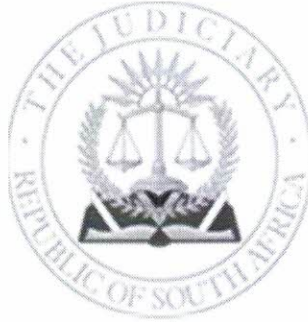
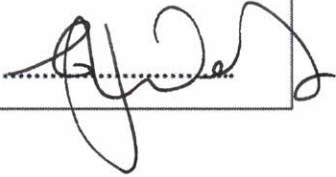


IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA



CASE NO.: 8699/2020

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
<u>18/05/2021</u>	
	

In the matter between:

JOHANNES ZACHARIAS HUMAN MULLER N.O.

First applicant

AVIWE NTANDAZO NDYAMARA N.O.

Second applicant

MANTLA PROFESSOR MADLALA N.O.

Third applicant

(In their capacities as the joint liquidators of
SWIFAMBO RAIL LEASING (PTY) LTD:
Registration No. 2010/007968/07)

AVIWE NTANDAZO NDYAMARA N.O.

Fourth applicant

NICHOLAS TIMKOE N.O.

Fifth applicant

(In their capacities as joint liquidators of SWIFAMBO
RAIL HOLDINGS (PTY) LTD: Registration No.
2011/109702/07)

And

DOMINGOS FRANCISCO ANTONIO GOMES

First respondent

JUDGMENT

van der Westhuizen, J

- [1] This is an application for leave to amend particulars of claim in an action instituted by the applicants, as plaintiffs in their respective capacities as joint liquidators of two companies in liquidation, against the respondents, as defendants in the action. This application for leave to amend is opposed.
- [2] On being served with the combined summons issued by the applicants, the respondents filed a notice of intention to defend the action against them. In response to the summons, the respondents served a notice in terms of the provisions of Rule 23(1) calling upon the plaintiffs to remove a cause of complaint, on the grounds that the particulars of claim are vague and embarrassing and/or lack averments to sustain a cause of action. Having received no response to the Rule 23(1) notice, the respondents filed an exception to the applicants' particulars of claim.
- [3] The applicants thereupon gave notice of an intention to amend their particulars of claim. A notice of objection by the respondents was filed in response to the notice of the intention to amend. The applicants filed a formal application for leave to amend their particulars of claim. The formal application for leave to amend was supported by an affidavit. The respondents filed an opposing affidavit to which the applicants replied.
- [4] For the purposes of this judgment, it is required to restate the requirements when a party intends to amend its pleadings and those when such application is objected to.

[5] Rule 28 of the Uniform Rules of Court stipulates the provisions that apply when a party intends to amend its pleading. These are:

- (a) A party who desires to amend a pleading, excluding a sworn statement, shall give notice of such intention to all parties;
- (b) The said notice shall state that unless written objection to the proposed amendment is delivered within a stipulated time, the amendment would be effected;
- (c) An objection to a proposed amendment shall clearly and concisely state the grounds upon which the objection is founded;
- (d) If an objection that complies with the stipulated requirements is received within the prescribed time period, the party wishing to amend may, within a stipulated time period, lodge an application for leave to amend;
- (e) Should no objection to the proposed amendment be delivered, every party who received the notice of intention to amend shall be deemed to have consented to the amendment and the party wishing to proceed with the amendment shall effect the amendment in the prescribed manner;
- (f) Where a court has granted an order for amendment, the amendment shall be effected in the prescribed manner within a stipulated time period;
- (g) A party affected by the amendment may within a stipulated time period make any consequential adjustments to its

pleading, and may take the steps contemplated in Rules 23 and 30 of the Uniform Rules of Court;

- (h) A party giving notice of an amendment shall, unless a court otherwise direct, be liable for the costs occasioned by the amendment.

- [6] The respondents lament the applicants' approach to this application for leave to amend. First and foremost, the respondents submit that the proposed amendment does not address the grounds of objection, and in the event that the amendment is granted, their objections would remain. The respondents secondly lament, in the form of a point *in limine* taken in their opposing affidavit, that the applicants did not deliver their application for leave to amend within the prescribed time period and hence fell foul of the provisions of Rule 30. However, the respondents did not proceed with the steps to be taken as provided in Rule 30. No notice in terms of Rule 30(2) was delivered, and furthermore, the respondents filed their opposing affidavit in lieu thereof, thus taking a further step as contemplated in Rule 30. Nothing turns on that issue and the point *in limine* stands to be refused. It is to be recorded that the opposing affidavit is deposed to by the respondents' attorney of record, no confirming affidavit from either of the respondents was filed.
- [7] The respondents' exception in terms of Rule 23, as uploaded on *CaseLines*, is illegible. It appears as an attachment to the opposing affidavit. The applicants have summarised the grounds in their founding affidavit in support of their application for leave to amend. The respondents do not appear to dispute that summary.
- [8] The applicants state in their application for leave to amend that the proposed amendment is pursued, not in acknowledgement of the complaints, but in an endeavour to obtain a proper ventilation of the dispute between the parties, so that justice may be done.

- [9] In their exception, the respondents raised 7 grounds. Those are: paragraph 4 of the particulars of claim was vague and embarrassing, lacking sufficient particularity to sustain the allegation; paragraph 5.5 of the particulars of claim was vague and embarrassing, lacking sufficient particularity to support the allegation; a failure to plead a connection between Railpro and Swifambo, and Railpro and Prasa respectively, having pleaded in paragraph 1 (sic) read with paragraphs 3.5 and 3.6 of the particulars of claim that Railpro and Swifambo are separate entities; issue is taken with the misnumbering in the particulars of claim at paragraph 7 thereof; a failure to disclose a cause of action for the purposes of section 26 of the Insolvency Act, 24 of 1936 by failing to disclose who had made the disposition; a failure to disclose a cause of action for the purposes of section 31 of the Insolvency Act by failing to plead the conduct of the respondents amounting to collusive and/or fraudulent conduct; a failure to disclose a cause of action for the purposes of the *Actio Pauliana* by failing to plead which entity's estate was diminished and in what manner. Railpro and Swifambo are the two entities that are in liquidation.
- [10] Having delivered the exception following on the notice to remove the cause of complaint, the respondents failed to enrol the exception, presumably due to the filing of the notice of intention to amend the particulars of claim. The respondents hold the view that that exception remains and would be enrolled for adjudication, once this application for leave to amend the applicants' particulars of claim has been dealt with.
- [11] The exception is directed at the applicants' particulars of claim as un-amended. The objection raised in terms of Rule 28(3) is aimed at the proposed amendment of the particulars of claim. In their opposing affidavit, the respondents raise grounds of objection, which allegedly differ from those stipulated in their notice to remove the cause of complaint in terms of Rule 23. In their opposing affidavit the respondents rely on 5 grounds of opposition.

- [12] A copy of the notice of objection filed in response to the application for amendment was attached to the answering affidavit and was not uploaded separately on *CaseLines*. When documents are not uploaded onto *CaseLines* in an appropriate manner, navigating through a maze of documents bundled together, makes it extremely difficult to adjudicate upon the matter. What further complicates the adjudication of this matter is the fact that the respondents did not upload onto *CaseLines* their notice calling for the removal of the cause for complaint in terms of the provisions of Rule 23(1).
- [13] The respondents' notice of objection in terms of Rule 28(3) does not comply with the requirements of the said Rule. Apart from an oblique reference to the notice filed in terms of Rule 23(1), the specific grounds of objection are not clearly determinable. This is more so where the objector raises different grounds in its opposing affidavit. The primary objection raised in the Rule 28(3) notice is a lamentation of apparent non-compliance on the part of the applicants with regard to prescribed time periods in respect of an application for leave to amend. This complaint would provide a basis for a Rule 30 notice. It does not form a basis for objection as contemplated in Rule 28(3). The Rule 30 approach was glaringly not followed by the respondents.
- [14] As recorded earlier, the complaint raised in the notice of objection relating to the proposed amendment, obliquely records that the proposed amendment would not address the issues raised earlier in the notice in terms of Rule 23(1). The grounds of objection are thus to be determined with reference to a different document (which is not accessible), and clearly does not comply with the requirements of Rule 28(3). If that process is to be followed, then it is not understood why different, and less, grounds were raised in the opposing affidavit, particularly when no indication is given which of the initial 7 grounds have become resolved. The notice of objection in terms of Rule 28(3) does clearly not comply with the requirements of being "clear and concise". An oblique reference to a different document is not "*clear and concise*".

[15] Furthermore, the respondents in their opposing affidavit record emphatically that the *“majority of the proposed amendments are uncontroversial and merely address a number of drafting errors in the particulars of claim.”* The respondents then state that having regard to the exception and the Rule 28(1) notice, *“there are a number of causes of complaint which arise and render the proposed particulars of claim excipiable for the purposes of Uniform Rule 23.”*

[16] What is then pled, are grounds of objection that relate to different paragraphs in the particulars of claim, with oblique reference to the initial particulars of claim in its un-amended form. The focus is diverted to different complaints.

- (a) In ground one, and with reference to paragraphs 5, and 8 of the proposed amendment, the focus is on payment of amounts that apparently do not implicate the respondents;
- (b) Ground two is directed at paragraph 7 of the proposed amendment. The complaint is that the proposed amendment lacks clarity as to what money was *“disbursed”* by the defendants due to further lacking allegations of what moneys they had received. This ground is linked to the first ground;
- (c) In ground three it is alleged that an increase of the amount initially claimed is sought in the proposed amendment. The complaint raised is that no allegations are pleaded to support any *alternative* amount claimed as proposed to be amended. The complaint is directed at an alleged “no connection” between Railpro and the respondents;
- (d) Ground four is directed at a lack of support for alternative claims, either in respect of amounts, or parties;

- (e) The fifth ground relates to proposed paragraphs 9,10 and 11 of the proposed particulars in its amended form that relate to the claims under sections 24 and 31 of the Insolvency Act and it is stated that those paragraphs remain excipiable. The complaint in a non-specific manner being apparently one of lack of particularity.

- [17] From the opposing affidavit, read as a whole, it appears that the only connecting theme between the exception (which is accessible) and the Rule 28(3) objection is that of a lack of particularity. That issue is insufficient to determine what the precise complaint of the respondents is.
- [18] Considering the respondents' objections, one apparently has to read the exception (which is accessible) together with the complaints set out in the opposing affidavit, despite not being clearly stated, or a request, to do so. The respondents in their opposing affidavit fail to deal with the grounds raised in the Rule 23(1) notice to remove the cause of complaint, or the exception. The court is now required to wade through the exception and the opposing affidavit to ascertain the "*clear and concise*" objections supposedly raised by the respondents in their non-specific Rule 28(3) notice. That clearly does not comply with the requirement of "*clearly and concisely*".
- [19] It is clear from a purposive reading of the respondents' exception and their subsequent Rule 28(3) objection, that the respondents pick on specific passages in the particulars of claim as un-amended and the proposed amendment. However, the respondents fail to read those passages in their respective own contexts and fail to read same within the respective contexts of the two documents as a whole.¹

¹ *Nel et al NNO v McArthur et al* 2003(4) SA (T0 at 149BF-G; *Troskie v Von Holdt et al* (2704/2012) [2013] ZAECGHC 31 (11 April 2013) at [20]

- [20] When reading the initial particulars of claim as a whole, and in conjunction with the proposed amendment as a whole, in my opinion, the particularity pled is sufficient to enable the respondents to plead thereto. The applicants are not obliged to plead the *facta probantia*, but only the *facta probanda* in support of the particular cause of action. From the aforementioned lamentations of the respondents, they seek detailed allegations in regard to the pled causes of actions. The respondents are not entitled to that. That much would be revealed by the evidence, such of which the applicants may be able to present to the court.
- [21] Mr Eagon, who appeared on behalf of the respondents, readily conceded that the respondents required “*more flesh to the skeleton*”. The submission was not that the “*skeleton*” was indeed lacking in itself, which may have altered the position in respect of any objection raised. The said concession implied “some flesh” having been pled, i.e. that at least the skeletal averments in respect of the cause of action were pled. The “*more flesh*” required relates to *facta probantia* to support the *facta probanda* pled.
- [22] What is required of a party is to either admit, or to deny, or to confess and avoid the allegations pled.² This, in my view, the respondents can do. From the foregoing there is no merit in the oblique objection raised to the proposed amendment. It follows that the application to amend stands to be granted.
- [23] There remains the issue of costs. The applicants seek an indulgence and in terms of the provisions of Rule 28, the applicant should bear the costs occasioned by the amendment. However, the applicants seek a punitive costs order on the ground that the opposition was frivolous. On the other hand, the respondents also seek a punitive costs order.

² Rule 27(2) of the Uniform Rules of Court.

[24] In my view, both parties have been remiss in following and complying with the stipulated requirements relating to amendment of pleadings and the opposition thereto as recorded earlier. A fair and reasonable order in this matter would be one that each party is to pay its own costs.

I grant the following order:

1. The plaintiffs' particulars of claim are to be amended in terms of the plaintiffs' Notice of Amendment dated 30 June 2020 and annexed hereto marked NOA1-NOA18;
2. The plaintiffs are directed to deliver the amended pages of their particulars of claim within 10 days from the date of this order;
3. The normal Court Rules will apply for the delivery of any subsequent pleading by the defendants;
4. Each party is to pay its own costs.



C J VAN DER WESTHUIZEN
JUDGE OF THE HIGH COURT

On behalf of Applicant: P J Greyling
Instructed by: Schabort Potgieter Attorneys

On behalf of Respondent: G R Eagon
Instructed by: Chris Greyvenstein Attorneys