



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.: 2014/2023

In the matter between:

FREE STATE WHEELS (PTY) LTD

Applicant

and

WRC RENTALS (PTY) LTD
MARNUS NICO COETZEE
DANIËL BENJAMIN GROBLER
AXE HOLDINGS (PTY) LTD
WRC 2020 (PTY) LTD
LAYSAN LIMITED

1st Respondent
2nd Respondent
3rd Respondent
4th Respondent
5th Respondent
6th Respondent

CORAM:

VAN ZYL, J

HEARD ON:

14 SEPTEMBER 2023

DELIVERED ON:

14 MARCH 2024

[1] This is an application by the applicant (the plaintiff in the main action) to amend its Particulars of Claim, which application is

being opposed by the respondents (the defendants in the main action).

[2] I will refer to the parties as in the main action.

Background:

[3] In response to the plaintiff's Particulars of Claim, the defendants filed a Notice in terms of Rule 23(1) on the basis that the Particulars of Claim is vague and embarrassing.

[4] The plaintiff consequently filed a Notice of Intention to Amend its Particulars of Claim, whereupon the defendants filed a Notice of Objection to the proposed amendment in terms of Rule 28(3).

[5] The opposition to the proposed amendment is based on the premises that the plaintiff's Particulars of Claim in its proposed amended form will remain vague and embarrassing.

[6] The plaintiff subsequently filed an application in the form of a Notice of Motion, without an affidavit in support thereof, in terms whereof it is seeking leave from the court to amend its Particulars of Claim in accordance with its Notice of Intention to Amend. It is the said application which the defendants are opposing.

The first to sixth defendants' Notice to remove cause of complaint in terms of Rule 23(1):

[7] The said Notice raises numerous grounds on which the defendants rely for their stance that the Particulars of Claim is

vague and embarrassing. For reasons, which will become evident, I will, at this stage, only deal with some of the grounds:

1. In the summons the plaintiff cited and joined six defendants to the action. The plaintiff's claim is based on contractual grounds. It incorporates, *inter alia*, a Sale Agreement, an Addendum to the Sale Agreement and a Repurchase of Shares Agreement. Throughout the Particulars of Claim, the plaintiff referred to "*the defendant*" and failed to differentiate between the respective defendants. The defendants consequently raise the following complaints:

"1.3 The first to sixth defendants are unable to determine from the allegations as presently pleaded in the plaintiff's summons, which of the first to sixth defendants, if any, are referred to as '*the defendant*' in each instance... The first to sixth defendants are further unable to determine from the allegations as presently pleaded in the plaintiff's summons, whether the reference to '*the defendant*' in each instance ... is alleged to be a reference to the same defendant, and if so, which of the first to sixth defendants."

2. The defendants also raise the complaint that some of the annexures to the Particulars of Claim, being annexures to the relevant contracts, are illegible, with the result that they are unable to determine and plead to the contents thereof.
3. In the preamble to the plaintiff's prayers in the Particulars of Claim, the plaintiff pleads as follows:

"WHEREFORE THE PLAINTIFF CLAIMS FROM THE FIRST DEFENDANT:

The plaintiff prays against the first-, second- and third defendants, jointly and severally, payment by the one the other to be absolved."

The defendants consequently raise the following complaint:

"2.2 The first to sixth defendants are unable to determine from the allegations as presently pleaded in the plaintiff's summons, whether the plaintiff claims payment from the first defendant only, or whether the plaintiff claims payment from the first, second and third defendants, jointly and severally."

4. In prayer 2 of the Particulars of Claim the following relief is claimed:

"Interest on this amount, calculated at the applicable mora interest rate *a tempore morae* ..."

The aforesaid prayer furthermore contains a note as to the applicable interest rate in terms of the original contracts which constitute, on face value thereof, a note by the draftsman of the Particulars of Claim which was clearly not intended to form part of the said pleading, apparently addressed to the person who instructed him/her to draft the Particulars of Claim. The defendants raise the complaint that they are unable to determine whether they are expected to plead to the said note and furthermore raise the following complaint:

"3.5 The first to sixth defendants are unable to determine from the allegations as presently pleaded in the plaintiff's summons, what the plaintiff alleges to be the agreed rate of interest, and/or what the rate of interest is that the plaintiff purports to claim in the summons."

The plaintiff's Notice of Intention to Amend:

[8] In the plaintiff's Notice of Intention to Amend it addresses the aforesaid complaints as follows:

1. It differentiates between the respective defendants throughout the Particulars of Claim.
2. It proposes to add the following as paragraph 7.7 of the Particulars of Claim:

"7.7 All appendices to this document, added as true copies of the originals, are the best and most clearly legible copies the plaintiff has available."

3. It addresses the preamble to the prayers contained in the Particulars of Claim to read as follows in its proposed amended form:

"WHEREFORE THE PLAINTIFF CLAIMS against the first-, second- and third defendants, jointly and severally, payment by the one the other to be absolved".

4. It proposes to remove the note that inadvertently appears in prayer 2 and to amend prayer 2 to read as follows:

"Interest on this amount, calculated at a rate as set out in the Sale Agreement of 27 July 2020 (and as pleaded in para 9.2.3 of the Particulars of Claim) from date of Service of Summons until date of final payment, alternatively such interest as calculated at the applicable mora interest rate a tempore morae, from 11 January 2023 until final date of payment."

The defendants' objection in terms of Rule 28(3) to the proposed amendments:

[9] In its objection the defendants raised the following aspects:

1. The defendants seem to have no squabbles with the proposed amendments which differentiate between the respective defendants.
2. The annexures and documents relied on by the plaintiff "*as part of its cause of action as presently pleaded, and in its proposed amended form*", remain illegible and the defendants remain unable to properly plead to it.
3. The defendants appear to have no objection to the proposed amendment of the preamble to the prayers contained in the Particulars of Claim.
4. With regard to prayer 2 in respect of the interest, the defendants persist with the following complaints:

"2.2.1 The grounds raised in paragraph 3.2 of the first to sixth defendants' notice are incorporated herein by reference as if specifically restated *mutatis mutandis*. The first to sixth

defendants remain unable to properly (or at all) plead to the plaintiff's allegations in support of its claim and prayer for interest in its proposed amended form.

2.2.2 The first to sixth defendants remain unable to determine from the allegations as presently pleaded in the plaintiff's summons, or in its proposed amended form, what the plaintiff alleges to be the agreed rate of interest, and/or what the rate of interest is that the plaintiff purports to claim.

2.2.3 The grounds raised in paragraphs 6, 10.5 and 10.6 of the first to sixth respondents' notice are incorporated herein by reference as if specifically restated *mutatis mutandis*. The first to sixth defendants remain unable to determine from the allegations as presently pleaded in the plaintiff's summons, or in its proposed amended form, what the plaintiff alleges to be the agreed rate of interest, and/or what the rate of interest is that the plaintiff purports to claim from the first to sixth defendants and/or as against the second and third defendants, and/or how the amounts claimed as interest, if any, are calculated.

2.2.4 The ground raised in paragraph 12.3 of the first to sixth-defendants notice are incorporated herein by reference as if specifically restated *mutatis mutandis*. The first to sixth defendants remain unable to determine from the allegations in the plaintiff's summons as presently pleaded, or in its proposed amended form on what basis Appendix F reflects amounts calculated as interest at the rate reflected in each instance, and/or how the amounts claimed or reflected as interest in each instance, are calculated."

The nature and form of the application for leave to amend:

- [10] As indicated earlier, the plaintiffs filed a Notice of Intention to Amend without a supporting affidavit. Mr Coertzen, who appeared on behalf of the defendants, assisted by Mr Bester, submitted that the plaintiff ought to have brought a substantive application in the form of a Notice of Motion supported by an affidavit wherein it explains its proposed amendments and the reasons and basis therefore. Mr Coertzen submitted that for this reason alone the application ought to be dismissed.
- [11] Mr Grobler, who appeared on behalf of the plaintiff, submitted that the said application is an interlocutory application and as such need not be accompanied by a supporting affidavit.
- [12] In support of his argument, Mr Coertzen relied on the following *dicta* in the judgment of a Full Court in the matter of **African Amity NPC and Others v Minister of Home Affairs and Others** (51735/2021) [2023] ZAGPPHC 503 (29 June 2023):

"[26] The authorities state that there is no strict compliance required with Rule 28(4) in terms of lodging an application for leave to amend. Whether it is necessary for the applicant to lodge an application in terms of Rule 28(4) is contingent on the circumstances of the matter and the subject matter of the amendment before the court. Therefore, failure to lodge an application for leave to amend will not always be fatal, depending on the circumstances of a particular case.

[27] In the case of *De Kock v Middelhoven* the court said:

"...In my view, the new rule 28(4) postulates two procedures by which a party seeking an amendment may approach and follow the court for leave to amend. It is of capital importance to point out in the first place that the choice of the procedure to seek such leave is, by

using the word 'may', left entirely to the discretion of such a party. The first procedure that a party pursuing an amendment may use is oral. By this method, all that such a party has to do after receiving the notice of objection in terms of rule 28(3) is to set such a matter down for hearing and, on the date of hearing, simply walk into court and orally apply for leave to amend. The second procedure of applying for leave to amend is to 'lodge an application for leave to amend' as enjoined by the provisions of rule 28(4). What the new rule 28(4) has done is to abolish the regimented procedure of the old rule 28(4) which compelled a party seeking an amendment to bring a substantive application for leave to amend. The new rule 28(4) does not compel a party seeking an amendment to deliver an application for leave to amend. As I pointed out earlier, it is entirely the decision of the party pursuing leave to amend whether to apply for leave to amend orally or to lodge an application for leave to amend."

[28] *Booyesen and others v Followers of Christ Church of South Africa and Namibia and others* case suggests that although the Rule does not make it peremptory to bring a substantive application under Rule 28(4), it is not an either or situation as the situation of each case may dictate which course is dictated by the circumstances. The court said:

"[18]... First and foremost, I fully agree that the relevant Rule does not signify a peremptory provision but suggests procedural flexibility. However, I am not of the view that it was the intention of the legislator, when making the provisions of Rule 28 (4) discretionary, to afford a litigant an absolute or sole discretion to be exercised on an indiscriminate basis.

[19]... It is quite surprising that the Middelhoven decision does not put any limit to that power. The exercise of the discretion afforded should be measured against the nature of the amendment and the subject matter of the case in question. I firmly believe that the circumstances of a particular case will determine which course of action to follow. It is further my view that if a party chooses the wrong procedure out of

the two permissible courses of action, it may do so at his or her own peril and runs the risk of an order being granted against him or her.

[20] ... the procedure to be followed is determined on a case-by-case basis, depending on the particular circumstances."

[29] The Booyesen case is more apt as opposed to the Middelhoven case which makes it superfluous to have Rule 28 if parties are at liberty to walk into court and move a proposed amendment which is opposed without affording the court the benefit of appreciating the essence of the proposed amendment and weigh its gravamen and the prejudice that it may have on the opposite party. In this case the issues are profound and touch on constitutional rights. Furthermore, one of the grounds of opposition to the intended amendment is that the amendment, if granted, would itself be excipiable. It is our view that this is one of the cases where a substantive application ought to have been brought."

[13] Rule 28(4) determines as follows:

"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."

[14] In **Erasmus, Superior Court Practice**, DE van Loggerenberg, Jutastat, Revised Service 22 of 2023, at D1 Rule 28-2, the following is stated with reference to the abovementioned judgment of *De Kock v Middelhoven*:

"The court held that rule 24(8) postulated two procedures by which a party seeking an amendment may approach a court for leave to amend. One was oral: by this method, all that the applicant had to do after receiving the notice of objection was to set such a matter down for hearing and on the date of hearing simply walk into court and orally apply for leave to amend. The other was to lodge a formal application for leave to amend as enjoined by the

provisions of rule 28(4). It was left entirely to the discretion of the applicant to decide with which course to proceed. Accordingly, the matter was properly before the court. Rule 1 was substituted with effect from 22 November 2019, and now includes a definition of 'application', viz 'a proceeding commenced by notice of motion or other forms of applications provided for by rule 6'. Rule 6(11) and (14) makes specific provision for interlocutory and other applications incidental to other proceedings. It is submitted that in the light of the foregoing an application to amend as contemplated in rule 28(4) should comply with the relevant provisions of rule 6 and cannot be made orally from the bar. To this extent the decision in the *De Kock* case should therefore not be followed. (My emphasis)

At D1 Rule 28-4 the learned author further states as follows with regard to Rule 28(4):

“Subrule (4): ‘Lodge an application for leave to amend.’ An application under this subrule is an interlocutory application as contemplated in rule 6(11) and need not be brought on notice of motion supported by affidavit. However, it is well established that an application for an amendment seeking to withdraw an admission must be supported by affidavit.”

See also **Swartz v Van der Walt t/a Sentraten** 1998 (1) SA 53 (W) at 56 I – J & 57 G – J.

- [15] In this instance there is no admission which the plaintiff is seeking to withdraw.

- [16] In the circumstances I agree with the submission of Mr Grobler that there was no need to have filed a substantive application as meant in Rule 6(1). An interlocutory application as meant in terms of Rule 6(11) suffices.

- [17] The point raised on behalf of the defendants can therefore not be upheld.

Applicable principles re amendments and exceptions:

- [18] A court hearing an application for an amendment has a discretion whether or not to grant it, which discretion must be exercised judicially. The primary object of allowing an amendment is to obtain a proper ventilation of the disputes between parties, to determine the real issues between them, so that justice may be done. The practical rule is that an amendment will not be allowed if the application to amend is made *mala fide* or if the amendment will cause the other party such prejudice or injustice as cannot be cured by an order for costs and, where appropriate, a postponement. See **Macsteel Tube and Pipe, a division of Macsteel Service Centres SA (Pty) Ltd v Vowles Properties (Pty) Ltd** (680/2020) [2021] ZASCA 178 (17 December 2021) at para [24].
- [19] The onus is on the party seeking an amendment to establish that the other party will not be prejudiced by it. See **Krischke v Road Accident Fund** 2004 (4) SA 358 (W) at 363 B.
- [20] An amendment should not be refused merely in order to punish the applicant for some mistake or neglect on his part; his punishment is in his being mulcted in the wasted costs. See **Trans-Drakensberg Bank Ltd (under Judicial Management) v Combined Engineering (Pty) Ltd** 1967 (3) SA 632 (D) at 640 H.

[21] An amendment ought not to be allowed when the amendment itself is excipiable or where its introduction into the pleading would render such pleading excipiable. In YB v SB and Others NNO the court held as follows at paras [11]- [12]:

“[11] ... It is accepted law that a court will not allow amendments where their effect would render such a pleading excipiable or where it does not cure an excipiable pleading. (Erasmus *Superior Court Practice* service 42, 2012 B1 – 183). In *Crawford-Brunt v Kavnat and Another* 1967 (4) SA 308 (C) at 310G Tebbut AJ (as he then was) held, however, that, 'If the pleading would appear to be possibly open to exception or even if the court is of opinion that the question of whether or not the pleading is excipiable is arguable, it would seem to be the more correct course to allow the amendment.' (My emphasis)

[12] Considering the legal principles as hereinbefore set out, Ms Gassner has in my view correctly submitted that insofar as the trustees' objections to the amendments in the present matter are directed at the alleged defects in the particulars of claim in relation to the trust assets, which they contend render them bad in law, the following principles governing exceptions are relevant in assessing the grounds of objection to the amendment sought:

- The court must accept as correct the allegations contained in the particulars of claim, incorporating the proposed amendment, and determine whether those allegations are capable of supporting a cause of action in respect of the assets of the Ruby Trust (*Stewart and Another v Botha and Another* 2008 (6) SA 310 (SCA) para 4).
- The defect in the pleadings must appear ex facie the pleadings and no extraneous facts may be adduced to show that the pleading is excipiable (*Barnard v Barnard* 2000 (3) SA 741 (C) para 10).
- It is for the excipient (ie the trustees) to satisfy the court that the conclusion of law pleaded by the plaintiff cannot be supported by any reasonable interpretation of the particulars of claim. (My emphasis)

[22] In the abovementioned of **Crawford - Brunt v Kavnat and Another** 1967 (4) SA 308 (C) at 310 D – 311 A the court held as follows:

“It remains, therefore, to consider whether the new particulars of claim which applicant wishes to substitute are excipiable and whether applicant's refusal to supply the particulars requested thereto has resulted in a situation where the amendment sought by her should be refused on that ground. In *Cross v Ferreira*, 1950 (3) SA 443 (C), it was laid down that, save in exceptional cases where the balance of convenience or some such reason might render another course desirable, the Court will not allow an amendment to a pleading if the pleading as amended would be excipiable. It seems clear, however, both from a reading of this case and of subsequent cases in which *Cross v Ferreira* has been referred to, that such an amendment will only be refused on the ground that the amended pleading would be excipiable if it is clear that the amendment would obviously render the pleading excipiable. The operative words in the judgment in *Cross v Ferreira* at p. 449 are 'would be excipiable' and not 'may be excipiable'. If the pleading would appear to be possibly open to exception or even if the Court is of opinion that the question of whether or not the pleading is excipiable is arguable, it would seem to be the more correct course to allow the amendment. I am supported in this view by the decision in *Pieters v Pitchers*, 1959 (3) SA 834 (T), where application by a plaintiff in an action for the amendment of a declaration was opposed by the defendant on the ground that the amendment would render the declaration excipiable. The Court held that as the defendant's contention was at least an arguable matter, the amendment should be granted, **the Court not being in a position, nor called upon, to decide the question of the exception at that stage. The Court held that, if an exception could be lodged, it could be done in proper form and before the proper Court in due course.** This approach is also, in my view, consistent with the general principle that amendments should normally 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

(see *Moolman v Estate Moolman and Another*, 1927 CPD 27; *Cross v Ferreira*, *supra* at p. 447, and cases there collected; *Myers v Abramson*, 1951 (3) SA 438 (C) at pp. 446 to 450; *Heeriah and Others v Ramkisson*, 1955 (3) SA 219 (N) at pp. 221 - 222)." (My emphasis)

Merits of the application to amend:

[23] The two proposed amendments in respect of the differentiation between the respective defendants, on the one hand, and the amendment of the preamble to the prayers, on the other hand, are uncontested, although the defendants' case is that the Particulars of Claim remain excipiable despite the two proposed amendments. If it is to be accepted, for the sake of argument, that the Particulars of Claim is presently excipiable, the said two amendments contribute hugely to clarify the pleading. The two amendments definitely not render the pleading vague and embarrassing. There can consequently be no valid objection to the mentioned two amendments.

[24] The proposed amendment in respect of the illegible annexures by the insertion of an explanatory paragraph is being opposed on the basis that it does not remove the complaint, since the relevant annexures remain illegible and therefore the Particulars of Claim remain excipiable.

[25] Rule 18(6) determines as follows:

"A party who in his or her pleading relies upon a contract shall state whether the contract is written or oral and when, where and by whom it was concluded, and if the contract is written a true copy thereof or of the part relied on in the pleading shall be annexed to the pleading."

[26] In **Absa Bank Ltd v Zalvest Twenty (Pty) Ltd** 2014 (2) SA 119 (WCC) the plaintiff and the defendant entered into a written mortgage loan agreement. The defendant defaulted and the plaintiff sought judgment against it. In its particulars of claim, the plaintiff alleged that it was unable to annex a copy of the loan agreement to its pleadings since the document had been destroyed in a fire and no other copy of it could be found. The defendant excepted to the particulars of claim on the basis that rule 18(6) had not been complied with. The defendant contended that the import of rule 18(6) was that the inability of the plaintiff to annex a copy of the loan agreement to its particulars of claim resulted in it having no cause of action. In dismissing the exception, Traverso DJP and Rogers J, *inter alia*, stated (*per* Rogers J) as follows:

[9] The rules of court exist in order to ensure fair play and good order in the conduct of litigation. The rules do not lay down the substantive legal requirements for a cause of action, nor in general are they concerned with the substantive law of evidence. The substantive law is to be found elsewhere, mainly in legislation and the common law. There is no rule of substantive law to the effect that a party to a written contract is precluded from enforcing it merely because the contract has been destroyed or lost. Even where a contract is required by law to be in writing (eg a contract for the sale of land or a suretyship), what the substantive law requires is that a written contract in accordance with the prescribed formalities should have been executed; the law does not say that the contract ceases to be of effect if it is destroyed or lost.

[10] In regard to the substantive law of evidence, the original signed contract is the best evidence that a valid contract was concluded, and the general rule is thus that the original must be adduced. But there

are exceptions to this rule, one of which is where the original has been destroyed or cannot be found despite a diligent search. In such a case the litigant who relies on the contract can adduce secondary evidence of its conclusion and terms (see *Singh v Govender Brothers Construction* 1986 (3) SA 613 (N) at 616J – 617D). There are in modern law no degrees of secondary evidence (ie one does not have to adduce the 'best' secondary evidence). While a photocopy of the lost original might be better evidence than oral evidence regarding the conclusion and terms of the contract, both forms of evidence are admissible once the litigant is excused from producing the original. In *Transnet Ltd v Newlyn Investments (Pty) Ltd* 2011 (5) SA 543 (SCA) a defendant, in opposing its eviction from certain premises, relied, inter alia, on a written addendum to the lease agreement. The defendant did not annex the addendum to its plea, alleging that a copy of the addendum was not in its possession and was last in the possession of the plaintiff. The original addendum was not adduced in evidence. The question whether an addendum had ever been concluded was hotly disputed. The Supreme Court of Appeal held that in the circumstances of the case the defendant was excused from producing the original and found that the execution and terms of the addendum had been sufficiently proved by oral testimony (see particularly in paras 4 – 5 and 17 – 19). ...

[11] That then is the substantive law. The rules of court exist to facilitate the ventilation of disputes arising from substantive law. The rules of court may only regulate matters of procedure; they cannot make or alter substantive law (*United Reflective Converters (Pty) Ltd v Levine* 1988 (4) SA 460 (W) at 463B – E and authority there cited). The court is, moreover, not a slave to the rules of court. As has often been said, the rules exist for the courts, not the courts for the rules (see *Standard Bank of South Africa Ltd v Dawood* 2012 (6) SA 151 (WCC) para 12). ...

[12] A rule which purported to say that a party to a written contract was deprived of a cause of action if the written document was destroyed

or lost would be ultra vires. But the rules say no such thing. Rule 18(6) is formulated on the assumption that the pleader is able to attach a copy of the written contract. In those circumstances the copy (or relevant part thereof) must be annexed. Rule 18(6) is not intended to compel compliance with the impossible. (I may add that it was only in 1987 that Rule 18(6) was amended to require a pleader to annex a written copy of the contract on which he relied. Prior to that time the general position was that a pleader was not required to annex a copy of the contract — see, for example, *Van Tonder v Western Credit Ltd* 1966 (1) SA 189 (C) at 194B – H; *South African Railways and Harbours v Deal Enterprises (Pty) Ltd* 1975 (3) SA 944 (W) at 950D – H.) (My emphasis)

...

[20] ... If it is impossible for the plaintiff to produce the written contract or a copy thereof, the law allows him to prove the execution and terms of the written contract by other evidence. A rule of procedure cannot deprive the plaintiff of his cause of action or of his right to adduce secondary evidence of the contract, though the rules would still require the plaintiff to plead with appropriate particularity the conclusion of the contract and its terms. (My emphasis)

[21] I also, with respect, disagree with the learned judge's proposition that '(i)n the absence of the written agreement the basis of the [plaintiffs'] cause of action does not appear ex facie the pleadings' (para 18). If a plaintiff pleads the conclusion of a written contract and the terms relevant to his cause of action, the cause of action will appear ex facie the particulars of claim. That, after all, is how causes of action based on written contracts were legitimately pleaded prior to the amendment of rule 18(6) in 1987, at a time when there were no procedural requirements to annex the written contract. What is true is that since 1987 a plaintiff who fails to annex the written contract will (at least in the absence of a properly pleaded explanation) be in breach of rule 18(6).

[22] To the extent that the plaintiff requires the condonation sought in para 4.5 of the particulars of claim, that request is not before us. If the defendants consider that condonation is necessary and, if they wish to oppose condonation, a court could give procedural directions for the filing of affidavits. Alternatively the request for condonation in the particulars of claim could be tried as a separated issue in terms of rule 18(6). However, and unless the plaintiff's allegations concerning the loss of the document by way of fire are untrue, the only other persons who are likely to be in possession of a copy of the mortgage loan agreement are the defendants themselves. At this stage we do not know that the defendants do *not* have a copy of the agreement. If they do have a copy of the agreement, they would obviously receive short shrift in opposing condonation. If they, like the plaintiff, do not have a copy, I have already explained why in my view the plaintiff would not be non-suited. This would either be because rule 18(6) does not apply to such a case or because condonation in terms of rule 27(3) could not properly be refused. ...

[23] ... What cannot appropriately be done is to serve an exception contending that the particulars of claim disclose no cause of action; the non-compliance with rule 18(6) is unrelated to the question whether there is or is not a cause of action. ...

...

[25] I would dismiss the exception with costs. ..."

[27] In my view the aforesaid principles are *mutatis mutandis* applicable to the present circumstances in respect of the illegible annexures to the respective contracts attached to the Particulars of Claim. The relevant paragraph now provides an explanation as to why more clearly legible annexures have not been attached to the Particulars of Claim.

[28] The paragraph which the plaintiff seeks leave to insert, in itself, is definitely not vague and embarrassing. Even should it be accepted, for the sake of argument, that the Particulars of Claim may possibly be excipiable as it presently stands, which I am not called upon to determine at this stage, the insertion of the said paragraph will not contribute to the excipiability of the pleading. If it is to be accepted that the Particulars of claim is not presently excipiable, the insertion of the relevant paragraph will not render it excipiable. In both scenarios the insertion of the relevant paragraph will, in fact, lend more clarity to the Particulars of Claim as a whole.

[29] The proposed amendment in respect of prayer 2 in relation to the claim for interest, is strongly objected to by the defendants as are evident from paragraphs 2.2.2 – 2.2.4 of the defendants' Notice of objection to the proposed amendment, already quoted in subparagraph [9](4) above.

[30] The proposed amended prayer 2 has already been quoted earlier in the judgment, but for the sake of ease of reference I repeat same:

"Interest on this amount, calculated at a rate as set out in the Sale Agreement of 27 July 2020 (and as pleaded in para 9.2.3 of the Particulars of Claim) from date of Service of Summons until date of final payment, alternatively such interest as calculated at the applicable mora interest rate a tempore morae, from 11 January 2023 until final date of payment."

[31] To consider the contents of paragraph 9.2.3 of the Particulars of Claim in context, I deem it apposite to also quote paragraph 8

and the preceding subparagraphs of paragraph 9 in their present form:

"THE SALE AGREEMENT:

8.

On or about 27 July 2020 and at Bloemfontein, the Plaintiff and the First Defendant concluded a written sale Agreement. Robert David Wiggett, properly authorised thereto by means of written resolutions passed by both the Plaintiff and the Defendant on 20 July 2020, had represented both the Plaintiff and the Defendant.

9.

The express, alternatively implied, in the further alternative salient tacit terms of the Agreement were:

9.1 The Plaintiff sold to the Defendant its rental fleet, consisting of the vehicles set out in Schedule 1 to the Agreement together with accompanying rental contracts concerning such vehicles as an enterprise and going concern.

9.2 The purchase consideration aforesaid going concern was determined at R46,821,270.00 which would be payable as follows: [*sic*]

9.2.1 A deposit of R15,000,000.00 in cash, upon signing of the Agreement; and

9.2.2 The balance of the capital purchase consideration of R31,821,270.00, in monthly instalments of R688,662.40 over a period of 54 months, payable on or before the first day of each and every month, commencing on the first day of the month following the signature of the Agreement; and

9.2.3 Interest calculated at a rate of 7% per year linked to the prime rate from time to time but not less than 6%, should the rate vary in subsequent years, per annum. (My emphasis)

9.3 ...”

- [32] It is consequently evident that the plaintiff pleaded its case in respect of interest in paragraph 9.2.3 on the basis that the pleaded interest rate is what the parties agreed upon in terms of the Sale Agreement, dated 27 July 2020, either expressly, alternatively impliedly and in the further alternative tacitly.
- [33] It is therefore the very same alleged agreed interest which the plaintiff is claiming in terms of prayer 2 in its proposed amended form, as its main claim in respect of interest.
- [34] In the alternative, the plaintiff is claiming mora interest, obviously in the event it is not able to successfully prove the alleged agreed interest. The alternative claim is clearly based on the substantive law as contained in section 1, read with section 2(a) of the Prescribed Rate of Interest Act, 55 of 1975, which reads as follows:

“1 Rate at which interest on debt is calculated in certain circumstances

(1) If a debt bears interest and the rate at which the interest is to be calculated is not governed by any other law or by an agreement or a trade custom or in any other manner, such interest shall be calculated at the rate contemplated in subsection (2) (a) as at the time when such interest begins to run, unless a court of law, on the ground of special circumstances relating to that debt, orders otherwise.

(2)(a) For the purposes of subsection (1), the rate of interest is the repurchase rate as determined from time to time by the South African Reserve Bank, plus 3,5 percent per annum.”

[35] A summons (Particulars of Claim) must contain a prayer for interest if an order for interest is sought and must set out the grounds upon which interest is claimed. If interest is claimed by virtue of an agreement, the agreement should be alleged in the summons (Particulars of Claim). See **Erasmus Superior Court Practice**, *supra*, at D1 Rule 17-10. This is exactly what the plaintiff is attempting to do by means of paragraph 9.2.3 of its Particulars of Claim, read with the proposed amended prayer 2 thereof.

[36] In my view there is nothing vague and embarrassing about the proposed amended prayer 2, read with paragraph 9.2.3 of the Particulars of Claim. There is no basis upon which the defendant can allege that they are unable to determine “*what the plaintiff alleges to be the agreed rate of interest, and/or what the rate of interest is that the plaintiff purports to claim*”.

[37] The proposed amended prayer 2, in itself, is not excipiable, nor does it render the Particulars of Claim excipiable. Should it again, for argument’s sake, be accepted that the Particulars of Claim in its present form is excipiable, prayer 2 will not contribute to the excipiability thereof; in fact, it will clarify the particulars of claim in respect of prayer 2 thereof.

[38] There is consequently no basis upon which the defendants can object to the proposed amendment of prayer 2.

[39] None of the proposed amendments will prejudice or cause an injustice to the defendants. The application for leave to appeal is also, in my view, *bona fide*.

Costs:

[40] Rule 28(9) determines as follows:

"A party giving notice of amendment in terms of subrule (1) shall, unless the court otherwise directs, be liable for the costs thereby occasioned to any other party."

[41] The general rules pertaining to costs governing amendments are set out in **Erasmus Superior Court Practice**, *supra*, at D1 Rule 28-22/23:

"It is clear that the court, in accordance with the basic rule governing awards of costs, has a discretion.

The grant of an amendment is an indulgence to the party requiring it, which entails that such a party is generally liable for all the costs occasioned by or wasted as a result of the amendment. ...

Costs occasioned by an amendment have often been held to include the costs of such opposition as is in the circumstances reasonable and not vexatious or frivolous. In other cases the costs of unsuccessful opposition were not so included and the unsuccessful objector was ordered to pay the costs of his opposition even though it was not considered unreasonable or vexatious or frivolous.

It has, however, been stressed that in deciding whether the party to whom an indulgence is granted is to pay the costs of opposition, the recognition of a single criterion for liability (such as the reasonableness of the

opposition) tends to hamper the exercise of the unfettered discretion which the court has in its awards of costs, the exercise of that discretion being essentially a matter of fairness to both sides. Though reasonableness of the opposition is an important criterion in cases where an indulgence is sought, it need not necessarily be the only criterion. A criterion which may be useful in one case may in other cases not have the desired fair effect. Each case must, therefore, depend upon its own facts." (My emphasis)

- [42] The fact that the proposed amendments will not render the Particulars of Claim excipiable does not mean that it renders it non-excipiable or immune to an (new) exception in terms of Rule 28(8). The plaintiff has, by means of the application to amend, side stepped an exception to be taken. The amendments very well remove some of the complaints levelled in the Notice to remove causes of complaint in terms of Rule 23(3), and, in my opinion, will not render the pleading excipiable, but do not necessarily remove possible other, and remaining, grounds for a new exception. If this is so, the application may turn out to have been a futile exercise. For that reason, as well as the fact that the opposition of the application was, in my view, not unreasonable or frivolous, I deem it fair to order the plaintiff to pay the costs of the application.

Order:

- [43] The following order is made:

1. Leave is granted to the plaintiff to amend its Particulars of Claim in accordance with paragraphs 1 – 17 of its Notice of Intention to Amend, dated 8 June 2023.

2. The aforesaid amendments and the processes to follow thereupon, are to be done in terms of the applicable subsections of Rule 28.
3. The plaintiff is ordered to pay the costs of the application to amend.



C. VAN ZYL, J

On behalf of the plaintiff:

Adv. S Grobler SC

Instructed by:

Hendré Conradie Ingelyf

Bloemfontein

Ref: FRE62/0011 T1 JHC/AB

On behalf of the defendant:

Adv. Y. Coertzen

Assisted by:

Adv. B C Bester

Instructed by:

A P Pretorius & Partners

Bloemfontein

Ref: STAN1/0001/M MYNHARDT