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**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NUMBER: 2021-35668

(1) REPORTABLE: ~~YES~~/NO

(2) OF INTEREST TO OTHER JUDGE: ~~YES~~/NO

(3) REVISED: ~~YES~~/NO

DATE: 20 January 2025

SIGNATURE:

In the matter between:

BMW FINANCIAL SERVICES SOUTH AFRICA (PTY) LTD

Applicant

and

RIYADH DOOLA

Respondent

Heard: 30 OCTOBER 2024

Delivered: This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email. The date and time for hand-down is deemed to be 10h00 on 20 JANUARY 2025.

JUDGMENT

LE GRANGE, AJ:

Introduction

[1] The applicant herein seeks leave to make various amendments to its particulars of claim. The amendments relevant (due to their opposition) reads as follows:

'1.1 By inserting the following paragraphs: ... 8.3

...

8.3 On 28 February 2019, the Plaintiff received monies in respect of the sale of the vehicle. A copy of the payment history is attached hereto as Annexure "C2".

1.2 By addition of Annexures ... "C2" to the Particulars of Claim.

2.

2.1 By amending paragraph 10 to read as follows:

10. The Defendant bound himself as surety and co-principal debtor, at EMMARANTIA on the 23 FEBRUARY 2018, for the due and punctual performance and payment by NORTHEAD SHOWROOM CC of all debts and obligations whatsoever nature and howsoever arising, which NORTHEAD SHOWROOM CC may have in the past owed or may now or in the future owe to the Plaintiff for monies lent and advanced to NORTHEAD SHOWROOM CC, including payment of damages suffered by the Plaintiff as a result of the failure of NORTHEAD SHOWROOM CC to fulfil its obligations to the Plaintiff. A copy of the Suretyship Agreement is attached hereto marked as Annexure "E" whereof the contents thereof is incorporated herein as if specifically repeated herein.

2.2 By addition of Annexures "E" to the Particulars of Claim.'

[2] The respondent opposes the application on the following bases:

- On a legal point, that the deponent does not have the necessary authority and *locus standi*;
- That the amendment will render the particulars of claim excipiable for want of the necessary averments to sustain a cause of action against him, alternatively will leave the particulars vague and embarrassing; and
- That the introduction of an entirely new and different deed of suretyship introduces a new cause of action which is not permissible in the instance as the new claim has prescribed.

[3] The respondent has further sought the striking of paras 8.2 and 8.3 from the founding affidavit to the application for amendment.

[4] I will refer to the parties as in the main.

In limine

[5] The defendant raised an issue *in limine*, that the deponent of the founding affidavit to the application for amendment does not have: (i) the necessary authority to act in these proceedings on behalf of the plaintiff; and (ii) *locus standi* to institute the action.

[6] This issue has been settled for more than two decades. In *Ganes v Telecom Namibia Ltd* 2004 (3) SA 615 (SCA) at 624G–I, the Court held as follows at para 19: -

‘There is no merit in the contention that Oosthuizen AJ erred in finding that

the proceedings were duly authorised. In the founding affidavit filed on behalf of the defendant Hanke said that he was duly authorised to depose to the affidavit. In his answering affidavit the first appellant stated that he had no knowledge as to whether Hanke was duly authorised to depose to the founding affidavit on behalf of the defendant, that he did not admit that Hanke was so authorised and that he put the defendant to the proof thereof. *In my view, it is irrelevant whether Hanke had been authorised to depose to the founding affidavit.* In the present case the proceedings were instituted and prosecuted by a firm of attorneys purporting to act on behalf of the defendant. In an affidavit filed together with the notice of motion a Mr Kurz stated that he was a director in the firm of attorneys acting on behalf of the defendant and that such firm of attorneys was duly appointed to represent the defendant. That statement has not been challenged by the appellants. It must, therefore, be accepted that the institution of the proceedings was duly authorised. *In any event, Rule 7 provides a procedure to be followed by a defendant who wishes to challenge the authority of an attorney who instituted motion proceedings on behalf of an plaintiff. The appellants did not avail themselves of the procedure so provided.* (See *Eskom v Soweto City Council* 1992 (2) SA 703 (W) at 705C -J.) [Emphasis added.]

[7] The issue of *locus standi* is equally off track as it is not the deponent who is instituting the claim but the plaintiff.

[8] In the premises the point *in limine* stands to be dismissed.

Does the proposed particulars of claim constitute a new cause of action

[9] It is essential for adjudication of this issue to firstly understand what is meant with the term 'cause of action'.

[10] The leading case in relation to the definition of the term 'cause of action' is *McKenzie v Farmers' Co-operative Meat Industries Ltd* 1922 AD 16, where Maasdorp JA approved the definition given in the English case of *Cook v Gill* which defined the phrase 'cause of action arising in the city' as:

‘Every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court.’

[11] More recently, the Supreme Court of Appeal in *Truter*¹ confirm this as follows:

‘[19] ‘Cause of action’ for the purposes of prescription thus means –

‘...every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.’

[12] To descent upon the question whether a new cause of action is introduced, it must first be established what the cause of action is in the current particulars of claim.

[13] The relevant portions of the particulars of claim provide as follows:

‘4. On or about the 7th day of SEPTEMBER 2017, and at or near JOHANNESBURG, NORTHEND SHOWROOM CC and the Plaintiff, represented by a duly authorized representative signed a written Instalment Sale Agreement ("the Agreement"). Attached hereto marked Annexure "A" is a true copy of the Agreement. The Plaintiff prays that the terms of the Agreement be incorporated herein as if specifically pleaded. *However, the Plaintiff elects to proceed against the Defendant as NORTHEND SHOWROOM CC is voluntary liquidated...*

....

¹ *Truter v Deyse* [2006] ZASCA 16; 2006 (4) SA 168 (SCA) which was followed by the Constitutional Court in *Le Roux and Another v Johannes G Coetzee & Seuns and Another* [2023] ZACC 46

6. The following are, inter alia, terms of the Agreement

6.1 NORTHEND SHOWROOM CC would purchase from the Plaintiff the following:

VEHICLE DESCRIPTION: 2017 BMW M4 COUPE M-DCT
COMPETITION (F82)

ENGINE NUMBER: 0[...]

CHASSIS NUMBER: W[...]

(hereinafter referred to as the "Goods"), for the amount of R2 085 509.44 (TWO MILLION AND EIGHTY FIVE THOUSAND FIVE HUNDRED AND NINE RANDS AND FORTY FOUR CENTS) (hereinafter referred to as the "Recoverable Amount").

...

6.6.1 In the event of default by NORTHEND SHOWROOM CC with his obligations in terms of the Agreement, the Plaintiff would be entitled, without prejudice to any other rights that it may have in law, to cancel and/or terminate the agreement, and claim from NORTHEND SHOWROOM CC the full amount that would have been paid had NORTHEND SHOWROOM CC fulfilled all obligations due in terms of the Agreement...

7. The Plaintiff complied with all the terms and conditions of the Agreement and the Goods were duly delivered NORTHEND SHOWROOM CC.

8. NORTHEAD SHOWROOM CC took delivery of the Goods in terms of the Agreement.

9. NORTHEAD SHOWROOM CC has failed to timeously and punctually perform its obligations under the Agreement by falling into arrears with the monthly instalments, and which arrears, NORTHEAD SHOWROOM CC despite demand fails and/or refuses and/or neglects to pay. An account summary depicting irregular or non- payment is attached hereto marked as Annexure "D", the content thereof which are herewith repeated as specifically pleaded.

10. The *Defendant has bound himself as surety and co-principal debtor*, at BRYANSTON on the 9 JUNE 2017, for the due payment by NORTHEAD SHOWROOM CC to the Plaintiff for monies lent and advanced to NORTHEAD SHOWROOM CC and/or for a limited amount to all debts and obligations of whatsoever nature and howsoever arising from this agreement, which was then or which may thereafter become owing by, or claimable from NORTHEAD SHOWROOM CC to the Plaintiff from any cause of debt whatsoever. A copy of the Suretyship Agreement authorising such agreement is annexed hereto marked as Annexure "E" whereof the contents thereof is incorporated herein as if specifically repeated herein...

...

17. Under the aforementioned circumstances the Defendant is in breach with his obligations in terms of the Agreement and the Plaintiff is entitled to the cancellation and/or termination of the Agreement return and repossession of the Goods and to recover such damages as it may have suffered by reason of the Defendant's breach of the Agreement.

18. The Plaintiff cancelled and/or terminated the Agreement due to the Defendant's breach, alternatively the Agreement is hereby

cancelled and/or terminated.

WHEREFORE the Plaintiff claims, in its aforesaid representative capacity against the Defendant for:

1. Cancellation of the Agreement;
2. Return of the Goods being ... 2017 BMW M4 COUPE M-DCT;
3. That judgment for the amount of damages that the Plaintiff may have suffered, together with interest thereon, be postponed sine die, pending the return of the vehicle to the Plaintiff, the subsequent valuation and sale thereof and the calculation of the amount to which the Plaintiff is entitled.
4. Interest ...' [Emphasis added]

[14] I agree with the defendant that the particulars of claim is not a model of clarity. Firstly, the plaintiff fails to properly distinguish between the main agreement and the deed of surety as well as the party to the main agreement and the party to the deed of surety. I submit that this a badly altered copy-paste product which started off with a standard particulars of claim, aimed against a party to an instalment sale agreement (**main agreement**) for cancellation, return of a vehicle and damages, and ended up by substituting the defendant and to bound him, by inserting a deed of surety (**deed of surety**) which was concluded at BRYANSTON on 9 JUNE 2017. Confusingly, the remainder of the paragraphs and especially the relief remained the same.

[15] Be that as it may, it contains sufficient material allegations for this Court to conclude that plaintiff seeks relief against the defendant as surety (in terms of a deed of surety) for debt incurred and a consequent breach by a third party in terms of an instalment sale agreement pertaining to a specific 2017 BMW.

[16] The defendant is of the view that the introduction (by way of the proposes

amendment) of an entirely new and different deed of suretyship, one that was concluded at EMMARANTIA on the 23 FEBRUARY 2018, introduces a new cause of action which has prescribed.

[17] I am not convinced. A clear distinction should be draw between the material facts to sustain a cause of action (*facta probanda*) and the different pieces of evidence to be led to prove the material facts. The latter have no place in the pleadings but for facts that the rules (Rule 18(6)), in instances of contract and for practical reason provide that it must be attached.

[18] It is clear from the allegations in the particulars of claim that the plaintiff's claim was aimed against the surety (which can only be a claim for the payment of the outstanding balance due by a third party) and intended to annex the deeds of suretyship which so bound the defendant to the *specific* debt.

[19] With the proposed amendment, the plaintiff is still enforcing the same or materially the same debt, which is the test for allowing an amendment according to the then Appeal Court in *Sentrachem Ltd v Prinsloo* 1997 (2) SA 1(A).

[20] The fact that multiple instalment sale agreements and deeds of suretyship were concluded between the same parties, created room for error.

[21] I am comfortable in finding that the proposed amendment will not introduce a new cause of action (i.e. right of action) but merely introduces fresh and alternative facts supporting the original right of action as set out in the original cause of action.²

Excipiability of proposed particulars of claim

[22] The defendant has not indulged the Court with a concise set of grounds upon which the new proposes particulars of claim is excipiable. He did in its stead raised a plethora of defenses against the claim and the annexures to the particulars of claim, which can be pleaded.

² See in this regard Alfred Mc Alpine & Son (Pty) Ltd v Transvaal Provincial Administration 1977 (4) SA 310 (T) at 343B-D.

[23] This Court is certainly not going to wonder off in search for some ground on behalf of a litigant which itself may or may not find disgruntled about. I do not want to say that there is not any vagueness but for me to raise it will be improper.

[24] The defendant is more than entitled to file an exception in the event that he feels aggrieved with the amended particulars of claim.

Defendant's striking application

[25] As with the ground of a possible exception, the reason(s) for the striking is not clear.

[26] Considering the contents thereof I agree with the argument of plaintiff's counsel that it is relevant as it explains what the surrounding circumstances were which led thereto that the incorrect suretyship agreement was annexed to the particulars of claim.

[27] In the premises the striking application stands to be dismissed.

Costs

[28] Rule 28(9) determines as follows:

'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.'

Order

[29] In the result the following order is made:-

1. The application is granted, and the applicant is ordered to file its amended particulars of claim within 10 court days from the date that this order came to its knowledge.
2. The applicant is to pay the costs of the application on a party and party scale.

A J LE GRANGE
ACTING JUDGE

APPEARANCES:

COUNSEL FOR PLAINTIFFS:

S F Fisher-Klein instructed by Velile Tinto
& Associates Inc.

COUNSEL FOR DEFENDANT:

R Andrew instructed by Combrink Nel &
Ballack Inc t/a NBI Attorneys.