

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

25/2/15
CASE NUMBER: 47159/2011

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

25/2/15 [Signature]

DATE

SIGNATURE

In the matter between:

SENTRACHEM LTD

Applicant

and

A L TERREBLANCHE

Respondent

J U D G M E N T

VAN DER BERG AJ

- [1] This is an application to amend the plaintiff's particulars of claim. The applicant (the plaintiff in the main action) filed a notice of intention to amend in terms of rule 28(1) of the Uniform Rules of Court ("*the proposed amendments*"), whereafter the respondent objected in terms of rule 28(3) ("*the respondent's objection*"). The applicant then brought this application to amend in terms of rule 28(4) of the Uniform Rules of Court. The applicant filed an affidavit in support of its application, and the respondent filed an answering affidavit.

PARTICULARS OF CLAIM AND TRIAL ISSUES

- [2] The action was initially instituted by a pension fund (“*the Fund*”) which was duly registered under the provisions of the Pension Funds Act, 1956 (“*the PFA*”). Subsequently, the Fund was substituted as plaintiff by the liquidator of the Fund in terms of rule 15 pursuant to the liquidation of the Fund. In terms of a court order handed down on 22 November 2013, the liquidator in turn was substituted as plaintiff by the present applicant after a cession and assignment concluded between him and the applicant. All this appears from paragraph 1 of the applicant’s particulars of claim (as currently constituted), and which is admitted in the plea.
- [3] The plaintiff’s claim (as appears from the current particulars of claim) can be summarised as follows:
- [3.1] The respondent was a member of the Fund.
- [3.2] A surplus apportionment scheme had been approved by the Registrar of Pension Funds on 13 July 2010.
- [3.3] The respondent is a former member of the Fund, and in terms of the surplus apportionment scheme the respondent was entitled to payment of an amount of R94 614.99 which was paid to him.
- [3.4] However, on or about 6 October 2010, a further amount

of R453 872.31 was also paid to the respondent by Fund.

[3.5] It is alleged that the payment of R453 872.31 was paid in the *bona fide* and reasonable, but mistaken belief that the said amount was due to the respondent.

[3.6] The Fund's claim against the respondent based on unjust enrichment has been ceded to the applicant by the liquidator.

[4] The respondent admits receipt of the amount of R453 872.31.

[5] The following is thus common cause on the pleadings:

[5.1] The Fund paid an amount of R453 872.31 to the respondent; and

[5.2] The Fund has ceded its claim against the respondent for payment of the amount of R453 872.31 to the applicant.

[6] The applicant must of course still prove that the Fund had a valid claim against the respondent based on unjustified enrichment which could be ceded to the applicant.

[7] There had also been other amendments to the particulars of claim which had been duly effected.

APPLICANT'S PROPOSED AMENDMENTS

- [8] The applicant seeks in a number of paragraphs to add before the word "*scheme*" the words "*surplus apportionment*". No objection is taken to this, and these amendments must be allowed.
- [9] In paragraph 1 of the rule 28(1) notice, two other amendments are proposed to paragraph 7 of the particulars of claim. Firstly, the reference to "*the plaintiff*" as being a former member was clearly an error, and should have read "*the defendant*". The other amendment is simply to state that the surplus apportionment scheme also provided for the apportionment of actuarial surplus. This is consistent with the provisions of section 15B(9) of the PFA (in terms of which the surplus apportionment scheme was approved) and is not even a necessary allegation. These amendments must be allowed.
- [10] The amendments in paragraphs 2.3 and 3.2 of the rule 28(1) notice simply repeat that the amount R453 872.31 was paid to the respondent "*by the Fund*", an allegation that already appears in paragraph 10 of particulars of claim and which has been admitted by the respondent in his plea. This is therefore not a new averment.
- [11] In terms of paragraph 2.3 of the rule 28(1) notice, the applicant wants to amend particulars of claim to indicate that the amount of R94 614.99 was paid "*by the Fund*". This payment does not form part of the applicant's cause of action and is therefore not a necessary averment. It is also not in dispute. There can be no

prejudice in allowing this amendment.

[12] The amendment sought in paragraph 3.1 replacing the words “*a further*” with “*another*” before “*the amount of R453 872,31*” is cosmetic and should be allowed.

[13] The applicant also seeks to add a new paragraph to read as follows:
“The amount of R453 872.31 was not due to the defendant in terms of surplus apportionment scheme or in terms of any other obligation by the Fund to the defendant.”

[13.1] This is hardly a novel allegation, as it is implied in the current paragraph 10 which reads:
“The sum of R453 972.31 was paid to the defendant by the Fund in the bona fide and reasonable, but mistaken belief that the said amount was due to the defendant.”

[13.2] The respondent objected on the basis that the addition of the words “*in terms of any other obligation*” constituted a new and extended cause of action. This is clearly without merit. There can be no prejudice in allowing the introduction of this new paragraph into particulars of claim.

[14] In paragraph 11 of the current particulars of claim it is alleged that the defendant has been unjustly enriched at the expense of “*the*

plaintiff who has been impoverished...”(own emphasis). This is incorrect, and possibly due to the fact that the applicant omitted to amend this paragraph when it was substituted as plaintiff pursuant to the cession and assignment agreement. This is a mere formality, and there can be no objection to allow the word “*plaintiff*” to be substituted with the words “*Fund (duly substituted with the plaintiff as cessionary as set out above)*”. This is especially so as the cession and the *locus standi* of the current plaintiff (i.e. the applicant) have been admitted by the respondent in its plea.

DEFENDANT’S NOTICE OF AMENDMENT

[15] On 31 March 2014 (whilst the trial set down for 28 March 2014 but which never commenced stood down) the respondent served a notice of intention to amend his plea. It was met with an objection and the respondent did not proceed with this notice of amendment, but seemingly still relied on it in his notice of objection. It included the following:

[15.1] A “first special plea” that the plaintiff’s claim had become prescribed. This is based on the fact that the plaintiff was only substituted by court order on 22 November 2013, but the payment to the defendant had taken place on 6 October 2010.

[15.2] A “second special plea”, which avers that the plaintiff’s particulars of claim refer to the Fund making payment to

the defendant in numerous paragraphs, whilst there is no reference to any payment being made by the plaintiff to the defendant.

RESPONDENT'S OPPOSITION TO AMENDMENT

- [16] The respondent raised a number of objections in its rule 28(3) notice, and in his answering affidavit raised further issues together with two points *in limine*. I shall deal with the submissions presented on behalf of the respondent by *Mr Pienaar*. He also made certain concessions.

Points in limine: challenge to founding affidavit

- [17] The respondent raises two points *in limine* directed at the applicant's founding affidavit.
- [18] Firstly, he challenges the authority of the deponent to the founding affidavit, Ms Spies, to depose to the affidavit. Ms Spies is the applicant's attorney of record.
- [19] It is surprising that litigants still take this point more than 20 years after Flemming DJP in *Eskom v Soweto City Council* held that a party's attorney could legitimately use any witness who in his opinion advances the application, even if the witness has no authority to bring, withdraw or otherwise deal with the application

itself.¹ Flemming DJP found “*the regularity of arguments about the authority of a deponent unnecessary and wasteful*”. The Supreme Court of Appeal followed *Eskom* on two occasions.²

[20] *Mr Pienaar* attempted to distinguish *Eskom* as follows: Ms Spies made a bald allegation that she had authority to depose to the affidavit. The respondent specifically denied in his answering affidavit that she had such authority, and according to *Plascon-Evans* the respondent’s point has not been rebutted.

[21] The situation still falls within the ambit of *Eskom* where Flemming DJP said:

“A witness, also when a deponent, may testify even if he has no authority to bring, withdraw or otherwise deal with the application itself.”

[22] Streicher JA said the following in the Supreme Court of Appeal:³

“In my view, it is irrelevant whether Hanke had been authorised to depose to the founding affidavit. The deponent to an affidavit in motion proceedings need not be authorised by the party concerned to depose to the affidavit. It is the

¹ *Eskom v Soweto City Council* 1992 (2) SA 703 (W) at 706 A

² *Ganes and Another v Telecom Namibia Ltd* 2004 (3) SA 615 (SCA) at paragraphs [18] – [19], p 624B- 625A; *Unlawful Occupiers, School Site v City of Johannesburg* 2005 (4) SA 199 (SCA) at paragraphs [13] – [16]

³ *Ganes and Another v Telecom Namibia Ltd* (*supra*) at 624G-H

institution of the proceedings and the prosecution thereof which must be authorised.”

[23] The second point *in limine* is that the deponent does not have personal knowledge of the facts of the matter. The deponent is the applicant's attorney of record. Her affidavit deals mostly with the history of the litigation and the pleadings. I have not been referred to a single fact (as opposed to inferences or submissions or arguments or opinions) in the applicant's founding affidavit which is contested by the respondent. The respondent's remedy, if the founding affidavit did contain inadmissible hearsay, was to have brought an application to strike out inadmissible portions in terms of rule 6(15) of the Uniform Rules of Court and/or in terms of the common law. It failed to do so. This point is equally without any merit.

[24] Both the points *in limine* are dismissed.

Defence of prescription

[25] In the respondent's heads, the following was pointed out: the court order allowing the applicant to be substituted as plaintiff was only handed down on 22 November 2013, the actual substitution was effected on 4 December 2013, and the payment by the Fund to the defendant had taken place on 6 October 2010.

- [26] It is then submitted that from the date of payment to date of substitution more than three years had lapsed, and the submission is then made that the applicant's claim against the respondent had become prescribed in terms of the provisions of section 10(1) and 11(d) of the Prescription Act, and that therefore the amendment should not be allowed.
- [27] It cannot be accepted as a valid objection to the proposed amendments.
- [28] In the first place, the substitution of the applicant was effected months before the rule 28(1) notice forming the current application was served.⁴ If the respondent's arguments are sound, any objection based on prescription should have been raised at the time when the court considered the substitution of the applicant as the plaintiff. Alternatively, the respondent should have filed a consequential plea after the substitution order. Further alternatively, the respondent should (and possibly still can) have amended his plea to introduce a special plea of prescription.
- [29] *Mr Pienaar* accepted that the proposed amendments do not introduce a new cause of action. He argued, however, that once the applicant has brought an application for amendment, it is open for the respondent to challenge the proposed new particulars of claim on

⁴ It was served and filed on 14 April 2014.

any ground, even grounds that existed before the proposed amendments were filed. He did not cite any authority for the proposition, and I am not aware of any. The proposition is not in accordance with the provisions of rule 28(3) which refers to an “objection to a proposed amendment.”

[30] The respondent in its rule 28(3) notice raised the objection that the proposed amendments would meet or counter (“*ondervang*”) his special plea of prescription. This was presumably a reference to the respondent’s earlier notice of amendment which was not followed through. *Mr Pienaar* did not continue with the objection coached in that form.

[31] Secondly, as *Mr de Villiers* (who appeared for the applicant) pointed out, prescription was raised in a defective manner. The onus on a plea for prescription rests on the defendant. A defendant relying on prescription has to allege and prove the date on which the plaintiff had actual or constructive knowledge of the debt.⁵

[32] The respondents did not in his answering affidavit or in his objection allege a date when the applicant had actual or constructive knowledge of the debt. It follows that the issue of prescription was not properly raised in these proceedings, and cannot form the basis

⁵ *Gericke v Sack* 1978(1) SA 821 (A) at 828 A-D; *Macleod v Kweyiya* 2013(6) SA 1 (SCA), paragraph [10] at 6F-G

of a valid objection⁶. (*Mr Pienaar* based his argument solely on the assumption that prescription commenced on the date of payment of the amount of R453 872.31.)

“Unjustified enrichment not at expense of the applicant (the plaintiff)”

[33] The following argument is raised in the respondent’s heads of argument:

[33.1] *“6.1 It is trite law that the unjustified enrichment should be at the expense of the Applicant, the Plaintiff, whilst the alleged unjustified enrichment on which the Applicant’s action is founded, is at the expense of the said Pension Fund, a third party.”*

[33.2] *“6.2 It is trite law that in order to found a claim for having being unjustly enriched, payment of the amount involved should have been effected by Applicant...”*

[33.3] The submission is then made that no *nexus* exists between the applicant and the respondent, and that the applicant lacks the required *locus standi*.

[33.4] The argument concludes that the further amendment of particulars of claim is “fatally defective”, and would

⁶ In *Union Finance Holdings (Pty) Ltd v Bonguli* 2013 (2) SA 42013 (2) SA 449 (GSJ) at paragraph [6] Van Oosten J held that prescription can be raised in an application to amend, but it is clear from the judgment that it must be “properly” raised. See cases in the previous footnote.

cause the applicant's claim to be excipiable.

[34] In my view these submissions cannot be accepted.

[35] The argument does not take the cession of the Fund's claim into account. The applicant's case is that the Fund was impoverished, had a valid enrichment claim against the respondent, and ceded this claim to the applicant. No authority was advanced that an enrichment claim cannot be ceded, and no reason presents itself why it would not be possible.

[36] If the argument is sound (and in my view it is not), it does not arise from the proposed amendment, but from the previous substitution allowed by the court. This "defence" was raised as a special plea in the respondent's notice to amend which was not followed through.

Other objections contained in the rule 28(3) notice

[37] *Mr Pienaar* conceded that other objections contained in the rule 28(3) objection were not sound. This concession was correctly made, as these objections were frivolous in the extreme. I return to this aspect later in the judgment.

PREJUDICE

[38] *Mr de Villiers* pointed out that the principle is that an amendment ought to be allowed, where this can be done without prejudice to the other party. A court has a wide discretion to achieve justice between

the parties.⁷

- [39] The respondent avers in his answering affidavit that the amendments increased the number of consultations with his attorneys, thereby increasing his legal expenses. No authority has been offered that this constitutes prejudice which justifies the refusal of an amendment. The proposed amendments do not introduce new facts or allegations, and no further consultations will be required. In any event, the applicant tendered the wasted costs of the amendment in its rule 28(1) notice (save in the event of the proposed amendments being opposed) and in terms of rule 28(9) the applicant would have been liable for the costs had there been on opposition.

COSTS AND CONCLUSION

- [40] It is clear that the amendments must be allowed. That leaves the issue of costs.

- [41] It was submitted on behalf of the respondent that the applicant sought an indulgence and should pay the costs of the application. It was also submitted that a founding affidavit in an application to amend is only required in special circumstances, and was not

⁷ See *inter alia* *Embling and Another v Two Oceans Aquarian CC* 2000 (3) SA 691 (C) at 694 I to 695 G; *Luxavia (Pty) Ltd v Gray Security Services (Pty) Ltd* 2001 (4) SA 211 (W) at paragraphs [10] to [12]; *Randa v Radopile Projects CC* 2012 (6) SA 128 (GSJ) at paragraphs [7] and [12] – [15]

necessary in this case.⁸ (This submission makes the *in limine* challenges to the founding affidavit somewhat puzzling.) It was argued that the filing of the founding affidavit caused the respondent to file an answering affidavit, and he should therefore not be mulcted in costs. It was further submitted that the founding affidavit was unduly prolix.

- [42] In my view circumstances justified the filing of a founding affidavit. In his rule 28(3) objection, the respondent complained that the proposed amendment would meet or counter (“*ondervang*”) his two special pleas. The defendant’s plea contains no special pleas. The court dealing with the application to amend would not have understood the rule 28(3) objection without being informed of the history of the matter, and in particular the defendant’s previous aborted attempt at amendment. It was likewise necessary to inform the court how and when the substitution of the plaintiffs came about.
- [43] The founding affidavit is not unduly prolix. It runs to 16 A4 pages, printed in double spacing. It sets out the important facts with little or no elaboration.
- [44] Although the applicant seeks an indulgence, the respondent had no real grounds for objecting, and accordingly he must bear the costs of

⁸ Respondent *inter alia* relied on: *Sentrachem Ltd v Prinsloo* 1997(1) SA (A); *Swartz v Van Der Walt T/A Sentraten* 1998 (1) SA 53 (W)

the application.⁹

[45] *Mr de Villiers* submitted that the respondent should pay such costs on a punitive scale as his opposition was vexatious and frivolous. I agree.

[46] In developing his argument that a founding affidavit was unnecessary, *Mr Pienaar* submitted (correctly) that only two amendments were strictly necessary: firstly, by substituting “defendant” with “plaintiff” in one paragraph (a typographical error), and secondly, by substituting “plaintiff” with the words “Fund (duly substituted with the plaintiff as cessionary as set out above)” (an error caused by the substitution of plaintiffs). The other proposed amendments were superfluous. This begs the question: why was objection taken to the proposed amendments, and why did the respondent persist in opposing the application?

[47] The objections were unreasonable, frivolous, unmeritorious and even downright embarrassing. By way of illustration: The applicant posed the question in its founding affidavit whether one of the objections was really based on the fact that “plaintiff” differs from “Plaintiff”, and submitted that, if so, this in itself would justify a penalising cost order. The respondent chose not to explain itself.

⁹ *Gcanga v AA Mutual Inc Association Ltd* 1979(3) SA 320 (E) at 330

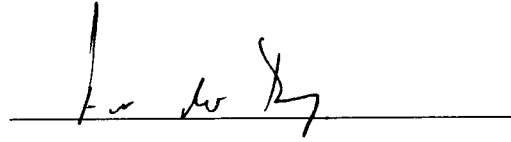
[48] Rule 28 creates a mechanism to amend pleadings in a cost effective manner without the intervention of the court. The rule is certainly not designed to allow a party to obstruct the granting of formal and innocuous amendments.

[49] In the circumstances, a special cost order is justified.¹⁰

[50] I accordingly make the following order:

1. The applicant is granted leave to amend its particulars of claim in accordance with his notice of amendment in terms of rule 28(1) dated 14 April 2014.
2. The applicant is to effect the amendment within ten days from the date of this order by the service of amended pages.
3. The respondent is allowed to effect consequential amendments to its plea within fifteen days from the date of service of the amended pages.
4. The respondent is ordered to pay the costs of the application on the attorney and client scale.

¹⁰ *SA Droëvrugtekoöperaasie Bpk v SA Raisins (Edms) Bpk* [1999] 3 All SA 245 (NC) at 255i and 255a-b

A handwritten signature in black ink, appearing to read 'L. van der Berg', is written over a horizontal line.

VAN DER BERG AJ

Acting Judge of the High Court

A P P E A R A N C E S

For the Applicant : Adv. D.P de Villiers

Instructed by : Fasken Martineau Attorneys

For the Respondent : Adv. W.F Pienaar

Instructed by : Cremer & Strydom attorneys

Date of hearing : 23 February 2015

Date of judgment : 25 February 2015