state the grounds upon which the objection is founded.

- (4) If an objection which complies with subrule (3) is delivered within the period referred to in subrule (2), the party wishing to amend may, within 10 days, lodge an application for leave to amend.

[9] It is trite that a party may seek to amend its pleadings any time before judgement is granted. It is also trite that a court hearing an application for an amendment has a wide discretion, which discretion should be exercised judicially (**Embling v Two Oceans Aquarium CC**¹). In exercising this discretion, the court should lean in favour of granting an amendment to ensure that justice is done between the parties by deciding the real issue between them (**Commercial Union Assurance v Waymark**²). Although Rule 28 does not stipulate the circumstance under which an amendment should be allowed, the approach was laid down in the *locus classicus* of **Moolman v Estate Moolman**³ as follows:

“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 the purpose of justice in the same position as they were when the pleading which it is sought to amend was filed”

[10] It follows therefore that the test for whether or not leave to amend should be granted is consideration of mala fide on the part of the applicant or consequential prejudice or injustice to the respondent, which injustice cannot be remedied by a cost order. The onus lies on the party seeking the amendment. The Respondents have, for the most part in their papers gone to town to address the merits of the main dispute which in my view, are not relevant for purposes of this application. They have also argued that the sought amendment raises no triable issue. The Applicant argued, correctly so, that the

¹ 2000 (3) SA 691 (C) 694G-H

² 1995 (2) SA 73 (TkGD) at para 77 F-I

³ 1927 CPD 27 at 29

requirement of a triable issue only applies to a party who seek amendments at a late stage of the proceeding, and not at the onset when no one has pleaded as is the case with the Applicant. See **Caxton Ltd and Others v Reeva Forman (Pty) Ltd and Another**⁴. It follows then that what is to be determined herein is whether there is any *mala fides* on the part of the applicant and whether the granting of this application will result in any prejudice against the respondents, which prejudice cannot be remedied by an appropriate cost order.

- [11] Other than arguing the merits of the main action between the parties, the Respondents raised no prejudice that it stands to suffer in the application is granted. In the main, the Respondents' opposition to this application is that the applicant's claim is still based on the alleged fraudulent conduct of the third defendant and misrepresentation to the fifth defendant and that the sought amendments do not address the exception. In my view, the issue of the alleged fraudulent conduct of the third defendant is exactly a matter to be ventilated on trial and not in these proceedings. The exception was removed from the roll and is not before this court to determine.
- [12] In my view, this application has been brought early enough in the proceedings to cause any kind of prejudice that cannot be remedied by a cost order – see the **Caxton** case as cited above. As stated above, a party can at any stage before judgement is granted seek leave to amend its pleadings and, to ensure proper ventilation of issues, courts should lean in favour of granting the amendment. Guided by the principles laid out above, I find no *mala fides* on the part of the Applicant neither there is in my view, any prejudice to be suffered by the Respondents in this application being granted. Instead, I hold the view that granting this application will ensure a proper ventilation of the real issues between the parties. That is the primary object of amendments as articulated in **Cross v Ferreira**⁵. Consequently, I make the following Order:

⁴ 1990 (3) SA 547

⁵ 1950 (3) SA 443 (CPD at para 447)

Order

1. The Applicant is granted leave to amend its particulars of claim in accordance with its notice of intention to amend dated 23 September 2022.
2. The Applicant is directed to file the amended particulars of claim within ten (10) days from the date of this order.
3. Costs shall be costs in the cause.



D.P. MTHIMUNYE, AJ

Appearances:

For the Applicant	Adv N.G.D. Maritz SC Pretoria Society of Advocates Adv F.G Janse Van Rensburg Bloemfontein Society of Advocates
Instructed by:	Cawood Attorneys Inc. c/o LM Attorneys Bloemfontein
For the Respondent :	Adv D.M. Leathern SC Adv A Craucamp Pretoria Society of Advocates
Instructed by:	Tingtingers Inc c/o Honey Attorneys