



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: **NO**
- (2) OF INTEREST TO OTHER JUDGES: **NO**
- (3) REVISED: no
- (4) Date of hearing: 13 May 2021

CASE NO: 34755/2019

In the matter between:

DISSILIO INVESTMENTS (Pty) Limited
(REGISTRATION NUMBER: 2013/184440/07)

Plaintiff

And

NEDBANK LIMITED
(1951/000009/05)

Defendant

JUDGMENT

NYATHI AJ

A. INTRODUCTION

[1] The Plaintiff instituted action against the Defendant on 04 October 2019. Pleadings eventually closed and the parties convened and held a pre-trial conference in May 2020. Trial bundles were prepared, and the matter was set down for trial on the 02 November 2020.

[2] Despite the mutual efforts of both parties to prepare adequately and timeously, the Plaintiff became of the view that it desired a significant amendment. It made this known to the Defendant.

[3] The matter was by agreement between the parties, removed from the trial roll, legal costs being reserved, and the matter was postponed sine die, and is still pending the allocation of a new trial date.

[4] The Plaintiff prepared an extensive amendment and served a notice of amendment on the Defendant. The Defendant opposes the amendment.

[5] In the amendment, Plaintiff seeks an adjustment of certain averments in its particulars of claim; and the introduction of further claims for repayment and/or compensation and/or damages from the Defendant — arising from the contractual relationship between the parties.

[6] The Defendant opposes the proposed amendment on the following grounds:

- 6.1 It alleges that the Plaintiff's claims have prescribed through the effluxion of time.
- 6.2 The amendment contains mala fide allegations.
- 6.3 The amended particulars of claim would be excipiable and therefore cause an embarrassment to the Defendant. And,
- 6.4 Resulting, if the amendment were to be granted, in prejudice to the Defendant.

[7] The Defendant has now set down his substantive application for leave to amend before me.

THE LAW ON AMENDMENTS

[8] Amendments to pleadings are regulated by Rule 28 of the Uniform Rules of Court. In terms of this rule, a party desiring to amend any pleading should notify all other parties of his intention to amend and furnish particulars of the amendment. The court may, subject to circumstances dealt with in the rule, at any stage before judgment grant leave to amend any pleading or document.

[9] The primary object of allowing an amendment is to obtain a proper ventilation of the dispute between the parties, to determine the real issues between them, so that justice may be done.¹

[10] In order to succeed in its application to amend its Particulars of claim, a Plaintiff must prove that its application is not *mala fide* and would not cause the other party such prejudice as cannot be cured by an appropriate order for costs. In *Moolman v Estate Moolman*² it was stated that an amendment would cause an injustice to the other side which could not be compensated by costs if – “*the parties cannot be put back for the purpose of justice in the same position as they were when the pleading it is sought to amend was filed*”.³

[11] An application to amend is an interlocutory application as contemplated in rule 6 (11) and need not be brought on notice of motion supported by affidavit.⁴

[12] A court hearing an application for an amendment has a discretion whether or not to grant it, a discretion which must be exercised judicially.⁵

¹ Blaauwberg Meat Wholesalers CC v Anglo Dutch Meats (Exports) Ltd [2004] 1 All SA 129 (SCA) at 133.

² 1927 CPD 27 at 29.

³ Erasmus - Superior Court Practice D1 – 332 [Service 15, 2020]; Randa v Radopile Projects CC 2012 (6) SA 128 (GSJ).

⁴ Swartz v Van der Walt t/a Sentraten 1998 (1) SA 53 (W) at 56 I-J and 57G-J.

⁵ Robinson v Randfontein Estates Gold Mining Company Ltd 1921 AD 168 at 243; Erasmus (supra) D1-331.

PLAINTIFF'S PARTICULARS OF CLAIM

[13] In the relevant paragraphs 3 and 4 of its particulars of claim, which the Plaintiff seeks to replace entirely, the Plaintiff has pleaded its case as follows:

"3. On or about 15 October 2013 the Plaintiff entered into a written loan agreement with the Defendant in terms of which, inter alia, the Plaintiff agreed to lend money to the Defendant to assist the Defendant in developing a shopping mall known as the Heidelberg Shopping Mall ("the project")."

"4 Annexed hereto marked annexure "A" is a copy of the aforesaid loan agreement ("the loan agreement")."

THE PROPOSED AMENDMENTS

[14] In terms of the proposed amendments Paragraphs 7, 8 10 15, 19 of the particulars of claim are to be renumbered.

[15] The proposed amendments are as follows:

"1. By inserting as a preamble heading, immediately after the description "Particulars of Claim", and prior to the introduction of averment 1 thereof, the words "First Claim".

2. By deleting the existing paragraph 3 thereof in its entirety, and substituting it with the following averments, comprising the new paragraph

3: - *"3.1. On or about the 30th August 2013, alternatively, on or about the 18th September 2013, and at or near Johannesburg, one Jaron Jacob Tobias and one Jacobus Marthinus Johannes Coetzer, acting on behalf of a company to be formed (on the one hand) and the Defendant (duly represented by one Brenda Sithole and one Mbuso Mashinini (on the other hand) partially signed and considered entering into a loan agreement, with one another;*

3.2. On about the 5th November 2013, and at or near Johannesburg, the Plaintiff duly represented by Johannes Marthinus Jacobus Coetzer and Jaron Jacob Tobias, entered into a written loan agreement ("the property loan agreement"), with the Defendant (at the time duly represented by Boitumelo Gladys Letsoalo and Kashrie Sewlal), in terms of which, inter alia, the Defendant agreed to lend money to the Plaintiff to assist the Plaintiff in developing a shopping mall complex known as the Heidelberg Shopping Mall ("the project")."

3. By deleting paragraph 4 thereof in its entirety, and substituting it with the following averments, comprising the new paragraph 4: -

"The property loan agreement comprised two documents, to wit; firstly, the document described as "property loan agreement" (a copy of which is attached to the Defendant's Plea and marked as Annexure D1.1); and secondly, the loan schedule (dated 15 October 2013, replacing the loan schedules of 30 August 2013 and 18 September 2013) — (a copy of which is attached to the Defendant's Plea, and marked

Annexure D1.2). Throughout the pleadings, the combination of Annexures D1.1 and D1.2 read in conjunction with one another, will be referred to as the "property loan agreement". "

4. By renumbering the existing paragraph 7 thereof, as the new paragraph "7.1". 5.
5. By inserting immediately after paragraph 7.1 and prior to the existing paragraph 8, the following averments-

"7.2 Upon a proper interpretation of clause 5.4 of Annexure D.1.2. of the property loan agreement, the Defendant was not entitled to levy an early repayment fee as against the Plaintiff in the event of the Plaintiff effecting repayment of the outstanding balance of the loan amount, once accrued interest, fees, costs and other charges had already been unilaterally debited by the Defendant, in the Plaintiff's loan banking accounts with the Defendant.

7.3 The Plaintiff avers that the words "amount reasonably determined by Nedbank" ("the incorrect provision"), as currently stipulated in clause 5.3 of the Fixed-Rate Addendum, constitute provisions that are contra bonos mores; alternatively, against public policy and not in the public interest, and accordingly, fall to be severed from the remaining portions of clause 5.3 thereof ("the severance"), alternatively, is void.

7.4

7.4.1. Alternatively to paragraph 7.3 hereof, clause 5.3 of the Fixed-Rate Addendum, did not reflect the common continuing intention of the parties correctly. The common continuing intention of the parties, as it existed when the Fixed-Rate Addendum was reduced to writing, was to the effect that the words "amount reasonably determined by the parties jointly" ("the correct provision") ought to have been inserted in the Fixed-Rate Addendum. Alternatively, the incorrect provision was neither discussed, nor agreed to, by the Plaintiff prior to signature;

7.4.2. Accordingly, a mistake occurred in the drafting of clause 5.3 and by the insertion of the incorrect provision— either as a result of a bona fide mutual error; alternatively, as a result of an intentional act on the part of the Defendant; further alternatively, as a result of a mistake common to the parties in drafting the Fixed-Rate Addendum, in such a manner as to include the incorrect provision, or to exclude the correct provision; 7.4.3. In the circumstances, the parties signed the Fixed-Rate Addendum, in the bona fide but reasonably mistaken belief, that it recorded the correct provision and that it contained the true agreement between the parties.

7.4.3. In the circumstances, the parties signed the Fixed-Rate Addendum, in the bona fide but reasonably mistaken belief, that it recorded the correct provision and that it contained the true agreement between the parties.

7.5. Further alternatively to sub-paragraphs 7.2, 7.3 and 7.4 hereof, the Defendant acted mala fide, in not alerting the Plaintiff to the inclusion of the incorrect provision, whether prior to signature or timeously, or at all.

7.6. The Plaintiff accordingly demands rectification of the Fixed-Rate Addendum, to include the correct provision, in order to conform with the common continuing intention of the parties."

6. By renumbering the existing paragraph 8 thereof, as the new paragraph "8.1".

7. By inserting immediately after sub-paragraph 8.1, the following averments:

"8.2. Insofar as the Fixed-Rate Addendum document, made provision in clause 5.1.2. thereof, for a repayment schedule to be attached thereto, such document was never attached to the fixed rate addendum, and accordingly, the Defendant is estopped from alleging that any repayments effected by the Plaintiff in reduction of the outstanding capital loan balance, were conducted other than in accordance with the Defendant's repayment schedule."

7. By renumbering the existing paragraph 10 thereof, as the new paragraph "10.1".

8. By inserting, as a second sentence, in the newly renumbered paragraph 10.1 thereof, the following averments:

"The Plaintiff avers that upon a proper interpretation of the clauses comprising Annexures D1.1 and D1.2 to the property loan agreement, that the Plaintiff was not obliged to effect payment to the Defendant, of an early repayment fee — whether as contended for by the Defendant, or at all."

9. By inserting immediately after paragraph 10.1 thereof, the following averments:

"10.2 The Plaintiff avers that upon a proper interpretation of the clauses comprising the fixed rate addendum, the Plaintiff was not obliged to effect payment to the Defendant, of any breakage costs — whether as contended for by the Defendant, or at all".

10. By inserting immediately after the existing paragraph 11 thereof, and prior to paragraph 12 thereof, the following averments:

"11.1 The parties had agreed, as appears from Annexure D.1.1 of the property loan agreement, that the fixed rate addendum, would be signed simultaneously therewith. In as much as the fixed rate addendum was not signed simultaneously with Annexure D1.1 of the property loan agreement, but only signed in isolation on 10 April 2014, the fixed rate addendum, falls to be treated pro non scripto, and therefore, to be set aside, alternatively is void".

11.2 Alternatively to paragraph 11.1. hereof, and notwithstanding the provisions of clause 4.3 of Annexure D.1.2. of the property loan agreement, the parties failed to agree at a future date, as to the contractual fixed rate, that would be applicable to the fixed rate loan period. Accordingly, the fixed rate addendum falls to be treated pro non scripto, and therefore, to be set aside, alternatively is void."

11. By renumbering the existing paragraph 12 thereof, as the new paragraph "12.1".

12. By inserting after the new paragraph 12.1, following averments: -

"12.2 The Plaintiff was only obliged to effect the payment of breakage costs to the Defendant, arising from any conversion and/or early repayment, if it had failed to give at least 5 (five) business days' notice of its intention to do so, to the Defendant (and as provided for in clause 5.2 of the Fixed - Rate Addendum). The Plaintiff afforded an ample notice period to the Defendant, alternatively afforded a notice period of its intentions, in excess of 5 (five) business days to the Defendant."

13. By renumbering the existing paragraph 15 thereof, as paragraph "15.1"; and inserting the word "*property*" in between the words "*the*" and "*loan*", therein.

14. By inserting immediately after sub-paragraph 15.1, the following averments:

"15.2 Alternatively to paragraph 15.1 hereof, the Plaintiff avers that it was not obliged to effect payment of an early repayment fee; nor payment of breakage costs, to the Defendant — whether as contended for by the Defendant, or at all."

15. By inserting in paragraph 19 thereof, immediately before the words "the Plaintiff paid the breakage costs", the following averments: -

"In the incorrect and reasonable but mistaken belief that breakage costs were payable, the Plaintiff did not object timeously to the Defendant unilaterally appropriating and adding breakage costs, to the outstanding loan balance, and".

16. By inserting in the existing paragraph 22, the words "*and is sine causa and*" immediately before the word "*constitutes*".

17. By introducing, immediately after the existing paragraph 23 thereof, the following averments:

"24 The Plaintiff has complied or substantially complied with all of its contractual obligations arising from the period of a contractual relationship between the parties, more particularly, during the period 31 October 2013 until 22 December 2017."

18. By inserting immediately after paragraph 24, the following averments:

"Second Claim

25.1 At the inception of the contractual relationship between the parties, alternatively, at the time of the signing of the property loan agreement, the parties agreed that the Defendant would levy an overall aggregate service fee of R 2 800 000, to the Plaintiff on the understanding that the duration of the property loan agreement, would comprise a maximum of 75 consecutive months.

25.2 Insofar as the addendum to the property loan agreement (Annexure "C" hereto), altered the effective commencement and termination date of the new loan period, the Plaintiff's repayment of all and any monies outstanding to the Defendant effected on 21 December 2017, occurred one day prior to the agreed and anticipated termination date of the new loan period.

25.3 In these circumstances, the Plaintiff avers that the Defendant was not entitled to payment of the full R2,800,000 service fee.

25.4 Given the duration of the addendum to the property loan agreement, from 31 October 2017 until 31 January 2018; alternatively, until the date of transfer of the Plaintiff's share in and to the project, to Community Property Limited ("the transfer), whichever occurred first; the Plaintiff avers that the new loan period terminated on 22 December 2017, being the date of the transfer.

25.5 The Plaintiff avers that it is entitled to a proportionate reduction of the service fee (as agreed to on 5 November 2013; alternatively, as agreed on the date of the fixed rate addendum on 10 April 2014; further alternatively, as agreed to on the date of the addendum to the property loan agreement on 31 October 2017).

25.6 Accordingly, the originally — envisaged duration of the loan period for 75 consecutive months was terminated after 50 consecutive months, thereby entitling the Plaintiff to a one- third reduction of the service fee.

25.7 In the circumstances, the Defendant has unjustly enriched itself by procuring payment of the full service-fee of R 2 800 000 to itself, in circumstances where it had no right to do so.

25.8 The Defendant's conduct in this regard, is sine causa and constitutes an unjust enrichment to the prejudice of the Plaintiff".

19. By deleting prayer (a) and renumbering the remaining prayers as prayers (a), (b) and (c), respectively.

20. By introducing the following prayers after prayer (c): -

"(d) an order rectifying the property loan agreement, to insert the correct provision and delete the incorrect provision;

(e) alternatively, to prayer (d), an order declaring the property loan agreement and the fixed rate addendum as terminated and/or cancelled;

(f) an order that the Defendant is not entitled to levy a breakage cost, nor to levy an early repayment fee;

(g) an order that the Defendant refund to the Plaintiff the full breakage costs in the amount of R1,107,556.78;

(h) an order that the Defendant refund to the Plaintiff the full early repayment fee of R1,080,470.58.

(i) an order that the Defendant is not entitled to impose a full service fee;

(j) an order that the Defendant refund to the Plaintiff one third (33.3%) of the service fee, being R 933 333.33."

[16] Defendant's first objection to the amendment is that the Plaintiff seeks to introduce a new claim that has already prescribed. I am unable to see where prejudice presents itself in this regard since prescription can be met with a special plea in any event. The amendments are on the whole clarificatory and are part and parcel of the Plaintiff's original right of action.⁶

[17] The second ground of objection is that the Plaintiff's application is *mala fide*. The general approach of our courts has been to allow amendments where this could be done without prejudice to the other party. In *Moolman v Estate Moolman & Another*,⁷ Watermeyer J set out the general approach as follows:

"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 the pleading which is sought to be amended was filed."

[18] The third ground is that the amended particulars would be excipiable. A perusal of the proposed amendment is more to place on record the true issues around the dispute. This is permissible.⁸

⁶ *Evans v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 836D.

⁷ 1927 CPD 27

⁸ *Trans-African Insurance Co Ltd v Maluleka* 1956 (2) SA 273 (A) at 279C.

[19] The Fourth ground of objection is that if an amendment were to be granted, the Defendant would suffer prejudice. The amendment is usually granted if such an amendment would not cause an injustice to the Defendants which cannot be compensated by an order of costs in respect of such an amendment, in other words, unless the parties cannot be put back, for the purposes of justice, in the same position as they were when the pleading which is sought to be amended, was filed;⁹

[20] In the result, the objection is overruled, and the following order is made:

1. The application for amendment is hereby granted.
2. The Plaintiff is hereby granted leave to amend its particulars of claim in accordance with its notice to amend in terms of Rule 28 (1) dated 4th January 2021.
3. The Plaintiff is to effect the amendment within ten days from the date of this order by service of the amended pages.
4. The Defendant is allowed to effect consequential amendments to its plea within fifteen days from the date of service of the amended pages.
5. The Plaintiff is ordered to pay the Defendant's costs of this application.

⁹ First 3D (Pty) Ltd v Coleman and Another (39217/18) [2021] ZAGPPHC 336 1 June 2021.



J.S. NYATHI
Acting Judge of the High Court
Gauteng Local Division,
Johannesburg

Date of Judgment: 19 July 2021

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