IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case No.: 3807/2013

In the matter between:

CG CASKET & COFFIN MANUFACTURES CC	Applicant/Plaintiff

and

JNJ COFFINS CC	First Respondent/ Defendant
JACQUES VAN RENSBURG	Second Respondent/ Defendant
NADINE VAN RENSBURG	Third Respondent/ Defendant

HEARD ON:	14 AUGUST 2014
JUDGMENT BY:	MBHELE, AJ
DELIVERED ON:	16 OCTOBER 2014

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[1] This is an application in terms of Rule 28 (4) OF Uniform Rules (the Rules) for an amendment of the plaintiff's particulars of claim dated 13 September 2013.

[2] The Applicant seeks to amend its particulars of claim in the following manner:

2.1 By deleting paragraph 5 in its entirety and substituting it with the following paragraphs; 5A, 5B, 5C and 5D.

- 5A

  During or about 2008 the first defendant applied to the plaintiff for a credit facility. The application was in writing, but the document was subsequently lost, alternately destroyed and in consequence the plaintiff does not have a copy thereof;

- 5B

  The plaintiff accepted the first defendant's application and duly supplied and delivered its goods to the first defendant from time to time on 30 days credit terms and the first defendant frequently honoured payment.

- 5C

  The arrangement prevailing between the parties at the time was on the same terms and conditions of the plaintiff's usual credit terms contained in a document called "CG CASKET & COFFIN MNFRS; CC- CREDIT APPLICATION FOR A BUSINESS ACCOUNT" which the Defendants then signed on or about 31 October 2011 and at Heilbronn, Free Sate (the "credit agreement").

- 5D

  The credit agreement is annexed hereto marked "A", and;

5D (1) the parties acceded to the terms thereof by quasi mutual assent.

5D (2) the parties have adopted the terms thereof even though it was not formally signed by the plaintiff nor have the plaintiff provided the first defendant with a confirmation of credit letter, despite its acceptance and approval of the credit facility in terms thereof; and

5D (3) the parties *de facto* acted in terms thereof, save only for the confirmation of credit letter "mentioned above".

2.2 By deleting the words "…and amplified by separate Deed of suretyship annexed hereto marked "C"… from paragraph 14.

[3] Consequently, by removing the said annexure "C" from the particulars of claim.

BACKGROUND

[4] The Applicant issued summons out of this court on 23 September 2013. The Respondents took exception against the Applicant's particulars of claim. The court upheld the exception in a judgment by Motloung AJ dated 24 April 2014.The Applicant was given 14 days to amend its particulars of claim.

On 12 May 2014 the Applicant delivered Rule28 (1) Notice to amend its particulars of claim.

The Respondents are objecting to the Applicant’s proposed amendment on the basis that the proposed amendment to the particulars of claim will offend the provisions of uniform Rule 18 (6) and furthermore that it is excipiable on the grounds that it is vague and embarrassing.

[5] Mr De Wet, on behalf of the Respondents pointed out that an amendment ought not to be allowed where its introduction into the pleading would render such pleading excipiable.

ISSUES IN DISPUTE

[6] Mr Hattingh, on behalf of the applicant, argued that it is not stated in the particulars of claim that the applicant relies on the contract signed in 2008. The 2008 contract was only mentioned to show the genesis of a contractual relationship between the applicant and the respondents. He argued further that the applicant relies on a contract signed in 2011 to prove its claim. It is his submission that the agreement was accepted by mutual conduct on the part of the applicant.

[7] It is further contended on behalf of the applicant that the terms of the agreement signed in October 2011 are the same as those of the 2008 contract. The parties continued to transact with each other on the same terms as those of the 2008 agreement after the Respondents signed an agreement in 2011.

[8] Mr De Wet on behalf of the respondents submits that the proposed amendment does not state with clarity why the new credit agreement was signed in 2011. He further submits that if the 2011 agreement was concluded on the same terms and conditions as the 2008 agreement, it should contain clause11.1 which requires of the applicant to furnish the respondents with confirmation of acceptance letter. It is further contended on behalf of the respondents that the applicant did not comply with its obligations as set out in the application when he failed to send respondents letter of acceptance.

[9] Mr De Wet further contends that the doctrine of quasi mutual assent is not applicable in the circumstances as there are other basic principles that the applicant failed to comply with. He failed to perform in terms of clause11.1 of the 2011 Contract.

Pillay and Another v Shaik and others 2009(4) SA 74 SCA

[10] It is not in dispute that the parties had a contractual relationship dating as far back as 2008. It is also not in dispute that the parties transacted with each other after October 2011. What seems to be the main source of objection from the Respondents is the fact that the 2008 contract is not attached to the Applicant's particulars of claim.

EXCEPTION

[11] Mr De Wet submits on behalf of the respondents that the amendment should be refused as its introduction will render the

pleading excipiable. He submits that the particulars of claim as amended does not comply with Rule 18.6 which requires of a party relying on an agreement to state if the agreement is oral or in writing. It is further contended that the applicant must attach the 2008 contract or give an explanation as to what happened to the said contract to enable the respondents to plead.

[12] Mr Hattingh submits that the applicant has attached a copy of the contract signed in 2011 to prove its claim. The 2008 contract was mentioned for the purposes of proving acceptance of conduct as quasi mutual assent of 2011 contract.

[13] He further argued that if one looks at the external manifestation of the conduct of the parties, the conclusion to draw is that the parties were *ad idem*. The applicant continued to deliver the stock as in terms of the 2011 contract and the respondents honoured their payments regularly until at the time they defaulted. He further argued that culpa and fault is not an element for quasi mutual assent.

[14] The applicant's failure to send the respondent letter did not preclude parties from performing in terms of the contract.

[15] It is general rule that an exception on the basis that a pleading is vague and embarrassing will not be allowed unless the excipient will be seriously prejudiced if the offending allegation will not be expunged. The onus is on the excipient to the show both vagueness amounting to embarrassment and embarrassment amounting to prejudice.

[16] Defendants do not complain that the proposed amendment will render the particulars of claim excipiable on the basis that it fails to plead the terms of the agreement with sufficient clarity and particularity. They contend that the plaintiff's failure to annex the contract signed between the parties in 2008 renders the pleadings excipiable.

[17] I am of the view that the objection by the defendants to the proposed amendment is misplaced. The Applicant attached the agreement entered into in 2011, which had the same terms and conditions as the agreement signed in 2008. I am not of the view that the Applicant should be barred from enforcing its claim on the basis that it is not able to produce the written contract. The Applicant gave an explanation that the whereabouts of the 2008 contract are unknown.

[18] In **Absa Bank Ltd v Zalvest Twenty (Pty) LTD and Another** 2014 (2) SA119 (WCC) it was held:

> **"The rules of court exist in order to ensure fair play and good order in conduct of litigation. The rules do not lay down the substantive legal requirement for cause of action, nor in general are they concerned with the substantive law of evidence. The substantive law is to be found elsewhere, mainly in legislation and the common law. There is no rule of substantive law to the effect that a party to a written contract is precluded from enforcing its claim merely because the contract has been destroyed or lost. Even when the contract is required by law to be in writing (a contract for the sale of land or suretyship) what the substantive law requires is that a written contract in accordance**

with the prescribed formalities should have been executed; the law does not say that the contract ceases to be effective if it is destroyed or lost."

[19] I align myself with the above statement. In this case the amended particulars of claim will show that a contractual relationship between the Applicant and Respondents existed since 2008 and in 2011 the parties entered into a contract with the same terms and conditions as the initial contract. The particulars of claim as amended will not prevent the Respondents from putting their version. They may deny the existence of a contract or raise any defence available in law. The objection raised by the Respondents will be better ventilated at trial. In the result I am of the view that the application for amendment must be allowed.

[20] I therefore make the following order:

1. Applicant is granted leave to amend its particulars of claim as set out in its Notice of Amendment dated 06 June 2014.
2. Respondents to pay applicant's costs, Respondents to be jointly and severally liable for such costs.

N.M. MBHELE, AJ

On behalf of plaintiff:	Adv C. Hattingh
Instructed by:	Wessel & Hattingh Inc PIETERMARITZBURG c/o Phatshoane Henney Attorneys BLOEMFONTEIN

On behalf of defendants:	Adv P.J.T. de Wet
Instructed by:	Symington & De Kok BLOEMFONTEIN