

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

Case No: 21/37786

- (1) REPORTABLE: NO
- (2) OF INTEREST TO OTHER JUDGES: NO
- (3) REVISED



SIGNATURE

10/05/2024
DATE

In the matter between:

APEX TRUCK & TRAILER

Applicant/Plaintiff

and

PPCF BOERDERY CC

Respondent/Defendant

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down is deemed to be 10h00 on 10 May 2024

JUDGMENT

INGRID OPPERMAN J**Introduction**

[1] This is an application brought by the plaintiff for leave to amend its particulars of claim. The application has been brought after the close of pleadings and prior to discovery. The matter is far from trial ready.

The Claim as currently formulated

[2] The plaintiff's claim is for payment of damages relating to latent defects arising from an oral agreement in terms of which the defendant purchased four Scania trucks from the plaintiff and traded-in three International trucks (*the International trucks*) and paid R100 000 as a deposit in respect of the last transaction. In addition thereto, a second agreement was alleged which constituted an oral novation of the first agreement whereby the fourth Scania truck would not be purchased and the plaintiff would retain the cash deposit of R100 000 as partial compensation for the costs to repair the International trucks.

[3] The plaintiff claims an amount of R634 573.71 as the difference between the trade-in deposits and the amount for which the plaintiff would have traded in the International trucks had the plaintiff known the true condition of the International trucks, less the R100 000 deposit. In short, there were latent defects in the International Trucks and if plaintiff had known about the defects it would not have credited the defendant by R734 573.71.

The proposed amendment

[4] The proposed amendment seeks to replace the terms of the first agreement to the effect that the defendant sold to the plaintiff the three International trucks for an

amount of R310 500 each. The purchase price of the International trucks would be “set off” as trade-ins in the sale of three Scania trucks in the amount of R1 385 750 each purchased by ABSA Bank and be delivered to the defendant as agent of, and on behalf of, ABSA Bank. The proposed amendment further seeks to replace the allegations pertaining to the second agreement to provide that a second oral agreement was concluded between the parties in terms of which the plaintiff would sell to the defendant's nominated principal (ABSA Bank), and the defendant would purchase on behalf ABSA Bank, a fourth Scania truck in the amount of R1 385 750. The defendant would pay the plaintiff a cash deposit of R100 000 to be “set off” as a trade-in in the sale of the fourth Scania truck. Pursuant to the second agreement, the defendant paid the plaintiff the R100 000, and the parties thereafter entered into an oral novation agreement (*the third agreement*) of the second agreement in terms of which the transaction pertaining to the fourth Scania truck would no longer continue and the plaintiff would retain the R100 000 as partial compensation for the cost of repairing the International trucks.

[5] In a nutshell, what the plaintiff pleads is that the defendant wished to acquire the Scania trucks and would obtain financing through ABSA Bank, but would trade in the International trucks as trade-in deposits as well as paying R100 000 as a cash deposit in respect of the fourth Scania truck which sale fell through and they agreed that the R100 000 would be utilized to compensate the plaintiff for the cost of repairs to the International trucks.

[6] Prior to dealing with the specific grounds of objection, it would be useful to distill the general principles in respect of amendments.

General Principles

[7] The court hearing an application for an amendment has wide powers to allow a change to pleadings at any stage, even after argument and before judgment.¹ Whether or not to grant the amendment is a matter for the discretion of the court, which discretion is to be judicially exercised.² As one of the primary functions of pleadings is to tell the other side what case it is that it has to meet, clarity in pleading is essential. If the opponent is fairly able to say at the trial that they did not know that this was the case that they had to meet then that evidence cannot be led at the trial. A postponement and an amendment can cure this shortcoming, the pleading can be 'fixed' (amended), the opponent now told of what the case is going to be, and the trial can resume with everyone knowing what is coming and having had a fair opportunity to prepare (call witnesses, make discovery etc.) for the pleaded case.

[8] The aim of the court is to do justice between the parties. In the context of amendments, mistake or neglect on the part of one of the parties ought not to stand in the way of ventilating and deciding the real issues between the parties,³ necessity for the amendment having arisen through some reasonable cause.⁴ Nevertheless, all amendments must be *bona fide*,⁵ and the court will, always, as a further essential consideration in the exercise of its discretion, examine any prejudice or injustice that the other party may suffer if the amendment is granted, which prejudice cannot be

¹ *Trans-Drakensberg Bank Ltd (Under Judicial Management) v Combined Engineering (Pty) Ltd and Another* 1967 (3) SA 632 (D) at 640A

² Erasmus *Superior Court Practice* (RS6-2018, D1-331): Commentary on rule 28(4) and authorities cited at note 15

³ *Trans-Drakensberg Bank Ltd (Under Judicial Management)* supra at 640F; *Kasper v André Kemp Boerdery CC* 2012 (3) SA 20 (WCC)

⁴ *Zarug v Parvathie, N.O* 1962 (3) SA 872 (D) at 876

⁵ *President Versekeringsmaatskappy v Moodley* 1964 (4) SA 109 (T); Schwikkard et al *Principles of Evidence* 3ed at 471-472

compensated for by a suitable order as to costs, and, where appropriate, a postponement.⁶

[9] An applicant seeking an amendment of its pleadings bears the onus of proving that the amendment is *bona fide*, and that the other party will not suffer prejudice as a result. Doubt as to whether the other party might suffer prejudice will result in the refusal of the application.⁷ Obviously, the closer a matter is to trial the more likely it is that there will be prejudice (the opponent may not be able to get ready to meet the new amended case in time for the trial), so the window for amendments narrows as the trial date approaches. In this case, as I mentioned in my introduction, the trial is a long way off.

[10] Where the applicant seeks to add new grounds for the relief claimed at an advanced stage of the proceedings, the applicant seeks an indulgence from the court, and is not entitled to the amendment as of right.⁸ In addition to proving that the application is *bona fide*, and that the other party will not suffer prejudice, the applicant must then also (1) prove that he did not delay in making the application after becoming aware of the evidential material upon which reliance is now placed, (2) provide a reasonably satisfactory reason why the amendment was not sought at an earlier stage,⁹ (3) explain the reasons for the amendment, and (4) show that there is *prima facie* something deserving of consideration, a triable issue.¹⁰

⁶ *Trans-Drakensberg Bank Ltd (Under Judicial Management) supra* at 638A; *Bulktrans (Pty) Ltd v Power Plus Performance (Pty) Ltd* [2003] JOL 11706 (ELC)

⁷ *Tengwa v Metrorail* 2002 (1) SA 739 (C) at 744; *Kali v Incorporated General Insurance* 1976 (2) SA 179 (D) at 182 A-C

⁸ *Minister van die SA Polisie v Kraatz* 1973 (3) SA 490 (A) at 512E; *Gollach v Gomperts (1967) (Pty) Ltd v Universal Mills & Produce Co (Pty) Ltd* 1978 (1) SA 914 (A) at 928D

⁹ *Bulktrans (Pty) Ltd v Power Plus Performance (Pty) Ltd supra*; *Trans-Drakensberg Bank Ltd (Under Judicial Management) supra*

¹⁰ *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd en 'n Ander* 2002 (2) SA 447 (SCA) at [34] -[36]

[11] In situations where an amendment is sought at an advanced stage of the proceedings, the applicant must further demonstrate his *bona fides* in the sense that material new factors have arisen or have come to the notice of the amending party making the application necessary.¹¹ An amendment might therefore not be *bona fide* if the basis for the amendment has long been known to the party seeking to amend at a late stage, or an amendment may not be *bona fide* if it is being introduced at a late stage to provoke the necessity for a postponement. This latter form of amendment is not *bona fide* because it is the result not of a genuine desire to lay a proper foundation in the pleadings for a case to be made out against the opponent but of a desire to avoid the trial running i.e. to get a postponement. It is thus not for nothing that both amendments and postponements are required to be *bona fide*.

[12] The greater the disruption caused by the amendment, the greater the indulgence sought by the applicant and the greater the burden on the applicant to convince the court that it ought to accommodate her.¹²

[13] Prejudice will exist in circumstances where the parties cannot be put back for purposes of justice in the same position that they were in when the pleading, which is now sought to be amended, was originally filed.¹³ This arises where witnesses have become unavailable, where evidence has been lost or other forms of disadvantage are visited on the opponent who, had the case been pleaded adequately at an earlier stage would have been able to get hold of the witness, obtain the evidence or otherwise prepare for the case against them. A late amendment may thus be

¹¹ *Consol Ltd t/a Consol Glass v Twee Jonge Gezellen (Pty) Ltd* 2005 (6) SA 23 (C) at 361-J

¹² *Ciba-Geigy (Pty) Ltd* supraat [42]

¹³ *Moolman v Estate Moolman* 1927 CPD 27

disallowed and the practice of issuing pleadings on the basis that “we can always amend” is discouraged.

[14] It goes without saying that pleadings be clear enough to understand (not be vague) should disclose a legally sound case, whether in the form of a particulars of claim (disclosing a cause of action) or in a plea (disclosing a defence). In other words, amendments ought not to be allowed where the amendment would render the particulars of claim excipiable.¹⁴

The application was brought out of time

[15] Rule 28 provides:

‘28 Amendments to pleadings and documents

(1) Any party desiring to amend any pleading or document other than a sworn statement, filed in connection with any proceedings, shall notify all other parties of his intention to amend and shall furnish particulars of the amendment.

(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)

(9) A party giving notice of amendment in terms of subrule (1) shall, unless the court otherwise directs, be liable for the costs thereby occasioned to any other party.

(10) The court may, notwithstanding anything to the contrary in this rule, at any stage before judgment grant leave to amend any pleading or document on such other terms as to costs or other matters as it deems fit.’

¹⁴ *Tengwa v Metrorail* 2002 (1) SA 739 (C) at 746F-G

[16] In terms of Rule 28 (4) the plaintiff was obliged to have brought the application to amend within 10 days of delivery of the notice of objection being on 22 February 2022. It did not. It brought the application within 17 days of delivery of the notice of objection being on 3 March 2022. The defendant contends that at the time the plaintiff applied for an amendment it had no right to apply for an amendment and the application accordingly stands to be dismissed on this ground alone. In *De Kock v Middelhoven*¹⁵, a matter which was on all fours with this one, Mabuse J held that Rule 28(4) does not compel a party seeking an amendment, to deliver an application for leave to amend. He held that '*it is entirely the decision of the party pursuing leave to amend whether to apply for leave to amend orally or to lodge an application for leave to amend.*' The learned authors in Erasmus in the commentary on Rule 28 suggest that this no longer holds good as Rule 1 was amended with effect from 22 November 2019 and now includes a definition of '*application*' to be '*a proceeding commenced by notice of motion or other forms of applications provided for by rule 6.*' The learned authors opine that because Rules 6(11) and (14) make specific provision for interlocutory and other applications incidental to other proceedings, an application in terms of rule 28(4) can no longer be made from the bar and to this extent, *De Kock* should no longer be followed.

[17] Nothing turns on this in this application because the plaintiff filed a notice of motion in terms of Rule 28(4) and thus did not move the amendment orally. However, it filed this notice of motion out of time and without a supporting affidavit.

[18] No prejudice was alleged by virtue of the 7 day delay nor is any apparent. The insistence on a condonation application under such circumstances seems unduly

¹⁵ 2018 (3) SA 180 (GP)

formalistic assuming it was at all necessary which I do not rule upon.¹⁶ There appears to be some merit in the argument that the reason why the defendant did not invoke the provisions of Rule 30 to set aside what is now contended to be an irregular proceeding, was because no prejudice could be shown. Be that as it may, I find that the application is un-prejudicially before this court, and I am entitled to adjudicate it both in terms of Rules 28(4) and 28(10).

Does the proposed new first agreement give rise to rights and obligations between the plaintiff and the defendant?

[19] The defendant, in its first ground of objection to the proposed amendment, contends that the first agreement resulted in an agreement of sale being concluded between the plaintiff and ABSA Bank in terms of which the plaintiff sold three Scania Trucks to ABSA Bank and the International trucks served the purpose of a deposit paid. That being so, the argument continues, it does not give rise to rights and obligations between the plaintiff and the defendant. The consequence of this is that no triable issue between the parties is introduced or put differently, it will render the particulars of claim excipiable because it will not disclose a cause of action as against the defendant.

[20] The first point to be made is that this objection does not require an affidavit to be countered by the plaintiff. This is so as, in deciding any exception, a Court must look at the pleadings as they stand and as if the allegations contained in those pleadings were admitted.¹⁷ Upon every interpretation of the pleading which a Court

¹⁶ *Pangbourne Properties Ltd v Pulse Moving CC and another*, 2013 (3) SA 140 (GSJ) and *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd*, 2007 (2) SA 363 (SCA) at [32] suggest prejudice is the overriding consideration and that a formal condonation application is not required.

¹⁷ *Champion v J D Celliers & Co Ltd* 1904 TS 788 at 790-1; *Wellington Court Share Block v Johannesburg City Council* 1995 (3) SA 827 (A) at 833F and 834D

can reasonably attach to it, no cause of action must be disclosed.¹⁸ The correctness of the facts averred in the particulars of claim must be assumed.¹⁹ In the case under consideration, the Court must be able to conclude that the plaintiff's claim is (not may be) bad in law in order to find that the proposed amendment does not raise a triable issue.²⁰

[21] The new first agreement to be introduced by the amendment contemplates that the plaintiff was the purchaser of three International trucks for an amount of R310 500²¹ each.

[22] Paragraph 4.1A of the proposed amended particulars envisages the manner in which the purchase price was to be paid which was by deducting the sum of R310 500 from the purchase price of R 1 385 750 of each of the 3 Scania trucks sold to the defendant by the plaintiff but financed through ABSA Bank.

[23] The cause of action and that which creates the rights and obligations between the plaintiff and the defendant is the alleged latent defects at the time of sale and delivery of the International trucks as elaborated upon in paragraphs 6.1, 6.2, 6.3 and 7 of the unamended particulars of claim (and which paragraphs will remain after the proposed amendment is effected). Paragraph 7 draws the threads together by setting out the amounts the plaintiff would have paid had it known of the latent defects. These are the averments which this court needs to view as factually correct for purposes of determining excipiability of the intended amendment. Plaintiff's cause of action against the defendant is the purchase of the 3 International trucks, the existence or not of

¹⁸ *Theunissen v Transvaalse Lewende Hawe Ko-op Bpk* 1988 (2) SA 493 (A) at 500E-F

¹⁹ *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* 2006 (3) SA 138 (SCA) at paras [3] – [10]; *Stewart and Another v Botha and Another* 2008 (6) SA 310 (SCA) at para 4]

²⁰ *Trustees, Bus Industry Restructuring Fund v Breakthrough Investments CC and Others* 2008 (1) SA 67 (SCA) at para [11]

²¹ The substituted paragraph 4.1

latent defects and the bearing thereof on the purchase price for such trucks. How such purchase price was to be paid, which is the question that's answered by the sale of the Scania trucks to the defendant financed by ABSA Bank, does not affect the cause of action between the plaintiff and the defendant created by the purchase of the International trucks by the plaintiff.

[24] This is a point of law which is either good or bad. I have determined that there is a construction (interpretation) of the proposed amendment which would not render the particulars excipiable (as failing to disclose a cause of action) and that finding then disposes of that part of the objection²².

Non-compliance with Rule 18(6)

[25] The second objection raised is almost exactly the one which was raised in the Supreme Court of Appeal in *Rustenburg Platinum Mines v Industrial Maintenance Painting Services*²³, which was dealt with as follows by Mpati P:

'The third objection raised is that the proposed amendment does not comply with the provisions of rule 18(6) of the Rules of Court in that it does not state in paragraph 6.2.2 when, where and by whom the agreement was concluded, nor does it state in paragraph 6.2.3 when, where and by whom the instruction was given and accepted on behalf of the plaintiff and the defendant respectively. There is no substance in this objection. Paragraph 6.2.2 of the amendment states that the parties were represented by their duly authorised representatives, who orally agreed at the plaintiff's premises during or about January/February 2003. These allegations must also be read into paragraph 6.2.3. It is for the defendant, if it so wishes, to request further particularity for purposes of the trial.'

[26] I can do no better than that summary.

²² *Krischke v Road Accident Fund*, 2004(4) SA 358 (W) at para [10]

²³ [2009] 1 All SA 275 (SCA) at para [22]

No evidence to sustain the second and third agreements

[27] It is not a requirement of an amendment prior to the trial commencing for the applicant to persuade the court that it has evidence to sustain the amended version. It is obviously quite another thing if after evidence is led an applicant wishes to amend its pleadings to a version which is at odds with the evidence already adduced by it. If the plaintiff in this case is unable to adduce evidence of the three agreements it now wishes to plead it will lose its case and be mulcted in costs for putting the defendant to the defence of a case which is without merit. It is however, not for this court now, at this stage of the proceedings ie prior to any evidence having been led, to disallow the amendment on such basis. Had the plaintiff withdrawn the action and had the plaintiff instituted action afresh based on the three agreements, the defendant could not have excepted or objected on the basis that the plaintiff does not have evidence to support its claim. These are issues which will be canvassed at trial and the absence of supporting documentation or contradictory documentation, should make good ammunition for cross-examination.

The failure by the plaintiff to have pleaded performance iro the Scania trucks to ABSA bank

[28] In the unamended version of the particulars of claim, the plaintiff pleaded delivery of the Scania trucks expressly. The amendment deletes that averment. Be that as it may, compliance with its obligations is pleaded in blanket form in paragraph 11, which, assuming performance with the agreement is needed for the latent defect claim, is sufficient to establish plaintiff's cause of action. I make the assumption advisedly because the aedilitian remedies are available to the plaintiff. Depending on the facts, a seller may be held liable for latent defects in the object sold by means of

the actio empti (for damages), actio redhibitoria (for repayment) or actio quanti minoris (for price reduction).

[29] I am satisfied that sufficient has been pleaded to disclose a cause of action. Further particulars, including what the reasonable costs associated with repairing the alleged defects are, can, in the fullness of time, be requested.

[30] Finally, I have a discretion whether to grant the amendment and in exercising my discretion in favour of granting the amendment am satisfied that the defendant will not be prejudiced but if refused, the plaintiff would suffer an injustice²⁴.

Costs

[31] The plaintiff has contended that the opposition to the application ‘*was ill-conceived, if not mala fide and absent any merit. The Defendant was forewarned and allowed every opportunity to avoid the imposition of the costs of this opposed application.*’²⁵ The plaintiff sought costs on a punitive scale.

[32] Rule 28(9) provides that the party wishing to amend shall, unless the Court otherwise orders, be liable for costs. This rule is based on sound principle. The party seeking to amend is seeking an indulgence and comes to court cap in hand. Unless the opposition to such amendment is unreasonable, the applicant should pay the costs.

[33] The proposed amendment is not a model of clarity and in fact, is massively confusing. Terminology like ‘set-off’ adds to the confusion as it is inappropriate in a tripartite agreement.

²⁴ *Embling and Another v Two Oceans Aquarium CC*, 2000 (3) SA 691(C) at 694G – 695 B

²⁵ Paragraph 4 (v) of the joint practice note

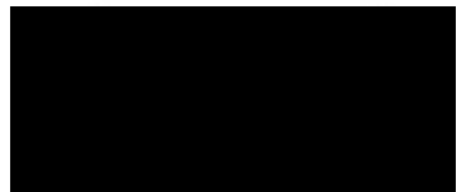
[34] In my view, the opposition was not unreasonable. This is particularly so as a substantial amendment ought ordinarily to be accompanied by an affidavit explaining the change in stance. I have found that it was unnecessary in this matter but can state categorically that it would have simplified matters considerably had there been one. This contributed towards the complexity of the matter and although the defendant argued for a punitive costs order on the basis that the plaintiff had sought punitive costs, I intend factoring this into the appropriate party/party scale despite the relatively small quantum of the claim.

Order

[35] I accordingly grant the following order:

- (a) The plaintiff is granted leave to amend its particulars of claim as per its notice in terms of Rule 28(1) dated 26 January 2022.

The plaintiff is to pay the costs of this application as between party and party on scale C.



INGRID OPPERMAN J
Judge of the High Court
Gauteng Division, Johannesburg

Counsel for plaintiff: Adv HP van Nieuwenhuizen

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Instructed by: Vorster, Robertse & Coetzee Inc

Date of hearing: 22 May 2023