

## REPUBLIC OF SOUTH AFRICA



## IN THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO DIVISION, POLOKWANE)

|                                       |                                   |
|---------------------------------------|-----------------------------------|
| (1)                                   | REPORTABLE: YES/ <del>NO</del>    |
| (2)                                   | OF INTEREST TO THE JUDGES: YES/NO |
| (3)                                   | REVISED.                          |
| DATE: 24/6/2021 SIGNATURE: [Redacted] |                                   |

CASE NO:2012/2016

OSZ TAYOB PIETERSBURG TRADING (PTY) LTD

T/A EH HASSIM

PLAINTIFF

And

ROSPA TRADING 49 CC

FIRST DEFENDANT

JOSEPH MMBANGISENI MUTAVHATSINDI

SECOND DEFENDANT

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**JUDGMENT**


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**MULLER J:**

- [1] The applicants apply, on motion, for an amendment of their plea. The application is opposed. I will for the sake of convenience refer to the parties as they are reflected on the pleadings.
- [2] The background succinctly stated is that the plaintiff instituted action in 2016 against the first defendant for the recovery of R855 867.94 based on a written contract which embodied a credit application. The claim against the second defendant is premised on a written suretyship signed by the second defendant on 4 July 2014 on behalf of the first defendant<sup>1</sup> (the debtor) as well as a written acknowledgement of debt<sup>2</sup> also signed by him on 4 July 2014, on behalf of the first respondent. The defendants pleaded and instituted a counter-claim based on unjustified enrichment. The counter-claim need not any attention as the amendment sought is only directed at an amendment of para 5 of the plea.
- [3] Initially para 5 of the plea was bald short and to the point. To understand what the amendment and the objection is about, reference will be made to the relevant paragraphs in the particulars of claim to which the plea relates.

It is pleaded in paragraph 7, 8 and 9:

"7"

"On or about 22 December 2011 and at Polokwane, the **Second Defendant** bound himself as surety and co-principal debtor *in solidum* with the First Defendant for the due and proper fulfilment of all the obligations of and for the punctual payment of all sums which were or may become due and payable by the First Defendant to the Plaintiff in terms of, or in connection with or arising in any way whatsoever out of the purchase by the principal debtor from the Plaintiff of

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<sup>1</sup> Annexure "OSZ 2" attached to the acknowledgement of debt.

<sup>2</sup> Annexure "OSZ 2" attached to the particulars of claim.



any goods and/or rendering of services and/or the provision of monetary loans or arising out of any of the provisions of agreement or arising from any other cause of action whatsoever.

8.1 On or about 4<sup>th</sup> of July 2014 and at Polokwane, the **Second Defendant** further bound himself as surety and co-principal debtor *in solidum* with the First Defendant for the due and proper fulfillment of all the obligations of and for the punctual payment of all sums which were or may become due by the First Defendant to the Plaintiff in terms of, or in connection with or arising in any way whatsoever out of the purchase by the principal debtor from the Plaintiff of any goods and/or rendering of services and/or the provision of monetary loans or arising out of any of the provisions of agreement or arising from any other cause of action whatsoever.

8.2 A true copy of the aforesaid Acknowledgement of Debt and Deed of Surety is annexed hereto and forms part of **Annexure "OSZ2"**

On or about 4<sup>th</sup> of July 2014 and at Polokwane the **Second Defendant** entered into a written acknowledgment of debt and undertaking to pay the outstanding balance including interest and legal costs by no later than 4 September 2014. A copy of the acknowledgment of debt and undertaking to pay is attached hereto marked **Annexure "OSZ2"** and the contents whereof the Plaintiff prays be read as if incorporated herein" (The emphasis is my own.)

[4] The plea with reference to paragraphs 7, 8 and 9 of the particulars of claim states:

"5."

AD PARAGRAPH 7, 8 AND 9 THEREOF

5.1 The contents are admitted,

5.2 The First and Second Defendant further plead that any monies due to the Plaintiff were settled in full."

[5] The plea in para 5.1 contains an admission that it is common cause that the allegations in para 7, 8 and 9 are correct. In addition both defendants pleaded that the debt has been settled in full.

[6] The onus to prove that full payment has been made rest on both the defendants.

See *Pillay v Krishna* 1946 AD 946, 958.

The notice of amendment seeks to introduce a defence that a misrepresentation was made to the first and second defendants which move them to sign the deeds of suretyships and the acknowledgment of debt.

- [7] The plaintiff objected to the proposed amendment on several grounds.

The first ground is that the amendment will render the plea excipiable on the basis that it will be vague and embarrassing. On the ground that the plea will be excipiable, the allegation is that the plea lacks particularity in relation to the material facts to make out a defence as required by Rule 18(4) since the defendants have failed to allege how the representation was made; who made the representation; was it foreseeable that the representation could induce the person to whom it was made to make and/or sign the acknowledgement of debt. The plaintiff says that as the plaintiff is a juristic person the identity of the person who made the representation must be pleaded is crucial to enable the plaintiff to identify the person in the first place, and in the second grounds if the person was authorized to bind the plaintiff. The prejudice is that the plaintiff will be unable to plead.

- [8] The second ground is that the plea failed to set out a complete cause of action in that the defence is based on a misrepresentation, it must be pleaded it was made intentionally negligently or innocently

- [9] Thirdly, the pleas failed to identify the consequent transactions without providing details of particularity what these consequent transactions were.

Fourthly, the allegation that the acknowledgement of debt did not take into account and reflect several payment made by the first defendant is an allegation of partial



payment. The plea should set out how and to whom these payment were made and does not allow the plaintiff to identify the dates and which payments were made.

Fifthly, the failure to identify which debits and credits and debits with reference to the allegation that annexure "EH2" does not represent the true and correct reconciliation statement.

- [10] Sixthly, in the amendment they pleaded that the defendants are in credit of R824 128-69. The amendment does not allege how the amount was calculated.

The second main ground is that the pleading seeks to withdraw an admission. Counsel for the plaintiff did not seriously persisted with this ground in argument. This ground is not sound.

- [11] The third main ground is that the amendment will cause an injustice and prejudice to the plaintiff.

- [12] The fourth main complaint is that the amendment will prolong the proceedings and increase the costs on the basis that the plea as it stands at the moment allowed the plaintiff to believe that it would not have to prove what has been admitted.

- [13] It is important to mention that ever since *Moolman v Estate Moolman* 1927 CPD 27, 29 the point of departure for a court faced with an application to amend is that:

"the practical rule adopted seems to be that amendments will always be allowed unless the application to amend is *mala fide* or unless such amendment would cause an injustice to the other side which cannot be compensated by costs, or in other words unless the parties cannot be put back for the purpose of justice in the same position as they were when they pleading which it is sought to amend was filed."

- [14] Despite the liberal view in respect of amendments an applicant must offer an explanation why the amendment is required together with a reasonable explanation why the amendment was only sought on September 2019. Similarly, the withdrawal

of an admission requires a full explanation as to the *bona fides* of the defendant and in addition introduces a new defence all together. It served the defence of payment. Instead rescission of the acknowledgment of debt and the suretyship agreement dated 04 July 2014 is claimed. The defence of payment will be restricted to the indebtedness arising out of the agreements during December 2016. It is the defendant's case that they only discovered after they appointed an expert and after the expert conducted an examination the reconciliation of the bulk account of the first defendant that the alleged fraudulent representation was discovered. The explanation for the delay in my view is reasonable. As stated earlier in this judgment. Mr Groenewald did not argue strongly that an admission has been withdrawn. The admission that the second defendant signed the documents will remain unaffected if the amendment is allowed. The proposed amendment will amount to an admission and avoidance which is an acceptable way to plead. Ground 2 of the objection is therefore rejected.

[15] It was held in *Crawford-Brunt v Kavnat and Another* 1967 (4) SA 308 (C) 310F-H that the excipiability of the pleading must be approached as follows:

"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 the 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."

[16] The plaintiff contends that the pleadings do not comply with Rule 18(4) in that the failure to say who represented the plaintiff and whether the representation was made



orally or in writing and finally whether it was foreseeable that the representation could induce the person to whom it was made to sign the surety and the acknowledgment of debt.

- [17] It is apposite to refer at this time to a problem with paragraphs 8 and 9 of the particulars of claim. They are vague and failed to disclose a cause of action. It will be recalled that it is pleaded in paragraph 7 that the second defendant (only) bound himself as surety and co-principal debtor for the indebtedness of the first defendant on 22 December 2011. And in para 8 it is pleaded that the second defendant (again) entered into a deed of suretyship on 4 July 2014 and in paragraph 9 it is alleged that the second defendant, in his personal capacity, entered into a the written acknowledgment of debt on the same date.
- [18] The contrary emerged *ex facie* the documents attached as annexure "OSZ2" to the particulars of claim. The acknowledgement of debt pertains to the indebtedness of first defendant and not the indebtedness of the second defendant as alleged in paragraph 9. The said suretyship was not signed by the second defendant in his personal capacity but he was acting as the "debtor" (who is the first defendant). *Prima facie* therefore, the particulars in paragraph 7, 8 and 9 of the particulars of claim with reference to the second defendant are vague and embarrassing.
- [19] I am obliged to consider the amendment in isolation since it is impossible to consider the amendment with regard to the allegations made in the particulars of claim which is, strictly speaking, not worthy of a plea until the ambiguity has been cleared up.

- [20] The plea in my view does not lack particularity with regard to the representation which was made by word or by conduct or both. In *Greary & Son (Pty) Ltd v Grove* 1964 (1) (SA) 434 (A) 441C-D it was stated with regard to fraud *ex delicto*:

"The plaintiff does not base its case upon a misrepresentation negligently made, but upon a wilful falsehood, i.e. an intentional wrongful act on the part of the defendant. What it has to allege and prove, therefore, is that the defendant has, by word or by conduct or both made a false representation, that it knew the representation to be false, that the plaintiff has lost or will lose customers, that the false representation is the cause thereof, and that the defendant intended to cause the plaintiff that loss by the false representation.

- [21] It seems clear therefore that in the present case it would be essential, if the defence is that the plaintiff has made a fraudulent misrepresentation to plead that the plaintiff made a false representation knowing it to be false. It is insufficient merely to allege that it was false.

- [22] In *Breedt v Elsie Mortors (Edms) Bpk* 1963 (3) SA 525 (A) at 529F-H.

"Wat wanvoorstellings betref, was daardie opmerking na my mening *obiter*. Die geleerde Appèlregter wou net wys dat "vals" dubbelsinnig was. Maar in ons regsterminologie, waar die woorde "valse voorstelling" gebruik word, beteken dit *prima facie* slegs 'n voorstelling wat onwaar is....Daarom stem ek met REGTER POTGIETER saam waar hy in die uitspraak van die hof a quo sê:

*Waar 'n regsgeleerde derhalwe in 'n pleit die woorde 'valse voorstelling' gebruik is die betekenis daarvan dat die wanvoorstelling onskuldig is. Indien die pleiter bedrog wens te pleit, moet hy die bewering maak dat die voorsteller bewus was daarvan dat die voorstelling vals was."*

- [23] In *Novick and Another v Comair Holdings Ltd and Others* 1979 (2) SA 116 (W) 123 D-H; 149 D-H the court sets out what should be pleaded by a party seeking to avoid a contract on the ground of a misrepresentation:

"(a) That the representation relied on was made.



(b) That it was a representation as to a fact. A promise, prediction, opinion or estimate or exercise of discretion is not a representation as to the truth or accuracy as to the truth or accuracy of its content; it can, however, often be construed as a representation that the person making it is of a particular state of mind.

(c) That the representation was false, In relation to an ordinary representation of fact, what must be shown is that the fact was not as presented. When a prediction, opinion or estimate is relied upon, what must be shown is not merely that it was, or turned out to be, erroneous, but that it did not represent the *bona fide* view, at the time when it was expressed, of the person who expressed it.

(d) That it was material, in the sense that it was such as would have influenced a reasonable man to enter into the contract in issue.

(e) That it was intended to induce the person to whom it was made to enter into the transaction sought to be avoided. This element is omitted from some of the judicial formulations of the law relating to misrepresentation. But that, I think, is *per incuriam*, and not because of an intention to suggest that it is not a necessary element."

[23] The plea in the proposed amendment accords with the averments necessary for a defence of innocent misrepresentation but certainly not on the basis of a fraudulent misrepresentation which is the case of the defendants. The deponent Meg McTyre stated in paragraph 25 and explicitly in paragraph 36 and 39 of the replying affidavit:

"36. The applicants submit that a proper case has been made out for fraudulent misrepresentation for the reasons contained in this application." and also in paragraph 39:

39. The applicants submit the Respondent should not be afforded the unjust advantage of being able to rely on an Acknowledgment of Debt agreement which, the applicants submit was fraudulently induced for the reasons contained in the Founding Affidavit as well as the reasons contained herein."

[24] It will be recalled that the deponent to the affidavits on behalf of the defendants is a practicing attorney which knows what the difference is between an innocent

misrepresentation and a fraudulent misrepresentation. She had the latter in mind in the proposed plea as the defence that the defendants wished to introduce.

[25] I am of the view that the amendment should be refused on the ground that an allegation that the representation which was made, was known to be false, which is necessary allegation to sustain a plea of a fraudulent misrepresentation has not been pleaded and renders the plea excipiable.

[26] It is unnecessary to deal with the remainder of the objections.

### **ORDER**

(1) The amendment is refused with costs.



A handwritten signature in dark ink, appearing to be 'GC Muller', is written over a horizontal line.

GC MULLER

JUDGE OF THE HIGH COURT LIMPOPO DIVISION:  
POLOKWANE

**APPEARANCES**

1. For the Plaintiff : RJ Groenewald
2. For the Respondent : B Manning
3. Date judgment reserved : 28 May 2021
4. Date Judgment delivered: 25 June 2021