



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

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

Case No: 1829/2020

In the matter between:

MALUTI PLANT CRUSHERS CC

(Registration number: 2001/061749/23)

Applicant

and

ALL STAR INDUSTRIES CC

(Registration number: 2010/018683/23)

First Respondent

LITHEBE JANTHIE SETAI

Second Respondent

RIYAAZ ZAYN AFRICA

Third Respondent

MANGAUNG METROPOLITAN MUNICIPALITY

Fourth Respondent

CORAM: HEFER AJ

HEARD ON: 23 NOVEMBER 2023

DELIVERED ON: 28 NOVEMBER 2023

[1] This is an application to amend the Plaintiff's Particulars of Claim in terms of Uniform Court Rule 28(4), pursuant to a notice of intention to amend which was filed in accordance with the Rules.

[2] Plaintiff's Rule 28(1) notice in regards to the intended amendment, reads *inter alia* as follows:

"In paragraph 10.1 by deleting the word 'orally', and adding the words at the end of paragraph 10.1 after the word "agreement":

'in writing'."

The notice further contain certain minor intended amendments, which can be described as "cosmetic" in nature.

[3] Presently, paragraph 10.1 of the Particulars of Claim reads as follows:

"10.1 During June 2019 and at Bloemfontein, Plaintiff duly represented by Drake Ahadji and First Defendant duly represented by Riyaaz Africa, orally amended the rate levied applicable to the agreement."

[4] The First and Third Respondents objected to the proposed amendment. For pragmatic reasons, I shall refer to the First and the Third Defendants in this judgment as **"the Defendants"**. The grounds for objection by the Defendants are as follows:

"1. On 18 August 2020 the Defendants raised an exception against the Particulars of Claim on the basis that it does not disclose a cause of action."

2. *The grounds of the exception are, inter alia, that:*

2.1 *Clause 1.3 of the 'Term and Conditions of Hire' of Annexure 'A' to the Particulars of Claim provides that:*

'1.3 This agreement records the whole agreement between the Owner and the Hirer and overrides all other agreements, terms or conditions purporting to relate to the hire of the plant and collateral verbal agreements are expressly excluded.'

2.2 *The Plaintiff and First Defendant thus reduced the terms of the agreement to writing and agreed that the written terms of Annexure 'A' overrides all other agreements and that any oral terms are expressly excluded.*

2.3 *Furthermore, paragraph 1.4 of Annexure 'A' to the Particulars of Claim contains a non-variation clause which provides that:*

'No condition, terms or representation not expressly herein shall be binding on the owner of the hirer and no variation shall be binding on either of the parties unless reduced to writing and agreed to by the owners.'

2.4 *The Plaintiff, in paragraph 10.1 of the Particulars of Claim relies on an alleged verbal amendment of the terms of Annexure 'A'.*

2.5 *Such verbal amendment is expressly excluded by clause 1.3 of the 'Terms and Conditions of Hire', as pleaded above.*

2.6 *Thus, the Plaintiff's reliance on the conclusion of a partly oral, partly written agreement and the Plaintiff's further reliance on the verbal amendment of the terms of the partly oral, partly written agreement is in direct conflict with the written terms of Annexure 'A'.*

3. *Defendants' notice of exception still stands and has not been argued.*
4. *Having received the Defendants' notice of exception the Plaintiff attempted on three previous occasions to cure the defects in the Particulars of Claim.*
5. *The Defendants objected to each of the Plaintiff's attempts to amend the Particulars of Claim on the basis that all the intended amendments did not cure the grounds of exception.*
6. *Having received the Defendants' objections as aforesaid, the Plaintiff did not proceed with a formal application to amend the Particulars of Claim.*
7. *This is now the Plaintiff's fourth attempt (more than three years after the summons was issued) to cure the defects in the Particulars of Claim.*
8. *However, the Plaintiff's fourth notice of intention to amend respectfully fails to address the defects identified in the notice of*

exception and will, simply put, merely compound the defects any further on the following grounds:"

[5] In summary in respect of the grounds of objection, the Defendants further rely on the provisions of Rule 18(6) which provides that a party who in its pleading relies upon a written contract shall append a true copy thereof or the part relied on in pleading to such pleading. According to the Defendants, whereas the Plaintiff has failed to append to its notice of intention to amend the ostensible written document concluded between the parties during June 2019 and in terms whereof the written terms of the agreement has been amended, the intended amendment does not comply with Rule 18(6) and stands to be dismissed.

[6] Further, also in respect of the objection to the intended amendment, it is also the Defendants' case that following from the non-compliance with Rule 18(6), relied upon by the Defendants, the Plaintiff has failed to plead the exact word(s) and/or exact term(s) of the amendment to the original agreement appended to the Particulars of Claim. As a final ground of objection, the Defendants then state that as such, the intended amendment does not disclose a cause of action, alternatively, it is vague and embarrassing to the extent that the Defendants will be prejudiced to plead thereto.

[7] An application in terms of Rule 28(4) is an interlocutory application as contemplated in Rule 6(11) and need not be brought on Notice of Motion

supported by an affidavit.¹ In the present application, the Plaintiff has chosen to support the application by way of an affidavit.

[8] According to Mr *Sander*, acting on behalf of the Defendants, the use of the affidavit by the Plaintiff, was done because the proposed amendment would render the Particulars of Claim excipiable “... *hence an application was lodged where the deponent attempts to lead evidence*”,²

[9] It is further Mr *Sander*’s argument that it does not lie in the mouth of a deponent, an attorney and not a party to the proceedings, to give context and lead evidence. The mere fact that the same saw it necessary to do so is indicative of the ailing nature of the proposed amendment and “*puts paid to any notion that the pleading in the context of the proposed amendment is not excipiable*”. Mr *Sander* then further continued to argue that this is the first score on which the application should be dismissed with costs. It is according to him also an abuse of process insofar as the deponent, apparently an attorney of this Court, seems to supplement an ailing proposed amendment under oath. It is further then argued that the amendment should be correct from the outset and it is not proper to explain or supplement the same in an application for leave to amend. This, according to Mr *Sander*, is because , in judging the excipiability of a pleading, the pleading itself is considered and no extrinsic evidence as to what it entails is allowed.

¹ *Swartz v Van der Walt t/a Sentraten* 1998 (1) SA 53 (W) at p. 61 – J.

² Respondents’ Heads, par. 25.

[10] I am in agreement with Mr *Sander*'s submission that in dealing with an exception, the Court should only consider the pleading against which an exception is raised and that no extrinsic evidence is allowed in respect of such pleading. I also agree with Mr *Sander*'s submission with reference to the matter of **Picbel Groep Voorsorg-fonds v Somerville**³, that, when Courts consider exceptions, no additional facts may be adduced by either party and the Court must assume that the facts alleged in the relevant pleading are correct.

[11] I do not however agree with Mr *Sander* that the fact that the Applicant has chosen to support its application by way of an affidavit, and "*give context and lead evidence*", constitutes a ground on which the application should be dismissed. In this respect the Defendants loose sight of the fact that in their own objection to the intended amendment, the Defendants refer to the fact that upon receipt of the Defendants' notice of exception to the Plaintiff's Particulars of Claim, the Applicant on three previous occasions, attempted to cure the defects in the Particulars of Claim. What is also contained in the same objection, is the statement that the Defendants objected to each of the Plaintiff's attempts to amend the Particulars of Claim on the basis that all the intended amendments did not cure the grounds of exception. Contained in this notice of objection, it is stated that having received the Defendants' objections to the previous amendments, the Plaintiff did not proceed with a formal application to amend the Particulars of Claim.

³ 2013 (2) All SA 692 (SCA) at par. [7]

[12] The history as contained in the founding affidavit to the application in terms of Rule 28(4), is in answer to the contents of the objection filed by the Defendants. Insofar as this court is still dealing with an application to amend and not an exception, the Applicant is fully entitled to deal with what is contained in the objection. Whereas the objection itself contains "evidence" in respect of the intended amendment, it will be unjust not to allow the Plaintiff to respond thereto.

[13] In any event, as will be shown, I did not come to my finding herein with reference to the facts as set out in the founding affidavit to the application. What follows is now a discussion of the grounds of objection as raised by the Defendants.

Discussion:

[14] If one, at this stage, accept that the amendments as envisaged in the Rule 28 notice are granted, the effect thereof will be that the relevant portions of the Particulars of Claim will read as follows:

"10.1 During June 2019 and at Bloemfontein, Plaintiff duly represented by Drake Ahadji and First Defendant duly represented by Riyaaaz Africa, amended the rate levied applicable to the agreement in writing.

10.2 Accordingly, the rate to be levied by Plaintiff was as from June 2019 amended from a Dry Rate to a Wet Rate, meaning on (sic) increased rate.

10.3 As a result, Plaintiff provided First Defendant with a quotation, which was accepted by First Defendant in supplying the Plaintiff with a purchase

order, a copy of the quotation is annexed hereto as per Annexure 'B' and the purchase order as per Annexure "C'."

[15] One of the grounds of objection as relied upon by the Defendants, is that should the leave to amend be granted as sought, and in particular in regards to paragraph 10.1 thereof, and effectively therefore in regards to the whole of paragraph 10, such amendment will render the Particulars of Claim excipiable on the basis of being vague and embarrassing as well as not disclosing a cause of action.

[16] The test applicable in deciding exceptions based on vagueness and embarrassment arising out of a lack of particularity has been dealt with in a number of authorities. In **Venter v Wolfsbergh Arch Investments 2⁴**, Potgieter AJ held

"A statement is vague when it is either meaningless or capable of more than one meaning or can be read 'in any one of a number of ways'. To put it at its simplest: the reader must be unable to extract from the statement a clear, single meaning."

[17] In **Lockhat and Others v Minister of the Interior⁵**, the following was held:

⁴ 2008 (4) SA 639 (C)

⁵ 1960 (3) SA 765 (D)

"If an exception on the ground that certain allegations are vague and embarrassing is to succeed, then it must be shown that a defendant, at any rate for the purposes of his plea, is substantially embarrassed by the vagueness or lack of particularity. Jooste v Jooste 1927 NPD 305 at p. 307; International Tobacco Company of SA Ltd v Wollheim and Others 1953 (2) SA 603 (AD). The object of all pleadings is that a succinct statement of all the grounds upon which a claim is made or resisted shall be set forth shortly and concisely; and whether such statement is vague, it is either meaningless or capable of more than one meaning. It is embarrassing in that it cannot be gathered from it what ground is relied on by the pleader."

- [18] The ultimate test as to whether or not the exception should be upheld is whether the excipient is prejudiced.⁶ In this regard, McCreath J, said the following in **Trope v South African Reserve Bank and Another**⁷:

"An exception to a pleading on the ground that it is vague and embarrassing involves a twofold consideration. The first is whether the pleading lacks particularity to the extent that it is vague. The second is whether the vagueness causes embarrassment of such a nature that the excipient is prejudiced. (Quinlan v McGregor 1960 (4) SA 383 (D) at 393E – H). As to whether there is prejudice, the ability of the excipient to

⁶ Erasmus, Superior Court Practice, 2nd Edition, Vol. 1, p. D1-300.

⁷ 1992 (3) SA 208 (TPD) at 211B – C

produce an exception-proof plea is not the only, nor indeed the most important, test – see the remarks of Conradie J in Levitan v Newhaven Holiday Enterprises CC 1991 (2) SA 297 (C) at 298G – H. If that were the only test, the object of pleadings to enable parties to come to trial prepared to meet each other's case and not be taken by surprise may well be defeated.

Thus it may be possible to plead to the Particulars of Claim which can be read in any one of a number of ways by simply denying the allegations made; likewise to a pleading which leaves one guessing as to its actual meaning. Yet, there can be no doubt that such a pleading is excipiable as being vague and embarrassing – See Parow Lands (Pty) Ltd v Schneider 1952 (1) SA 150 (SWA) at 152F – G and the authorities there cited.”

[19] At first glance, the intended amendment in regards to paragraph 10.1 of the Particulars of Claim, if read in conjunction with the remainder of paragraph 10 being paragraphs 10.2 and 10.3, are being contextualised by the contents of paragraphs 10.2 and 10.3 with particular reference to Annexures “B” and “C” to the Particulars of Claim.

[20] However, if one considers the contents of paragraph 10, and in particular paragraph 10.3 thereof closely, the conclusion which the Plaintiff seeks in respect of the alleged amendment in writing, does not necessarily stem from the

contents of Annexures "B" and "C" as argued on behalf of the Plaintiff. Paragraphs 10.1 and 10.2 of the Particulars of Claim, will, in its amended form, deal with the alleged amendment in writing to the effect that from June 2019 an increased rate was to be levied by the Plaintiff namely from a dry rate to a wet rate.

[21] Then, the following words are contained in paragraph 10.3 of the Particulars of Claim:

"As a result, (own emphasis) Plaintiff provided First Defendant with a quotation, which was accepted by First Defendant in supplying the Plaintiff with a purchase order, a copy of the quotation is annexed hereto as Annexure "B" and the purchase order as Annexure "C"."

[22] During his persuasive argument before me, Mr Sander indeed succeeded in convincing me that in the context of paragraph 10 as a whole, the allegations contained therein is not susceptible to only one single meaning. In particular, in respect of the words used in paragraph 10.3, the allegations as contained, may be interpreted to the effect that Annexures "B" and "C" does not necessarily contain the wording of the alleged amendment in writing. As it appears from the wording of paragraph 10.3, the contents thereof can also be interpreted to mean that subsequent to the amendment in writing (the particulars of which are then uncertain / unknown) Plaintiff then provided First Defendant with a quotation which was then accepted by the First Defendant.

[23] The lack of particularity referred to in regards to the proposed amendment in respect of paragraph 10.1 of the Particulars of Claim, will indeed render the Amended Particulars of Claim excipiable. As held in **Trope v South African Reserve Bank and Another**, in its amended form, the Particulars of Claim and in particular paragraph 10 thereof, will leave one guessing as to its actual meaning. As stated, although it may be possible to plead to the Particulars of Claim, whereas the intended amendment lacks particularity in respect what the alleged amendment in writing entailed, with reference to the context of paragraph 10 as a whole, there is no doubt that such a pleading is excipiable as being vague and embarrassing. Had the notice in terms of sec 28(1) referred to Annexures B and C in particular, the problem would have been solved and the Defendant's would have known what exactly the alleged amendment entailed.

[24] In view of my finding that, the proposed amendment will render the Particulars of Claim excipiable for the reasons as stated, I do not deem it necessary to deal with the remainder of the grounds of objection as raised by the Defendants.

[25] It is clear that the application stands to be dismissed whereas the remaining "*cosmetic*" amendments as contained in the Plaintiff's notice of amendment are closely related to the amendment of paragraph 10.1 which have been dealt with herein. As far as cost is concerned, the Plaintiff, being the unsuccessful party, should bear the cost of the application.

ORDER:

Therefore, I make the following order:

The application is dismissed with costs.



J J F HEFER, AJ

Appearances on behalf of the Applicant:
Instructed by:

Adv P Zietsman SC
Noordmans Attorneys
Bloemfontein

On behalf of the Respondents:
Instructed by:

Adv A Sander
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