IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case No: 2023-123197

DELETE WHICHEVER IS NOT APPLICABLE
1. REPORTABLE: YES/ NO
2. OF INTEREST TO OTHER JUDGES: YES/NO
3. REVISED
23 Apl 2026 .... DATE   [redacted] .... SIGNATURE
GAUTENG DIVISION, PRETORIA

In the matter between:

SAFRICAN INSURANCE COMPANY LIMITED Plaintiff

and

TSHIANEO HOLDINGS (PTY) LTD First Defendant

TSHIFIWA CASSIUS MUHANGANEI Second Defendant

JUDGMENT

Introduction

[1] This matter concerns two related procedural questions. The first is whether the defendants' exception to the plaintiff's original particulars of claim falls to be upheld on the basis that the pleading lacks averments necessary to sustain a cause of action. The second is whether the plaintiff's purported amended particulars of claim, delivered after the exception and after the defendants' notice in terms of rule 30, constitute an irregular step.

[2] The plaintiff is Safrican Insurance Company Limited. The first defendant is Tshianeo Holdings (Pty) Ltd. The second defendant is Mr Tshifhiwa Cassius Muhanganei, a director of the first defendant.

[3] The facts pleaded in the original particulars may be shortly stated. The plaintiff is a long-term insurer and financial services provider. Dibanani Holdings (Pty) Ltd ("Dibanani") was, on the plaintiff's version, onboarded by the plaintiff in September 2011, at a stage when Dibanani did not yet hold an FSP licence. Dibanani thereafter appointed the first defendant as its broker. The plaintiff's pleading alleged that the first defendant was to be paid commission of 10 per cent on funeral premiums received by the plaintiff.

[4] On 30 March 2023 Dibanani addressed a letter to the first defendant cancelling its appointment as broker with effect from 30 June 2023. On 4 July 2023 Dibanani informed the plaintiff that it had appointed MA-SAPU Financial Services (Pty) Ltd as its broker in place of the first defendant with effect from 1 July 2023.

[5] The plaintiff then pleaded that, due to a technical error in its accounting department, an amount of R816 164.88 was paid on 4 August 2023 to the first defendant instead of to Dibanani. The broker commission statement annexed to the particulars reflected that amount against the Dibanani scheme, while an amount of R4 305.28 was reflected as commission payable in respect of the first defendant's own business. The plaintiff further alleged that the first defendant was informed of the error on 11 August 2023; that the second defendant undertook in a virtual meeting to refund 80 per cent of the amount; and that, despite demand, the defendants failed to repay the sum of R816 164.88.

[6] The original particulars were divided into "Claim A" and "Claim B". Claim A relied on the erroneous payment and the alleged undertaking to refund. Claim B was framed as a claim arising from the erroneous payment and the receipt by the first defendant of money "not due to it". No express label was attached to the claim, but the heads of argument on both sides treated it as an enrichment claim, more specifically a claim akin to the *condictio indebiti*.

[7] The defendants excepted. The grounds were that the original particulars did not contain averments necessary to sustain a cause of action; that the plaintiff had not properly pleaded the requirements of unjustified enrichment or the condictio indebiti; that no case had been made out against the second defendant; and that the pleading did not disclose the legal basis on which the defendants were said to be liable.

[8] After receipt of the exception, the plaintiff delivered a notice of intention to amend in terms of rule 28(1). The defendants then delivered a notice in terms of rule 30 calling upon the plaintiff to withdraw that notice on the basis that it constituted an irregular step. Notwithstanding that notice, the plaintiff thereafter filed amended particulars of claim and purported to do so in terms of rule 28(5).

The Exception

[9] It is convenient to deal first with the exception to the original particulars.

[10] The principles governing exceptions are settled. An exception is a useful mechanism to dispose of bad claims or bad defences where the point appears *ex facie* the pleading. In **Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA**[1] the Supreme Court of Appeal

[1] 2006 (1) SA 461 (SCA)

reaffirmed that exceptions serve the valuable function of weeding out cases without legal merit. But that function must be exercised with care. The excipient must show that upon every reasonable interpretation the pleading can bear, no cause of action is disclosed.

[11] It is equally trite that a plaintiff is not required to plead evidence. What must be pleaded are the material facts necessary to sustain the cause of action. That much has been settled since **McKenzie v Farmers' Co-operative Meat Industries Ltd**[2]. And, as was emphasised in **National Director of Public Prosecutions v Phillips and Others**[3], pleadings must be lucid, logical and intelligible, so as to alert the other party to the case it has to meet.

[12] In the present matter the plaintiff submitted in its heads that it was unnecessary to identify a specific *condictio*. There is force in the general proposition. In **First National Bank of Southern Africa Ltd v Perry NO and Others**[4] Schutz JA observed that courts often spend too much time debating the proper historical label and too little time focusing on the substantive requirements of enrichment liability. In **Kudu Granite Operations (Pty) Ltd v Caterna Ltd**[5] the Supreme Court of Appeal recognised that the development of our law has progressed to the point where the old *condictiones* need not always be the exclusive starting

[2] 1922 AD 16
[3] 2002 (4) SA 60 (W)
[4] 2001 (3) SA 960 (SCA)
[5] 2003 (5) SA 193 (SCA)

point. But none of that relieves a pleader of the obligation to allege the material facts that sustain the chosen claim.

[13] Read benevolently and as a whole, the original particulars fail in three respects.

[14] **First**, claim A does not disclose a coherent independent cause of action. The pleading alleged that the first defendant was informed of the erroneous payment and that the second defendant undertook to refund 80 per cent of the amount. But the particulars went no further. They did not plead whether this was said to constitute an enforceable agreement, a compromise, an acknowledgment of debt, or some other juristic basis for liability. They did not plead the material terms of such agreement, the authority on which the second defendant acted, why the undertaking of 80 per cent translated into liability for the whole amount, or why both defendants were said to be jointly liable. On any reading, claim A lacked averments necessary to sustain a separate cause of action.

[15] **Secondly**, insofar as claim B was intended to be an enrichment claim, the original particulars did not adequately plead the plaintiff's own impoverishment and the nexus between its impoverishment and the first defendant's enrichment. Paragraph 20 of the original particulars alleged that the error was made "at the expense of the plaintiff and Dibanani" and that the money ought to have been paid to Dibanani, who remained without its commission. That allegation did not clarify the juridical basis on which the plaintiff itself claimed

restitution. If the money was due to Dibanani, the plaintiff was required to plead with clarity why it — and not Dibanani — was the impoverished party entitled to reclaim the payment. That was not done.

[16] **Thirdly**, the original particulars did not plead the essential facts necessary for a claim in the nature of the **condictio indebiti**. In Legator McKenna Inc v Shea[6] the Supreme Court of Appeal restated that the *condictio indebiti* requires, at least, allegations that the payment was made in the *bona fide* and reasonable but mistaken belief that it was owing, and that it was made *sine causa* or *indebite*, there being no legal obligation to make it. More recently, in **Mhlari NO and Others v Nedbank Limited**[7], the Supreme Court of Appeal reaffirmed that a person who pays money because of a reasonable error of fact or law in the belief that it is owing, whereas it is not, has a claim for repayment to the extent of the recipient's enrichment.

[17] The original particulars alleged a "technical error" and asserted that the amount was "erroneously" paid. But they did not allege that the payment was made in the *bona fide* and reasonable belief that it was due to the first defendant. Nor did they plead facts from which the reasonableness of the error could be assessed. In the setting of a pleaded commercial relationship, and where the annexed commission statement reflected a substantial amount under the Dibanani scheme, that omission was material. It is not enough merely to say

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[6] 2010 (1) SA 35 (SCA)
[7] (251/2023) [2024] ZASCA 39 (4 April 2024)

that a payment was erroneous. The pleader must allege the facts that make the payment legally recoverable.

[18] There is a further difficulty. The original particulars did not disclose a cause of action against the second defendant at all. The payment was alleged to have been made to the first defendant. The enrichment, if any, was that of the first defendant. The second defendant was cited merely as a director. No basis was pleaded for piercing the corporate veil, no personal enrichment was alleged, and no properly formulated contractual basis for his personal liability was pleaded. That defect was fatal to the claim against him.

[19] For these reasons the original particulars lacked averments necessary to sustain a cause of action. The exception to them must therefore succeed.

[20] That is not, however, the end of the matter. The defendants sought dismissal of the plaintiff's claim. That relief is too drastic. The ordinary course, when an exception is upheld on the basis that the pleading is defective, is to afford the pleader an opportunity to amend. The Supreme Court of Appeal in **Rowe v Rowe**[8] made plain that dismissal without leave is exceptional. A departure from that course is usually justified only where amendment would plainly be futile. This is not such a case. The defects are serious, but not necessarily incapable of cure. It is my considered view that the proper order is to uphold the exception,

[8] 1997 (4) SA 160 (SCA)

set aside the original particulars of claim, and grant leave to amend within a limited period.

The legal status of the amended particulars of claim

[21] I turn then to the plaintiff's purported amended particulars.

[22] Rule 28 establishes a simple sequence. A party wishing to amend delivers a notice of intention to amend. The opposing party may object within ten days, stating the grounds of objection. If no objection is delivered, the amendment may be effected. If objection is delivered, the party wishing to amend may not simply proceed; it must apply to court for leave to amend.

[23] In this matter the plaintiff delivered a notice in terms of rule 28(1) on 9 April 2024. On 10 April 2024 the defendants delivered a written notice in terms of rule 30. Whatever its label, the substance of that notice was unmistakable: it objected to the proposed amendment, set out the grounds of objection, and called upon the plaintiff not to proceed. In motion practice and pleadings alike, substance prevails over form.

[24] Once that objection had been delivered, the plaintiff was not entitled to invoke rule 28(5). The procedural consequence of the objection was that the plaintiff, if so advised, had to apply under rule 28(4) for leave to amend. It did not do so.

Instead, on 30 April 2024, it filed amended particulars as though no objection had been lodged.

[25] That step was irregular. It was contrary to the structure of rule 28 itself. Whether the defendants were correct in contending that a pending exception entirely barred an amendment without leave need not be finally decided. The narrower and sufficient ground is that, after objection had been raised, the plaintiff could not bypass rule 28(4) and file amended pages under rule 28(5). The amended particulars were therefore not properly before the court.

[26] The plaintiff's heads contended that a litigant may amend at any time before judgment. That proposition is too broadly stated. The power to amend is generous, but it is not free-floating; it must be exercised in accordance with the rules. A litigant cannot convert a contested amendment into an uncontested one by ignoring an objection and filing the amended pleading nonetheless.

[27] The defendants were accordingly entitled to complain that the amended particulars constituted an irregular step. The appropriate order is to set aside the purported amendment.

Costs

[28] As to costs, the defendants have been substantially successful on both the exception and the irregular-step point. There is, however, no sufficient basis for a punitive order. Ordinary costs will follow the result.

Order

[29] The following order is made:

1. The defendants' exception to the plaintiff's original particulars of claim dated 23 November 2023 is upheld.
2. The plaintiff's purported amended particulars of claim delivered on 30 April 2024 are declared an irregular step and are set aside.
3. The plaintiff is granted leave to deliver amended particulars of claim within 15 court days of this order.
4. The plaintiff shall pay the costs of the exception and the costs occasioned by the irregular-step proceedings, including the costs of counsel on Scale B where so employed.

[redacted]

MPHAGA AJ

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

APPEARANCES:

For the Applicant:

Instructed by: Ntombi Dude Attorneys Incorporated

Advocate for the Applicant: Adv N Lebona

For the Respondents:

Instructed by: Maponya K Attorneys

Advocate for the Defendants: Adv W Maodi