

IN THE KWAZULU-NATAL HIGH COURT, DURBAN
REPUBLIC OF SOUTH AFRICA

CASE NO. 15322/2010

In the matter between:

JILL CECILIA THOMAS

PLAINTIFF

and

IAN TREVOR LLEWELLYN THOMAS

DEFENDANT

J U D G M E N T

STEYN J

[1] This is an application for an amendment of an intendit in terms of Rule 28 of the Uniform Rules of Court. On 24 October 2012 the application for leave to amend the intendit was argued. The applicant who is the plaintiff in the proceedings before Court applied that the following be inserted:

“1. By including the following new paragraphs after paragraph 18 of the Intendit

“19

19.1 On or about 23 October 2002 and at Durban the parties, both acting personally, entered into a written agreement of settlement of which a copy is annexed hereto as “B”;

19.2 *The express, alternatively implied, alternatively tacit material terms of the agreement were inter alia:*

19.2.1 *Each party was entitled to one half of the combined value of the respective estates of the parties;*

19.2.2 *Both parties warranted that they had made a full disclosure of their assets and liabilities;*

19.2.3 *In the event that the Plaintiff was able to prove that the Defendant owned any assets as at the date of the agreement not disclosed by him in*

- annexure "A" to the agreement the Plaintiff shall be entitled to an amount equal to 75% of such assets as at the date of divorce;*
- 19.2.4 *In the event that the Plaintiff made investigations and located assets in the estate of the Defendant not disclosed by him to which the Plaintiff would be entitled in terms of clause 13.2 of the agreement the Defendant would be liable for the costs incurred by the Plaintiff in such investigations;*
- 20 *The Plaintiff has caused investigations to be made both in South Africa and abroad by the following persons:*
- 20.1 *Mr Marinus van Jaarsveld of Marinus van Jaarsveld Attorneys during the period subsequent to the court order to date; and*
- 20.2 *Bond Associates Limited, Investigative accountants of Belgrave Court, Westferry Circus, London, United Kingdom.*
- 21 *As a consequence of the investigations made by the persons referred to in paragraph 20 above the Plaintiff: -*
- 21.1 *discovered certain assets in the estate of the Defendant, as set out in paragraph 12 above, which he failed to discover at the date of the agreement;*
- 21.2 *incurred costs.*
- 22 *The incurring of investigative costs was contemplated by the parties when they entered into the agreement, annexure "B".*
- 23 *In the premises the Defendant is liable to the Plaintiff in the amount of R575 300,87, being the investigative costs incurred."*
2. *By inserting new prayers 8 and 9 which read as follows:*
- ‘8. *Payment of the sum of R575 300.87*
9. *Interest on the sum of R575 300.87 a tempore morae.’*
3. *By renumbering the existing prayers 8 and 9 to read 10 and 11."*

[2] The defendant opposed the application on the basis that the proposed contractual term that the applicant seeks to introduce by the amendment would render the intendit excipiable since it offends the "no variation" clause in the written agreement, it also offends the Conventional Penalties Act No. 15 of 1962 (hereinafter referred to as "the Act").

[3] In my view the crisp issue to decide is whether the proposed amendment would cause the intendit to be excipiable in that it introduces an implied or tacit material term to the contract and whether such amendment would offend the provisions of the Conventional Penalties Act.

[4] It is necessary to state that the plaintiff and the defendant were previously married to each other and that the marriage was dissolved by a final order of divorce granted by this Court on 23 October 2002. Prior to the final order being

granted the parties entered into a written settlement agreement, which regulated *inter alia* the proprietary consequences after the divorce.

Legal Regime

[5] The principles that apply to an application for amendment are trite and need not be repeated. Rule 28 of the Uniform Rules of Court must also find application. The Rule reads, in part, as follows:

“28(1).....

- (2) The notice referred to in subrule (1) shall state that unless written objection to the proposed amendment is delivered within 10 days of delivery of the notice, the amendment will be effected.
- (3) An objection to a proposed amendment shall clearly and concisely state the grounds upon which the objection is founded.
- (4) If an objection which complies with subrule (3) is delivered within the period referred to in subrule (2), the party wishing to amend may, within 10 days, lodge an application for leave to amend.
- (5) If no objection is delivered as contemplated in subrule (4), every party who received notice of the proposed amendment shall be deemed to have consented to the amendment and the party who gave notice to the proposed amendment may, within 10 days of the expiration of the period mentioned in subrule (2), effect the amendment as contemplated in subrule (7).”

The discretion that should be exercised by a court, seized with the application, should be exercised judicially. In *Moolman v Estate Moolman and Another* 1927 CPD 27 the Court held:

“The question of amendment of pleadings has been considered in a number of English cases. See for example: *Tildesley v Harper* (10 Ch.D. 393); *Steward v North Met. Tramways Co.* (16 Q.B.D. 556) and 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 purposes of justice in the same position as they were when the pleading which it is sought to amend was filed.”¹ (My emphasis.)

¹ *Ibid* at 29.

[6] In *Trans-Drakensberg Bank Ltd (under Judicial Management) v Combined Engineering (Pty) Ltd and Another*,² the Court comprehensively reviewed the jurisprudence applicable to amending pleadings and held:

“The amendment will be refused only if to allow it would cause prejudice to the other party not remediable by an order for costs and, where appropriate, a postponement. It is only in this relation, it seems to me, that the applicant for the amendment is required to show it is *bona fide* and to explain any delay there may have been in making the application, for he must show that his opponent will not suffer prejudice in the sense I have indicated. He does not come as a suppliant, cap in hand, seeking mercy for his mistake or neglect. Having already made his case in his pleading, if he wishes to change or add to this, he must explain the reason and show *prima facie* that he has something deserving of consideration, a triable issue; he cannot be allowed to harass his place on the record an issue for which he has no supporting evidence, where evidence is required, or, save perhaps in exceptional circumstances, introduce an amendment which would make the pleading excipiable (*Cross v Ferreira, supra* at p. 450) or deliberately refrain until a late stage from bringing forward his amendment with the purpose of catching his opponent unawares (*Florence Soap and Chemical Works (Pty) Ltd v Ozen Wholesalers (Pty) Ltd* 1954 (3) SA 945 (T), or of obtaining a tactical advantage or of avoiding a special order as to costs (*Middleton v Carr* 1949 (2) SA 374 (AD) at p. 386).”³

[7] In exercising a discretion it should be borne in mind that an amendment which would render a pleading excipiable should not be allowed. In *Du Plessis and Another v De Klerk and Others*⁴ Van Dijkhorst explained the position as follows:

“Whether a pleading would or would not become excipiable is a matter of law which should be decided by the Court hearing the application for the amendment.”⁵

² 1967 (3) SA 632 (D).

³ *Ibid* at 640H-641C.

⁴ 1995 (2) SA 40 (T).

⁵ *Ibid* at 43I-J.

The Written Agreement

[8] The preamble to the agreement that is pivotal to the application stipulates that the parties have reached agreement with regard to maintenance, property and other proprietary and ancillary consequences of the divorce and wish to record their agreement in writing.⁶ It is evident from the final order of divorce that the parties were at all times mindful of their right to obtain information about the other party's assets, so much so, that they have considered it necessary to incorporate part of the agreement into the final order. Paragraph 6 of the order reads:

"6. That each party hereby irrevocably authorises the other party or his/her agents to obtain information regarding his/her assets including shares, annuities, unit trusts, share options, bank accounts, insurance policies, provident funds, employers agreement, tax refunds up to and including the date of the divorce." (My emphasis.)

Seen in the context of a divorce it is clear from the agreement that the parties intended to finally rule upon their assets and any obligations that might exist between them. The context of the written agreement is fundamentally important and for purposes of this judgment I shall elaborate on it. The context denotes that the parties wanted to settle all disputes originating from their marital relationship as can be seen from the inclusion of the non-variation clause. The non-variation clause reads as follows:

"11 **NO VARIATIONS ETC**

11.1 Subject to paragraph 13:

11.1.1 this agreement contains all the terms and conditions of the agreement between the parties and shall be binding upon them on signature by them both;

11.1.2 no variation of or abandonment or waiver of rights or obligations shall be binding unless contained in this agreement or subsequently reduced to writing and signed by the parties;

⁶ See clauses 2.3 and 2.4.

11.1.3 save as is provided in this agreement, neither party shall have any further claims against the other and hereby waives and abandons all and any such claims.”⁷

Clause 13 is also important and reads:

“13 **WARRANTY**

- 13.1 The parties warrant that they have made a full disclosure of their assets and liabilities.
- 13.2 If Jill is able to prove that Ian owned, as at the date hereof, any assets not disclosed by him in annexure “A” then Jill shall be entitled to an amount equal to 75% of such assets as at the date of divorce.
- 13.3 If Ian is able to prove that Jill owned, as at the date hereof, any assets not disclosed by her in annexure “B” then Ian shall be entitled to an amount equal to 75% of such assets, as at the date of divorce.
- 13.4 Ian hereby irrevocably authorises Jill or her agents to obtain information regarding his assets including shares, annuities, unit trusts, share options, bank accounts, insurance policies, provident funds, employer’s agreement, tax returns up to and including the date of divorce.
- 13.5 Jill hereby irrevocably authorises Ian or his agents to obtain information regarding her assets including shares, annuities, unit trusts, share options, bank accounts, insurance policies, provident funds, employer’s agreement, tax returns up to and including the date of divorce.”

[9] In my view the proposed amendments ought to be considered against the terms of the written agreement and whether the proposed amendment would render the intendit excipiable. It is trite that a refusal will arise where it is clear that the pleadings “would be excipiable” and not “may be excipiable”.

[10] I shall now turn to the application. The applicant seeks leave to amend her intendit to include a claim for “investigative costs” in the amount of R575 300,87 that she incurred in making investigations to locate assets in the name of the estate of the respondent. Ms de Wet SC, acting for the applicant, has argued that the applicant relies on an alleged implied alternatively a tacit material term of the agreement that provides that in the event of the applicant making investigations and locating assets in the respondent’s estate not disclosed by him which she would be entitled to in terms of clause 13.2 of the agreement, then the

⁷ See clause 11.

respondent would be liable for the costs incurred by the applicant in such investigations. Mr Skinner SC, acting for the respondent in this application, defendant in the main action, strongly opposed the proposed amendment in that it would be excipiable and in conflict with the written agreement concluded between the parties in 2002, that a clause in a written agreement cannot be varied or amended by a tacit agreement and that the proposed amendment would offend the Conventional Penalties Act. He argued, that the “investigative costs” fall within the definition of penalty in the Act and that the proposed amendment would contravene the Act since it would entitle the plaintiff (now applicant) to recover both the penalty and also damages, based on the defendant’s (now respondent) breach of the written agreement.

Grounds of Objection

[11] In the light of the objections raised by the respondent it is necessary to determine whether the proposed term to the written agreement would constitute an excipiable pleading. Could it be said that the proposed amendment, i.e. the “investigative costs” should be part of an implied or tacit material term to the written agreement concluded in 2002. The parties specifically elected to include a non-variation clause to the contract. The effect of such a clause was definitively dealt with by Steyn CJ in *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en Andere*⁸ in stating:

“Waar partye so ‘n bepaling in hul kontrak ingelyf het, d.w.s. ‘n bepaling wat nie slegs ander bedinge nie, maar ook homself teen mondelinge wysiging heet te beveilig, kan ek geen rede vind waarom die een party nie die ander daaraan gebonde kan hou nie. Hul klaarblyklike doel met so ‘n bepaling is om te waak teen die geskille en bewysmoeilikhede wat by mondelinge ooreenkomste kan ontstaan. Om albei daarteen te beskerm kom hulle uitdruklik ooreen dat mondelinge wysigende ooreenkomste, ook wat die verskansende beding self betref, al word hul *animo contrahendi* aangegaan, tussen hul van nul en gener waarde sal wees. Indien ‘n party, uit hoofde juis van ‘n mondelinge wysiging, belet sou word om hom op so ‘n beding te beroep, sou ons hier met ‘n soort kontrak te doen hê wat sonder meer nie deur ‘n hof afgedwing word nie. Dit sou

⁸ 1964 (4) SA 760 (A).

‘n opvallende afwyking wees van die elementêre en grondliggende algemene beginsel dat kontrakte wat vryelik en in alle erns deur bevoegde partye aangegaan is, in die openbare belang afgedwing word. (*Wells v S.A. Alumenite Co.*, 1927 AD 69 op bl. 73; *Marlin v Durban Turf Club and Others*, 1942 AD 112 op bl. 131).”

[12] The Shifren principle was found to still be good law in *Brisley v Drotsky*⁹ by the majority of the Supreme Court of Appeal. The submission that the written contract has been varied or amended by implied or tacit terms that include a claim for “investigative costs” conflicts with clause 11 of the written agreement. The purported expansion of the written agreement would in my view render the pleading excipiable. This Court is mindful that it is not tasked to deal with an exception but has to consider on the facts and circumstances before it whether the proposed amendment would render the pleadings excipiable.¹⁰

[13] This brings me to the objection that the proposed amendment would constitute a penalty or damages as per section 2 of the Act. Ms de Wet has argued that the purported amendment would not constitute a penalty or damages, since the amendment entitles the applicant to recover costs incurred in order to investigate the veracity of the respondent’s disclosures and expenses, which are not damages.

In my view clause 13 should be analysed and considered coupled with paragraph 6 of the final divorce order. Paragraph 6 of the final divorce order authorises the parties to verify and obtain information regarding the other party’s assets. Clause 13 of the written agreement then stipulates that in the case where there had not been full disclosure the party that had failed to fully disclose would be penalised, since the “innocent party” would be entitled to 75% of the discovered assets.¹¹

⁹ 2002 (4) SA 1 (SCA)

¹⁰ See *Crawford-Brunt v Kavnat and Another* 1967 (4) SA 308 (C) at 310G-H.

¹¹ See clause 13.2 and 13.3 *supra* at para 8.

I fail to see how the applicant derives at the conclusion that clauses 13.2 and 13.3 do not constitute a penalty clause. A penalty is defined in the *Shorter Oxford English Dictionary*¹² as:

“A punishment imposed for breach of a law, rule or contract. A loss or disadvantage of some kind, either prescribed by law for some offence, or agreed on in case of breach of contract.” (My emphasis.)

The provision that relates to the respondent being liable to pay an amount equal to 75% of the discovered assets clearly amounts to the respondent being penalised. To include “investigative costs” as proposed by the amendment would entitle the applicant to both a penalty and damages and, in my view, would be in conflict with section 2 of the Act. I am not persuaded that the proposed amendment is not excipiable or that it would not cause injustice to the respondent. For these reasons the proposed amendment cannot succeed.

[14] Accordingly the following order is made:

The application is dismissed with costs, such costs to include the costs of senior counsel.

.....

¹² Volume 2, Oxford Press, at 2142.

Application heard on :	25 October 2012
Counsel for the Applicant :	Adv. A De Wet SC
Instructed by :	Marinus van Jaarsveld
Counsel for the Respondent :	Adv. BL Skinner SC
Instructed by :	Shepstone & Wylie
Judgment handed down on :	12 November 2012