

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

CASE NO: 39386/2021

(1) REPORTABLE:

(2) OF INTEREST TO OTHER JUDGES:

(3) REVISED: NO

DATE: 6 February 2023

In the matter between:

SHOPRITE CHECKERS (PTY) LTD Applicant
(REG NO: 1928/001817/07)

And

THE TRUSTEES FOR THE TIME BEING OF Respondent
THE 3 BROTEN TRUST

JUDGMENT

SENYATSI J:

[1] This is an opposed application for an amendment of the particulars of claim in the summons issued by the applicant (plaintiff in the main action). The application is brought in terms of Rule 28(1) of the Uniform Rules of Court.

[2] The applicant seeks to amend the first page of the combined summons to reflect the description of the defendants in the heading of the summons. The applicant also seeks to amend paragraph 2 of the particulars of claim to state:

“2.1. The first defendant is Lawrence Owen Coetzee NO. an adult male with ID number [...], with the chosen *domicilium* at Unit, Dimension 4, 145 North Road, Sandowns, Sandton, in his capacity as trustee of 3 Broten Trust..., where full and further particulars or to the point of unknown.”

[3] The applicant furthermore seeks to add 2.2; 2.3; 2.4. It also seeks to amend 5.1 of the particulars of claim and replace it with an amended averment and amend 5.2 of the particulars of claim and add an amended averment there to.

[4] The applicant furthermore seeks to insert Annexures "POC 21" and "POC 2" after Annexure "POC 2" attached to the particulars of claim. It also furthermore seeks to amend paragraph 5.3 of the particulars of claim and add an amended averment thereto and insert an Annexure "POC 2.3" after Annexure "POC 2.2" attached to the particulars of claim.

[5] The further amendments sought by the applicant is paragraph 6.2 of the particulars of claim which it wants to replace with the new averments. It also seeks to amend paragraph 7.1 of the particulars of claim and state an amended averment.

[6] The additional amendments sought paragraphs 7.1; 7.4 and 8.2 in terms of which amended averments are sought to be inserted.

[7] The respondent raises five objections to the amendments sought. These are:

7.1. First Objection

7.1.1. Should the amendment be allowed, the plaintiff would have introduced and cited individuals NO, as defendants and have made them parties to the action as defendants without proper service of the summons to them.

7.1.2. They argue that the proper procedure for bringing such parties before court is by way of joinder application and not an amendment

7.2. Second Objection

7.2.1. Should the amendment be allowed, the plaintiff's particulars would be excepiable and therefore not comply with the Uniform Rules of Court in that paragraph 6.3.2 of the particulars refers to the Deed of Suretyship which was annexed.

7.2.2. It is contended that the statement is vague and embarrassing as

7.2.2.1. Annexure "ADM2" is a printed form and requires no "completion";

7.2.2.2. Paragraph 6.3 of the plaintiff's particulars of claim sets out and deals with the terms of the addendum. It is submitted that this is confusing and that the particulars of claim are vague and embarrassing.

7.2.2.3. It is contended that should the amendment be allowed then as read as a whole the plaintiff's papers will remain vague and embarrassing and the defendants would be unable to plead thereto and would thus be prejudiced thereby.

7.3. Third Objection

7.3.1. Should the amendment be allowed, the plaintiffs particulars would be excepiable and the plaintiffs particulars of claim would not comply with Uniform Rules

of Court in that in paragraph 8.1.the plaintiff alleges that the defendants breached the addendum;

7.3.2. The plaintiff does so without any reference of how the addendum was breached or even which defendants breached the addendum;

7.3.3. In doing so the plaintiff has not pleaded its case with sufficient particularity to enable the defendants to reply thereto as is required by Rule 18 (4). As a consequence, should the amendment be allowed then read as a whole the plaintiff's papers will remain vague and embarrassing, and the defendants would be unable to plead thereto and would thus be prejudiced thereby.

7.4 Fourth Objection

7.4.1. Should the amendment be allowed, the particulars would be excepiable and the plaintiff's particulars of claim would not comply with the Uniform Rules of Court in that in paragraph 10 of its particulars of claim, the plaintiff claims the amount of R 3 857 971.21 without setting out any way how such amount is calculated or arrived at

7.4.2. This amount circles, so goes the objection, is not the amount any acknowledged indebtedness, nor the amount mentioned in the demand.

7.4.3 There is no basis other than the allegation in the Certificate of Balance to establish how this amount is calculated or arrived at

7.4.4. Accordingly, the plaintiff does not establish the amount as required in Rule 18(4) with sufficient particularity that the defendants can reply thereto

7.4.5. Thus, should the amendment be allowed then read as a whole the plaintiffs papers will remain vague and embarrassing and the defendants would be unable to plead thereto and would thus be prejudiced thereby

7.5. Fifth Objection

7.5.1. Should the amendment be allowed, the plaintiffs particulars would be excepiable and the plaintiffs particulars would be excepiable and the plaintiffs particulars would not comply with the Uniform Rules of Court in that paragraph 6.3.5

the plaintiff states of the documents, it is not clear which one, which was allegedly annexed – “which was indeed completed”

7.5.2. This statement is vague and embarrassing as; 7.5.2.1. Annexure “ADM5” is a “conveyancer prepared document” and requires no “completion”

7.5.2.2. paragraph 6.3 of the plaintiff’s particulars of claim sets out and deals with the terms of the addendum

7.5.3. This is accordingly confusing, the plaintiff’s particulars of claim vague and embarrassing

7.5.4. Thus should the amendment be allowed, then read as a whole the plaintiff’s papers will remain vague and embarrassing and the defendants would be unable to plead thereto and would thus be prejudiced thereby

[8] The objector prays that the application for the amendment of the pleadings should be refused.

[9] The issue for determination is whether or not, for the reasons advanced by the objector if the pleadings are allowed to be amended, whether the summons will be exceptible by reason of *inter alia*, being vague and embarrassing.

[10] The amendment of pleadings and documents is done in terms of Rule 28 (1) of the Uniform Rules of Court. The rule permits the amendment of any pleading and document other than the sworn statements and sets out a process that should unfold to enable the court to consider the amendment application.

[11] It is permissible for the court exercising its discretion and notwithstanding anything to the contrary in the rule, at any stage before the judgment, to grant leave to amend any pleading and document¹

¹ See Rule 28(10) of the Uniform Rules

[12] It is trite that the onus is on the party seeking the amendment in this case, the plaintiff, to establish that the other party, namely, the defendant will not be prejudiced by it.²

[13] The principles governing the granting of an amendment have been summarised by White J in *Commercial Union Assurance Co Ltd v Waymark NO*.³ These are the following:

- (a) The court has a discretion whether to grant or refuse an amendment;
- (b) An amendment cannot be granted for the mere asking; some explanation must be offered therefore;
- (c) The applicant must show that *prima facie* the amendment 'has something deserving of consideration, a triable issue';
- (d) The modern tendency lies in favour of an amendment if such facilitates the proper ventilation of the dispute, between the parties;
- (e) The party seeking the amendment must not be *mala fides*;
- (f) The amendment must not cause an injustice to the other side which cannot be compensated by costs;
- (g) The amendment should not be refused simply to punish the applicant for neglect;
- (h) A mere loss of opportunity of gaining time is no reason, in itself, for refusing the application;
- (i) The amendment is not sought timeously; some reason must be given for the delay;

[14] In *Macduff and Co. (In Liquidation) v Johannesburg Consolidated Investment Co, Ltd*⁴, Stratford J said the following in regard to the amendment of pleading application:

² See *Euro Shipping Corporation of Monrovia v Minister of Agriculture & Others* 1979 (2) SA 1072 (C)

³ 1995 (2) SA 73 (Tk GD)

⁴ 1923 TPD 310

‘My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting *mala fide*, so that by his blunder he has done some injury to his opponent which could not be compensated for by costs or otherwise.’

[15] It has been held by our courts in a number of cases, that the aim in allowing amendment to pleadings is to do justice between parties by deciding the real issues between them.⁵ In *Rosenberg v Bitcoin*⁶ it was held that our courts should be in favour of an amendment whenever such amendment facilitates the proper ventilation of a dispute between the parties.

[16] As regards the objection against citing the trustees in their official capacities, the respondent objects and states that because the citation of the parties has never been admitted, the leave to amend cannot and should not be granted. This in my view is of no moment. There is no prejudice that will be suffered if leave to amend is granted. This is so given that, if required is had to the unamended portion of citation of the respondents, mention is made of the trustees in their identified names without stating that they are cited in their representative capacities. I fail to appreciate how this is objected to. Accordingly, the objection is non-meritorious and must fail.

[17] It is trite that when legal proceedings against a Trust are commenced with, the trustees must be cited in their representative capacities and not in their private capacities.⁷

[18] To demonstrate the importance of citing the trustees in their official capacities, Mc Call J in *BOE Bank, formerly NPS Boland Ltd v Trustees Knox Property Trust*⁸; held as follows:

⁵ See *Transec (Pty) Ltd v The Premier of the Province of the Eastern Cape* (416/96) [1998] ZAECHC 4 (16 February 1998); *Trans Drakensberg Bank Ltd (Under Judicial Managment) v Combined Engineering (Pty) Ltd and Another* 1967 (3) SA 633 (CLD)

⁶ 1935 WLD 115 See also *Cross v Ferreira* 1950 (3) SA (C) 446 C at 447

⁷ See *Goolman Ally Family Trust t/a Textile Curtains & Trimmings v Textiles Curtains and & Trimmings (Pty) Ltd* 1989 (4) SA 985 (C) at 998 D – E, *Van der Westhuizen v Van Sandwyk* 1996 (2) SA 498 (W)

“It may well be that it would have been more correct to describe the principal debtor as the named Trustees, in their official capacity as Trustees of the Trust or as the Trustees for the time being of the Trust. Certainly, Rosner’s case (supra) where there is a litigation against the Trust, the Trustees in their representative capacity and not the Trust, as such, ought to be cited. That however, is not the end of the matter because it is clear that notwithstanding the requirements of the provisions of section 6 of Act 50 of 1956, that the identity of the creditor, the surety and the principal debtor must be capable of ascertainment by reference to the provisions of a Deed of Trust, extrinsic evidence other than the evidence of the parties as to their negotiations and consensus may be led in order to identify one of those parties.”

[19] The approach cited above was also applied in *Tusk Construction Support Services (Pty) Ltd and Others v Independent Development Trust*.⁹ In the instant case, as already alluded to, all three of the trustees were cited by name. It is therefore not even necessary as the respondents aver that a joinder-application should be made. No prejudice will be suffered by the respondents if the amendment is allowed.

[20] I now deal with the objection that if the pleadings amendment is allowed, the particulars of claim will become vague and embarrassing. The principles pertaining to an exception that a pleading is vague and embarrassing are trite. The exception must be directed not at a particular paragraph within the cause of action but to the cause of action as a whole which must be demonstrated to be vague and embarrassing.

[21] In *Jowel v Bramwell - Jones and Others*¹⁰ the Court held as follows on the principle:

⁸ [1999] 1 All SA 425 (D)

⁹ 2020 ZASCA 22 at para 25

¹⁰ 1998 (1) SA 835 (W) at 905 E - H

“I must first ask whether the exception goes to the heart of the claim and if so, whether it is vague and embarrassing to the extent that the defendant does not know the claim he has to meet...”

[22] It is evident from the quoted passages above, that the exception must relate to the whole cause of action in order for the pleadings to be exceptable and be susceptible to attack on the ground that the averment is vague and embarrassing. From the reading of the proposed amendment as a whole, I find no merit to attack it on the basis that if allowed, the pleading will be vague and embarrassing. This is so in regard to all the grounds that have been raised to object against the proposed amendment.

[23] Accordingly, the proposed amendment will ensure that the dispute between the parties is resolved expeditiously. This is so having regard to the fact that the pleadings can, as a rule, be allowed at any stage of the litigation before trial has commenced.

[24] There is no prejudice or injustice that will be suffered by the defendants as a result of permitting the amendment as proposed.

[25] Having regard to the papers in this litigation, I am satisfied with the explanation given by the applicant pertaining to the grounds for the amendment of the pleading. Accordingly, the application for leave to amend the pleading must succeed.

ORDER

[26] The following order is made:

- (a) Leave to amend the applicant's particulars of claim as set out in its Notice in terms of Rule 28(1) dated and signed 19 October 2021 (Annexure “C” to the application) is hereby granted;

(b) The Respondent is ordered to pay costs on the party and party scale.

ML SENYATSI
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

DATE APPLICATION HEARD: 7 June 2022

DATE JUDGMENT DELIVERED: 6 February 2023

APPEARANCES

Counsel for the Applicant: Adv Du Preez
Instructed by: Goodes & Co

Counsel for the Respondent: Adv AJ Venter
Instructed by: WITZ Inc