

**IN THE HIGH COURT OF SOUTH AFRICA
EAST LONDON CIRCUIT LOCAL DIVISION**

CASE NO: EL 240/2021

In the matter between:

RASHID PENA

Plaintiff

and

UNIVERSITY OF FORT HARE

1st Defendant

NURSING COUNCIL OF SOUTH AFRICA

2nd Defendant

MINISTER OF HIGHER EDUCATION AND TRAINING

3rd Defendant

MINISTER OF HEALTH

4th Defendant

MINISTER OF HOME AFFAIRS

5th Defendant

JUDGMENT

STRETCH J.:

[1] On 26 February 2021 the plaintiff instituted action against the first two defendants (hereinafter referred to as “UFH” and “SANC” respectively) for damages of R5,5 million allegedly flowing from certain administrative action taken by UFH as a result of which the plaintiff failed to complete a nursing degree with UFH. During April 2021, SANC delivered a notice of exception averring that the plaintiff’s particulars of claim are vague and embarrassing, that they lack averments necessary to sustain an action and that they constitute an irregular step, and affording the plaintiff 15 days within which to remove the causes of complaint.¹

[2] During May 2021, the plaintiff duly delivered a notice of intention to amend his particulars, purportedly in an attempt to cure the causes of complaint. The proposed amendment in fact constitutes a substitution of the entire original claim. SANC, in a seven-page document, objected to the proposed amendment, clearly and concisely stating the grounds upon which the objection is founded,² being in essence similar to those raised in its initial notice of exception. The objection further notifies the plaintiff that should he proceed with the application to amend in its present form, SANC would pursue a *de bonis propriis* costs order against the plaintiff’s attorney. The plaintiff nevertheless persisted with the existing application.

[3] It appears to be the plaintiff’s case that the grounds upon which SANC are opposing the amendment, do not constitute grounds precluding an amendment, but are defences which SANC must raise in its plea. SANC has raised nine grounds of objection to the proposed amendment. I will attempt to deal with them *seriatim*.

¹ Presumably in terms of rules 23(1) and 30(2)(b) of the Uniform Rules of Court.

² In terms of rule 28(3).

Failure to enunciate facts and circumstances from which the alleged tacit contract is inferred

[4] The proposed amendment introduces an averment that the plaintiff's claim arises from the breach of a written, alternatively tacit agreement between the plaintiff and UFH (the first defendant) for the plaintiff's enrolment and tuition in nursing studies. It is contended on behalf of SANC (who is the second defendant) that the proposed amendment does not enunciate the facts and circumstances from which the tacit contract is inferred. It is argued that this will render the amendment excipiable as it will fail to disclose a cause of action premised on the alleged tacit agreement.

[5] The plaintiff contends that for a tacit agreement to arise, the plaintiff need only "allege and prove a parallel conduct by rivals", in other words "one which was preceded by suggestive communications that do not themselves form an explicit agreement". The proposed amendment relating to the agreement reads as follows:

'Sometime in 2015, Plaintiff, who is a non-national, applied to study a degree in Nursing at University of Fort Hare (hereinafter referred to as Fort Hare), the First Defendant. Plaintiff was admitted by the said institution to undertake nursing studies. As a consequence, a written alternatively tacit agreement was concluded between the parties on 23th [sic] of November 2015 at East London, Plaintiff acting personally and First Defendant represented by Dr Mbiji P Mahlangu (hereinafter "the agreement"). A copy of the admission letter is annexed hereto as **"RP1"**.

... The material terms of the agreement were that the First Defendant will:

- provide Plaintiff with tuition and supervision of a professional standard in the programme of a nursing study and the courses in which he is enrolled for the duration of the nursing study (four years)
- ensure compliance with the legal requirements for and legislation applicable in the nursing studies including but not limited to registration of Plaintiff as a learner nurse with the Second Defendant
- require and make arrangements for Plaintiff to attend and/or participate in clinical practicals and/or allocate him in health institutions for those clinical practicals.

Plaintiff, who was not in possession of a study permit at the time of his admission at Fort Hare, was advised by the agents of the First Defendant that a grace period was given to academic institutions for the waiver of the said requirement.

In line with the terms of the written and/or tacit agreement referred to above Plaintiff commenced with his studies on 23 February 2016 after being cleared and registered by the First Defendant's international office.'

[6] On the papers before me, no written agreement was annexed to the particulars of claim in compliance with rule 18(6). Nor was the admission letter annexed in compliance with the undertaking in the particulars of claim.

[7] The plaintiff does however, in the alternative, rely on a tacit agreement. Rule 18(7) says that it shall not be necessary in any pleading to state the circumstances from which an alleged *implied* term can be inferred. Generally stated, an implied term arises by operation of law, whilst a tacit term is an unexpressed provision of the contract, derived from the common intention of the parties. It has been held however, that the expression 'implied term' is an

ambiguous one in that it is often used to denote at least two distinct concepts.³ It is, on the one hand, used to describe the unexpressed provision of a contract which the law imports. On the other hand, it is also used to denote an unexpressed provision of a contract which derives from the common intention of the parties, as inferred by the court from the express terms of the contract and the surrounding circumstances.⁴ The latter is sometimes described as a ‘tacit’ term, which is a description which was approved by the Appellate Division.⁵ The Constitutional Court has described a tacit term as follows⁶:

‘A tacit term is an unspoken provision on the contract. It is one to which the parties agree, though without saying so explicitly. The test for inferring a tacit term is whether the parties, if asked whether their agreement contained the term, would immediately say, “Yes, of course that’s what we agreed.” Before a court can infer a tacit term, it must be satisfied that there is a necessary implication that they intended to contract on that basis.’

[8] The sub-rule accordingly relates to a tacit term in an express contract.⁷ In other words, whereas a plaintiff who relies upon a tacit term in an express contract need not set out the circumstances from which the alleged term can be inferred, a plaintiff who relies on a tacit contract must set out the facts and circumstances from which the contract is inferred.⁸ In any event, where an exception is raised, or, as in the case before me, where an amendment is opposed, the test is whether the tacit term could reasonably be implied.⁹

³ See *Alfred Mc Alpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) at 531D

⁴ *Ibid*

⁵ *Ibid* at 532D

⁶ *Food and Allied Workers Union v Ngcobo NO* 2014 (1) SA 32 (CC) at 43F-44A

⁷ See *Roberts Construction Co Ltd v Dominion Earthworks (Pty) Ltd* 1968 (3) SA 255 (A) at 261E.

⁸ *Ibid* at 262B

⁹ *Lanificio Veram SA v Marusel Fils (Pty) Ltd* 1952 (4) SA 655 (A) page 660;

Pete’s Warehousing and Sales CC v Bowsink Investments CC 2000 (3) SA 833 (E).

[9] I am not persuaded that the proposed amendment fails to enunciate facts and circumstances from which an alleged contract is inferred. Although I have some difficulty in understanding what the plaintiff means when he refers to “parallel conduct by rivals”, I will assume, in his favour, that what he is seeking to convey is that he has pleaded facts and circumstances from which the alleged agreement can be inferred. To that extent I am constrained to agree. The plaintiff has managed to set out facts and circumstances in sufficient detail for the defendants to plead to them. He has also listed three material terms of the agreement, and has alleged as a fact that agents of the first defendant advised him that academic institutions had been given a grace period during which waiver of the requirement of a study permit applied. From the facts and the circumstances described by the plaintiff, it may be inferred that the first defendant was one of those institutions. This however, only really affects paragraphs 6, 7, 8, 9 and 10 of the 26 paragraph amendment notice.

Failure to allege facts to establish jurisdiction

[10] Paragraph 3.2 of the proposed amendment alleges that SANC’s business premises are situated in the province of Gauteng. The claim against SANC is premised on an alleged breach of what appears to be a delictual duty of care. It is pleaded that the whole cause of action arose within the area of jurisdiction of this court because the agreement (between the plaintiff and UFH) was concluded in East London, the performance of UFH’s obligations (allowing plaintiff to study nursing) was in East London, and that the “wrongful and/or negligent conduct complained about was communicated and/or took place in East London”.

[11] SANC contends that the communication of the alleged breach of the duty of care does not confer jurisdiction upon this court. It is argued that this is so

because the plaintiff has not pleaded any facts to suggest that SANC acted or failed to act at any place other than at its Gauteng address. The proposed amendment will thus be excipiable, according to SANC, because it lacks averments necessary to sustain a cause of action against SANC, in that it does not state any basis upon which this court will have jurisdiction to adjudicate a claim against SANC.

[12] The plaintiff, in his affidavit under reply, avers that this court has jurisdiction to hear this application as it is “interlocutory to the main proceedings currently pending before this Honourable Court.” I can only assume that this non-sensical reply was not drafted with the assistance of a legal practitioner. It does not merit consideration.

[13] It is also contended on the plaintiff’s behalf that SANC is but one of several defendants and s 21(2) of the Superior Courts Act 10 of 2013 accordingly applies. The subsection reads as follows:

‘A Division also has jurisdiction over any person residing or being outside its area of jurisdiction who is joined as a party to any cause in relation to which such court has jurisdiction or who in terms of a third party notice becomes a party to such a cause, if the person resides or is within the area of jurisdiction of any other Division.’

[14] This subsection was originally introduced into the former Supreme Court Act 59 of 1959 by s 2 of the Supreme Court Amendment Act 41 of 1970. The subsection extends the jurisdiction of a division of the High Court with regard to persons outside the ordinary jurisdiction of the division concerned. In other words, once it has been established that a particular division of the High Court has jurisdiction, the subsection can be used to join to that cause a defendant not resident within the area of jurisdiction of that division.¹⁰ The object of the

¹⁰ See *Els v Weideman* 2011 (2) SA 126 (SCA) at 132F

subsection is to avoid the inconvenience and expense of a multiplicity of actions.¹¹

[15] Whereas absence of jurisdiction is generally raised by way of a special plea, it may be raised as an exception if the lack of jurisdiction appears *ex facie* the pleadings.¹² This is not the first time that SANC has raised the issue of lack of jurisdiction. In its notice of exception to the plaintiff's original particulars of claim it avers that according to paragraph 39 of those particulars, read with annexure RP37 (which is not before me), SANC's rejection of the plaintiff's application for registration as a learner nurse occurred at a meeting of SANC's full board held at Pretoria (outside this court's geographical area of jurisdiction).

[16] I digress to point out that although the original particulars of claim were made up of an 11 page statement which appears to have been an affidavit at some stage deposed to by a legal practitioner, with no less than 19 annexures (which annexures have been omitted from these application papers), they have some use in this particular application, in that they give this court some idea of the *facta probantia* upon which the plaintiff is likely to rely at the end of the day.

[17] For purposes of background, the following averment is instructive:

'In a desperate attempt to ensure that Plaintiff gets registered to continue with his third year studies, Plaintiff launched urgent proceedings in the East London High Court under case number 306/2018 on the 20th of March 2018 to review and set aside the decision of SANC to refuse to register the Plaintiff and compel UFH and SANC to allow Plaintiff to proceed with his studies and place him for clinical training. SANC advised the Court that it wished to refer the matter to its full Council internal and as a

¹¹ See *Majola v Santam Insurance Co Ltd* 1976 (1) SA 874 (SE) at 877A

¹² *Dusheiko v Milburn* 1964 (4) SA 648 (A)

result the matter was removed from the roll to allow SANC to make a decision. A copy of the High Court Order is annexed hereto, marked **RP16**.¹³

The full council of SANC sat on the 27th and 28th of March 2018 and rejected Plaintiff's application for registration as a learner nurse. SANC failed to take consideration of all the information placed before it by the Plaintiff. A copy of the minutes and resolutions of the full Council meeting of SANC held on the 27th and 28 of March 2018 is annexed hereto, marked **RP17**.

The fourth Respondent (hereinafter referred as the Minister of Health) set up an Appeal Board Committee in terms of section 57(1) and (2) of the Nursing Act to hear an Appeal that was lodged by Plaintiff. The Appeal hearing was heard on the 24th and 25th of February 2021. There is no outcome yet for the appeal.¹⁴ However, Plaintiff submits that the on-going appeal does not vitiate Plaintiff's cause of action.'

[18] In the light of the foregoing, the issue of jurisdiction appears not to be as simple as SANC now contends, despite the fact that SANC's role as pleaded by the plaintiff in this application for an amendment is not exactly a model of eloquence or precision. Generally, if a question of jurisdiction is doubtful or arguable, an amendment should in principle be allowed and it should be left to the defendant to raise the issue of jurisdiction by way of an exception in terms of rule 28(8), or by way of a special plea, if advised to do so.¹⁵

¹³ Because the order did not form part of the application papers before me, I sourced a copy from the registrar. It transpires that all the parties were represented on 20 March 2018, when an order was granted removing the matter from the roll, and granting the plaintiff before me leave to approach the court on the same papers, duly supplemented if necessary.

¹⁴ Case no EL 306/18 referred to above, was removed from the roll on 15 June 2021 with no order as to costs.

¹⁵ See *Cordier v Cordier* 1984 (4) SA 524 (C) at 533C

Vagueness and embarrassment

[19] SANC has made reference to certain averments which it alleges are vague and embarrassing. Examples are, interchangeable references to “Fort Hare”, “the first defendant” and “this institution”, and reference to Fort Hare’s agents both in the singular and in the plural. For the reasons which follow, I do not deem it necessary to make a determination in this regard, despite the fact that this clearly constitutes shoddy and careless pleading.

Failure to allege that the plaintiff submitted to SANC a properly completed application for registration and failure to register him as a learner nurse

[20] Section 32 of the Nursing Act 33 of 2005 deals with the registration of learners. The relevant subsections read as follows:

- (1) A person undergoing education or training in nursing must apply to the Council to be registered as a learner nurse or a learner midwife.
- (2) The Council must register as a learner nurse or a learner midwife, any person who has complied with the prescribed conditions and has furnished the prescribed particulars for a training programme at a nursing education institution.
- (3) The person in charge of a nursing education institution must, within 30 days, notify and furnish to the Council information prescribed by the Council in respect of each learner nurse who has commenced, completed, transferred to or abandoned a nursing education and training programme. ...

[21] At paragraph 14.1 of the proposed amendment, the plaintiff alleges that, contrary to the terms of his agreement with UFH, UFH did not register plaintiff with SANC. I take it that this is intended to convey non-compliance with s 32(3) of the Nursing Act. At paragraph 19 of the proposed amendment, the plaintiff

alleges that in breach of its duty of care towards him, SANC refused or failed to register him as a learner nurse.

[22] Prima facie, these averments are not only diametrically opposed with the potential of being mutually destructive, but they are also alarmingly silent on what the plaintiff did or failed to do, before SANC refused to register him. In my view, the plaintiff must either plead that he performed in terms of the Act, thus rendering SANC's failure to counter-perform wrongful, or he must plead *facta probanda* which place him in a category where a legitimate expectation of performance on SANC's part is at the very least implied. In the absence of any of the aforesaid, I am constrained to agree that the proposed amendment fails to establish a causal link between the plaintiff's alleged damages and the conduct, or failure to act, on the part of SANC.

[23] The plaintiff also alleges that SANC was negligent in that it failed to protect him and members of the general public "from undertaking a nursing study or enrolling with an institution that does not comply with the Nursing Act", and that SANC was also negligent in that it failed to "inform Plaintiff timeously or at all of any and all circumstances which could or would harm him, prevent it and protect him as per the requirements of the Nursing Act."

[24] These averments are nothing less than incoherent ramblings with no substance or basis whatsoever. They are extremely embarrassing. Once again, I can only assume that they were not drafted by, or with the assistance of a legal practitioner.

Damages

[25] The plaintiff, in his proposed amendment, has elevated his damages to R7 500 000, under heads of emotional shock and stress (R500 000), constitutional damages (R2-million) and loss of future income (R5- million). The judgment which he seeks however, is not joint and several. Indeed, it is against one defendant only, whose identity is undisclosed. The proposed amendment is at the very least vague and embarrassing.

Failure to allege that the plaintiff possessed a valid study permit and SANC's alleged breach of a duty of care

[26] The plaintiff, in his proposed amendment (and in his original particulars of claim for that matter), alleges that he did not have a valid study permit¹⁶ at the time of his admission to UFH. This is common cause, so it seems. SANC contends that absent a valid study permit, the plaintiff was barred from studying in South Africa, and from being registered as a learner nurse. In the absence of a corresponding right to study and to be registered, so it is argued, the plaintiff could not have suffered any damages, and any amendment will accordingly be excipiable as it will fail to disclose a cause of action.

[27] In a nutshell, the proposed amendment avers that UFH permitted the plaintiff to commence studying on 23 February 2016 on the basis that the requirement for a study permit had been waived, and agreed that the plaintiff would in due course, be registered as a learner nurse with SANC. After two years of study however, UFH not only reneged on the agreement but also did not enrol

¹⁶ He is presumably referring to a study visa as defined and referred to in the Immigration Act 13 of 2002

Plaintiff for the third of a four-year programme, as previously agreed. As a result of this breach of the agreement, plaintiff suffered damages.

[28] The proposed amendment further avers that at some stage, SANC held out to the plaintiff that UFH is an academic institution “where tuition and supervision of a professional standard in the programme of nursing study are rendered in line with the applicable statutes”. The proposed amendment goes on to say that because SANC had the power to issue accreditation to academic institutions (such as UFH), it was also obliged to monitor compliance with the Nursing Act (the relevant provisions are a mystery) and that it had a “legal duty of care” to ensure that UFH complies with the Nursing Act. In breach of this legal duty, SANC likewise refused or failed to register the plaintiff as a learner nurse, thus unfairly depriving the plaintiff of his Constitutional right to further education. This caused him to experience shock and trauma, to fall behind in his studies, and to lose future income as “he could not complete the degree in time or at all.”

[29] It is further averred that SANC was negligent in failing to register the plaintiff as a learner nurse, and in failing to monitor and enforce UFH’s compliance with the Nursing Act, which negligence proper monitoring and the enforcement of compliance could have limited or could have “averted” the plaintiff’s loss, as the failure to monitor and the failure to comply with the Nursing Act would have been unearthed and would have been addressed timeously (presumably by SANC). Furthermore, SANC was negligent because it failed to prevent the plaintiff from enrolling with an institution that does not comply with the Nursing Act, when, by the exercise of reasonable care and the taking of reasonable steps, it could and should have done so.

[30] Lastly, it is alleged that SANC was negligent in failing to inform the plaintiff “of any and all circumstances which could or would harm him”, that SANC was negligent in not preventing these circumstances (which could or

would harm the plaintiff) from occurring, and that SANC was negligent in failing to protect the plaintiff as required in terms of the Nursing Act.

[31] It is contended on SANC's behalf that if the plaintiff suffered damages due to any alleged misrepresentations by UFH's agents to the effect that a grace period was given to academic institutions for the waiver of the said requirement (which, so it is argued, cannot be done in any event), such claim is not against SANC and on a different basis as the one on which the proposed amendment to the particulars of claim is premised. According to SANC the proposed amendment is thus excipiable in that it fails to disclose a cause of action.

[32] I have difficulty in making sense of the proposed amendment. I have some understanding as to why SANC has elected to bring *prima facie* valid objections to the amendment within the purview of an alleged failure to show that the plaintiff was in possession of a valid "study permit".¹⁷ I say this, because I find substance in the contention that the plaintiff has failed to make out a cause of action against SANC in the proposed amendment. The plaintiff has not managed to establish any causal link (based on an alleged duty of care) between the provisions of the Nursing Act (or any other legislation for that matter), and SANC's alleged refusal to allow the plaintiff to register as a learner nurse. Section 32 of the Nursing Act obliges the Council to register a learner nurse, provided the learner has complied with the prescribed conditions. It goes without saying that one such condition would be that an admitted foreigner must be in possession of a study visa as contemplated in s 13 of the Immigration Act 13 of 2002. As pointed out on SANC's behalf, it can hardly be held liable for damages in delict

¹⁷ The Immigration Act 13 of 2002 makes reference to a permanent residence permit, but when dealing with authority to temporarily sojourn in the Republic for purposes of transit, visitation, doing business, conveyance, obtaining medical treatment, working, taking part in an exchange programme or studying for example, it refers to a visa. Section 13 of the Act contemplates the issuing of a study visa, in the prescribed manner, by the Director-General of Home Affairs, to a foreigner intending to study in the Republic for a period not less than the period of study, provided that the foreigner complies with the prescribed requirements.

if UFH allowed the plaintiff to study without a visa in terms of an alleged agreement which SANC was not a party to.

[33] As succinctly set forth in SANC's heads of argument, liability depends on the wrongfulness of the act or omission of the defendant. Differently put, the conduct complained of must be legally reprehensible. At the pleading stage, the plaintiff must at the very least disclose the wrongful act or omission on which the cause of action is based.¹⁸ The plaintiff has not done so. In the circumstances I am inclined to agree with SANC. The proposed amendment is excipiable. It does not disclose a cause of action against SANC.

[34] The parties are *ad idem* that the primary objective of allowing an amendment is to properly ventilate the dispute between the parties and to determine the real issues between them so that justice may be done.¹⁹ The onus is on the objecting party to persuade the court that, as the pleadings stand (or in this case, as the proposed amendment stands), no cause of action is or will be disclosed upon every interpretation which the pleadings could possibly bear. The parties also agree that a court will usually allow an amendment unless it is *mala fide*, or if it will cause the objecting party prejudice which cannot be cured by a costs order. The power of the court to allow material amendments is, accordingly, limited only by considerations of prejudice or injustice to the opponent.²⁰

[35] By way of example, an amendment would cause an injustice to the other side which cannot be compensated by an appropriate costs order if the parties cannot be put back in the same position in which they were when the pleading sought to be amended was filed.²¹ Prejudice, on the other hand 'embraces

¹⁸ *Gouda Boerdery BK v Transnet* 2005 (5) SA 490 (SCA) at 498

¹⁹ See *Cross v Ferreira* 1950 (3) SA 443 (CPD) at 447.

²⁰ This is stressed in, for example, *Devonia Shipping Ltd v MV Luis* 1994 (2) SA 363 (C) at 369G.

²¹ See *Moolman v Estate Moolman* 1927 CPD 27 at 29.

prejudice to the rights of a party in regard to the subject matter of the litigation, provided there is a causal connection which is not too remote between the amendment of the pleading and the prejudice to the other party's rights.'²² The mere loss of the opportunity of gaining time, for example, is not in law prejudice or injustice.²³ Thus, if the real issue in a case is imperfectly or ambiguously expressed in the pleadings, an amendment designed to place on record the true issue will be allowed.²⁴

[36] Courts have also allowed amendments of prayers, but usually only if the amendment does not introduce a new cause of action.²⁵ Save in exceptional cases, where the balance of convenience or some other reason might render another course desirable, an amendment ought not to be allowed where its introduction into the pleading would render such pleading excipiable.²⁶ In other words, the issue proposed to be introduced must be a triable issue. A triable issue is one which (a) if it can be proved by the evidence foreshadowed in the application for the amendment, will be viable or relevant; or (b) as a matter of probability, will be proved by the evidence foreshadowed.²⁷

[37] An amendment should not be refused merely in order to punish the applicant for some mistake or neglect on his part. His punishment lies in him being mulcted in the wasted costs.²⁸ On the other hand, courts have on various occasions refused to allow amendments where, even if they were allowed, the amending parties would still have no prospects of success on the amended pleadings,²⁹ notwithstanding the provisions of rule 28(8) which would allow the

²² *South British Insurance Co Ltd v Glisson* 1963 (1) SA 289 (D) at 295H

²³ See the remarks of Schreiner J in *Union Bank of South Africa v Woolf* 1939 WLD 222 at 225.

²⁴ See *Slomowitz v Vereeniging Town Council* 1966 (3) SA 317 (A) at 329E-F.

²⁵ See *Bestenbier v Goodwill Municipality* 1955 (2) SA 226 (W)

²⁶ See *Cross* above.

²⁷ See *Caxton Ltd v Reeve Foreman(Pty) Ltd* 1990 (3) SA 547 (A) at 565H-J;
Consol Ltd t/a Consol Glass v Twee Jonge Gezellen (Pty) Ltd (2) 2005 (6) SA 23 (C) at 36I-J

²⁸ *Union Bank v Woolf* above at 225

²⁹ See for example *Lenferna v Jerome* 1925 (1) PH F20 (D).

objecting party to except or allege an irregular step (in this case for the second time), after the amendment has been granted.

[38] SANC also contends that the plaintiff has not made out a case for leave to amend in his founding affidavit. At first glance, this objection seems rather curious. After all, SANC initially excepted to the plaintiff's pleadings, affording him the opportunity to amend them. It is however contended that, having been afforded the opportunity to remove the causes of complaint, the plaintiff, instead of doing so, has delivered notice of a brand new set of pleadings, which are, so it is argued, even more excipiable (if that is possible), than the first attempt. SANC contends that it is constrained to object yet again, because a party may not sit back and say nothing, and then at the pleading stage complain that the pleading is defective and that it was taken by surprise. To this end SANC relies on *Trans-Drakensberg Bank Ltd (under judicial management) v Combined Engineering (Pty) Ltd & Another*³⁰ where the following is stated:

‘Having already made his case in his pleading, if he wishes to change or add to this, he must explain the reason and show prima facie that he has something deserving of consideration, a triable issue: he cannot be allowed to harass his opponent by an amendment which has no foundation. He cannot place on the record an issue for which he has no supporting evidence, where evidence is required, or, perhaps in exceptional circumstances, introduce an amendment which would make the pleading excipiable.’

[39] And this seems to be to be what SANC is complaining of. The plaintiff's original pleadings were at the very least, vague and embarrassing, so it says. In terms of rule 23(1), it gave the plaintiff 15 days to remove the cause of complaint. The plaintiff duly responded by giving notice of its amendment which, if not addressed, had the potential of exacerbating the problem instead of curing it. SANC pointed this out to the plaintiff. It was at pains, in a seven page further

³⁰ 1967 (3) SA 632 (D) 640

notice of objection, to point out these problems to the plaintiff, affording him a second opportunity to cure the defects complained of. The plaintiff elected not to. I have been at pains to identify those averments in the proposed amendment which may be argued to have made the threshold required for a defendant to at least plead to. My concern is, that there are seriously problematic areas which *prima facie*, fail to make out a cause of action. Added to that is the fact that this is not really an application for an amendment. It is an application to start all over again. The leave sought is for substitution of the original particulars of claim in their entirety. This being the position, it would serve little purpose for this court to embark on a pedantic nit-picking readacting exercise infusing the first set of particulars with snippets from the second set, in an attempt to put Humpty Dumpty back together again, when it cannot put him back on the wall where he belongs. The proposed amendment, read as a whole, in my view, at the very least still fails to disclose a cause of action against SANC, and falls to be dismissed.

Costs

[40] SANC has been constrained to occur costs on two occasions. Its response to the original pleadings and the proposed amendment has not been frivolous, vexatious, litigious or malicious. On the contrary, it seems to me that it has gone to great lengths to assist the plaintiff in identifying the weaknesses in his pleadings, and has on both occasions, notified the plaintiff's attorneys that it would seek a punitive costs order against them if they persisted in framing their particulars of claim as they have done. In his heads of argument and in arguing before me, SANC's counsel has prayed for the application for leave to amend to be dismissed with costs on an attorney and client scale. Having regard to the circumstances of this case, I am of the view that such an order is justified.

[41] The application is dismissed with costs on the scale as between attorney and client.

pp. 

I.T. STRETCH

JUDGE OF THE HIGH COURT

Date heard: 2 December 2021

Counsel for the applicant/plaintiff: Mr S. Nzuzo

Instructed by Makombe Bunyonyo Attorneys

EAST LONDON

Tel 074 741 9772; 043 721 0910

chiningatapiwa@gmail.com

bunyonyot@gmail.com

Counsel for the respondent/second defendant: Mr D.B. du Preez SC

Instructed by Maponya Attorneys (lynne@maponya.co.za; tasneem@maponya.co.za;

phindulo@maponya.co.za)

Care of Hexana Attorneys

EAST LONDON

Tel 043 743 2606

info@hexanaattorneys.co.za

Delivered by way of electronic mail to the local attorneys on 3 February 2022.