IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION – GRAHAMSTOWN)

Case No. 847/10
Date heard: 17 April 2014
Date delivered: 25 April 2014
Not reportable

In the matter between:

STANDARD BANK OF SOUTH AFRICA LIMITED	**Plaintiff**

and

ASHBURY GEORGE DAVENPORT NO	**First defendant**
CHRISTOBEL ERSKINE DAVENPORT NO	**Second defendant**
ASHBURY GEORGE DAVENPORT NO	**Third defendant**
CHRISTOBEL ERSKINE DAVENPORT NO	**Fourth defendant**
ASHBURY GEORGE DAVENPORT	**Fifth defendant**

Application for leave to amend plea – withdrawal of admissions – no satisfactory explanation of reason for making admissions and for wishing to withdraw them – application not bona fide, and therefore refused – amendment to attack standing of plaintiff on basis that it not 'legal holder' of agreements sued upon – leave refused because application not bona fide, amendment would be excipiable on basis of being vague and embarrassing because it is meaningless and in conflict with admissions in present plea – reserved costs of postponement – defendants directed to pay reserved costs of three days of applications to postpone trial – application for leave to amend dismissed with costs.

JUDGMENT

PLASKET J

[1] The plaintiff, the Standard Bank of South Africa Limited, sued Mr Ashbury Davenport and Ms Christobel Davenport, as first to fourth defendants, in their capacities as trustees of the Resolution Estate Trust and the Resolution Farm Trust, and Mr Davenport, as fifth defendant, in his personal capacity, to recover money advanced to the trusts and the fifth defendant totalling R3 553 770.51.

[2] The trial was to commence in early November 2013 before Alkema J. It did not commence because the defendants' legal representatives, including senior counsel, withdrew and their current attorney, Ms Carruthers, was instructed. The matter was eventually postponed, with the costs reserved, because Ms Carruthers had indicated that she intended amending the defendants' plea.

[3] The defendants were put to terms in that respect. They duly filed a notice of their intention to amend their plea. That, in turn, was objected to by the plaintiff leading to this application in which I am required to decide whether leave to amend the defendants' plea should be granted as well as two issues relating to costs, namely the costs of this application and the costs occasioned by the postponement of the trial on 4, 5 and 6 November 2013.

[4] The amendment that the defendants wish to effect is substantial. It involves, in the first instance, the withdrawal of a number of admissions that had earlier been made and, in the second instance, an attack on the standing of the plaintiff based on the allegation that it is not the 'legal holder' of the various agreements upon which it sues the defendants. The plaintiff opposes the relief claimed by the defendants on the basis that the withdrawal of the admissions is *mala fide* as no explanation for wishing to do so has been tendered and that the amendment concerning the plaintiff's standing does not raise a triable issue and is excipiable for disclosing no legal or legitimate defence.

<u>Amendments: the legal principles</u>

[5] Rule 28 of the uniform rules regulates the procedure for the amendment of a pleading. It is not necessary to set out the rule here. Suffice it to say that the application of the rule involves the exercise of discretion by the court to which an application for leave to amend has been made and that discretion must be exercised judicially.[1] In *Moolman v Estate Moolman & another*[2] Watermeyer J held that 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'.

[6] The basis for this approach to amendments is crisply stated by Wessels J in *Whittaker v Roos & another; Morant v Roos & another*:[3]

'This Court has the greatest latitude in granting amendments, and it is very necessary that it should have. The object of the Court is to do justice between the parties. It is not a game we are playing, in which, if some mistake is made, the forfeit is claimed. We are here for the purpose of seeing that we have a true account of what actually took place, and we are not going to give a decision upon what we know to be wrong facts. It is presumed that when a defendant pleads to a declaration he knows what he is doing, and that, when there is a certain allegation in the declaration, he knows that he ought to deny it, and that, if he does not do so, he is taken to admit it. But we all know, at the same time, that mistakes are made in pleadings, and it would be a very grave injustice, if for a slip of the pen, or error of judgment, or the misreading of a paragraph in pleadings by counsel, litigants were to be mulcted in heavy costs. That would be a gross scandal. Therefore, the Court will not look to technicalities, but will see what the real position is between the parties.'

And to much the same effect, Greenberg J, in *Rosenberg v Bitcom*,[4] stated that, although the granting of an amendment amounts to the granting of an indulgence, 'the modern tendency of the Courts lies in favour of an amendment whenever such an amendment facilitates the proper ventilation of the dispute between the parties'.

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[1] Andries Charl Cilliers, Cheryl Loots and Hendrik Christoffel Nel *Herbstein and Van Winsen: The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* (5 ed) (Vol 1) at 678. See too *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168 at 243; *Caxton Ltd & others v Reeva Forman (Pty) Ltd & another* 1990 (3) SA 547 (A) at 569G; *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd & 'n ander* 2002 (2) SA 447 (SCA) para 33.

[2] *Moolman v Estate Moolman & another* 1927 CPD 27 at 29. See too *Affordable Medicines Trust & others v Minister of Health & others* 2006 (3) SA 247 (CC) para 9.

[3] *Whittaker v Roos & another; Morant v Roos & another* 1911 TPD 1092 at 1102.

[4] *Rosenberg v Bitcom* 1935 WLD 115 at 117.

[7] In *Trans-Drakensberg Bank Ltd (Under Judicial Management) v Combined Engineering (Pty) Ltd & another*[5] Caney J reviewed the case law on amending pleadings and then held:[6]

'These observations, in all four Provinces, make it clear, I consider, that the aim should be to do justice between the parties by deciding the real issues between them. The mistake or neglect of one of them in the process of placing the issues on record is not to stand in the way of this; his punishment is in his being mulcted in the wasted costs. 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 opponent by an amendment which has no foundation. He cannot 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 . . . or deliberately refrain until a late stage from bringing forward his amendment with the purpose of catching his opponent unawares . . . or of obtaining a tactical advantage or of avoiding a special order as to costs . . .'

[8] The principles applicable to applications to amend were summarised thus by Henochsberg J in *Zarug v Parvathee NO*:[7]

'A large number of decisions were quoted to me but I do not think it necessary to refer to all of them, suffice it to say that it seems that the general tendency of the decisions of our Courts, following in this respect the trend of English judicial opinion, has been in the direction of allowing amendments where this can be done without prejudice to the other party, and, I think that the following legal principles can be gathered from the decisions quoted to me:

1. That the Court will allow an amendment, even though it may be a drastic one, if it raises no new question that the other party should not be prepared to meet.

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[5] *Trans-Drakensberg Bank Ltd (Under Judicial Management) v Combined Engineering (Pty) Ltd & another* 1967 (3) SA 632 (D).
[6] At 640H-641B. References in the quote have been omitted.
[7] *Zarug v Parvathee NO* 1962 (3) SA 872 (D) at 875H-876E.

2. With its large powers of allowing amendments, the Court will always allow a defendant, even up to the last moment, to raise a defence, such as prescription, which might bar the action.

3. No matter how negligent or careless the mistake or omission may have been and no matter how late the application for amendment may be made, the application can be granted if the necessity for the amendment has arisen through some reasonable cause, even though it be only a *bona fide* mistake.

An amendment cannot however be had for the mere asking. Some explanation must be offered as to why the amendment is required and if the application for amendment is not timeously made some reasonably satisfactory account must be given for the delay. Of course if the application to amend is *mala fide* or if the amendment causes an injustice to the other side which cannot be compensated by costs, or in other words, if the parties cannot be put back for the purposes of justice in the same position as they were in when the pleading it is sought to amend was filed, the application will not be granted.'

[9] An amendment that involves the withdrawal of an admission is treated somewhat differently, in the sense that it is usually 'more difficult to achieve because (i) it involves a change of front which requires full explanation to convince the Court of the *bona fides* thereof, and (ii) it is more likely to prejudice the other party, who had by the admission been led to believe that he need not prove the relevant fact and might, for that reason, have omitted to gather the necessary evidence'.[8] The position was summed up thus by Ogilvie Thompson AJ in *Frenkel, Wise and Co Ltd v Cuthbert; Cuthbert v Frenkel, Wise and Co Ltd*:[9]

'Before granting an amendment to a pleading which has the effect of withdrawing an admission therein I consider that the Court should require a satisfactory explanation of both the circumstances whereunder the admission was made and of the reasons why it is now sought to withdraw it: and, as in the case of all amendments to pleadings, the question of possible prejudice to the opposing party must of course also be considered.'

A rider must be added: the enquiry into whether or not the application to amend is bona fide – in other words, whether a satisfactory explanation has been given – is

[8] *President-Versekeringsmaatskappy Bpk v Moodley* 1964 (4) SA 109 (T) at 110H-111A.

[9] *Frenkel, Wise and Co Ltd v Cuthbert; Cuthbert v Frenkel, Wise and Co Ltd* 1946 CPD 735 at 749. See too *Bellairs v Hodnett & another* 1978 (1) SA 1109 (A) at 1150F-H; *Fleet Motors (Pty) Ltd v Epsom Motors (Pty) Ltd* 1960 (3) SA 401 (D) at 403H-404A; *Watersmeet (Pty) Ltd v De Kock* 1960 (4) SA 734 (E) at 736A-B; *JR Janisch (Pty) Ltd v WM Spilhaus & Co (WP) (Pty) Ltd* 1992 (1) SA 167 (C) at 170C-F.

the first enquiry and, if it is found that the applicant for the amendment does not clear this hurdle, there is no need to consider the second leg of prejudice.[10]

The issues

The withdrawal of admissions

[10] The defendants wish to withdraw a total of 16 admissions made in their already amended plea. The point is made by the plaintiff that when the current plea was amended further admissions were added to those that had already been made.

[11] The admissions that the defendants wish to withdraw go to the heart of the matter. They had admitted entering into the various agreements relied upon by the plaintiffs. They had pleaded only that the plaintiff had not complied with the requirements of the National Credit Act 34 of 2005 and that their admitted indebtedness was not due and payable.

[12] Strangely, now, by way of the amendment for which they seek leave, while the defendants admit signing an agreement, whenever one is alleged by the plaintiff, they deny what is recorded in the agreements attached to the particulars of claim. Stranger still, in argument, Ms Carruthers informed me that the problem that the defendants have is that the *form* of the copies of the agreements attached to the particulars of claim differ from the form of the originals. She said, however, that the *content* of the copies accords with the content of the originals.

[13] To illustrate the effect of what the defendants wish to do, I cite but one example. The amendment seeks to withdraw the admission in paragraph 12 of the plea in respect claim 1, a loan agreement in terms of which, the plaintiff alleged, the Resolution Estate Trust was extended overdraft facilities and in respect of which it owed the plaintiff R1 756 203.05.

[14] The plea states:

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[10] *President-Versekeringsmaatskappy Bpk v Moodley* (note 8) at 111A-B.

’12.1 The Defendants admit only what is recorded in annexure “C” and accordingly admit the agreement as set out therein.
12.2 Any allegation contrary to what is recorded in annexure “C” is denied and the Plaintiff is put to the proof thereof.
12.3 It is admitted that the Estate Trust made draws from time to time on its overdraft account.’

[15] In its notice of amendment the plaintiffs wish to delete paragraphs 12.1 and 12.2 and replace them with this:
‘12.1 The Defendants admit the signing of a credit agreement, but deny what is recorded in Annexure “C” and put Plaintiff to the proof thereof.
12.2 The content thereof is disputed and the Plaintiff is put to the proof thereof’.
It will be noted that paragraph 12.3 remains.

[16] In the founding affidavit Mr Ashbury Davenport states that when his present attorney took over the case, she compared the original agreements with the copies attached to the particulars of claim and saw that there were ‘noticeable differences’ in that the page numbering and paragraph numbers were in different places on the pages, lines were in different positions and there were differences in type setting and program. He then says:
‘In light of my clearly recalling only having signed one original in respect of each credit agreement, it was not possible that I appended my signature to two separate agreements which could have had different formats, spacing, signatures and other marked differences on them.’

[17] He proceeded to say:
‘23. At the time of pleading herein, I was under the mistaken belief that the various Loan Agreements between the parties; which have been attached by the Plaintiff as Annexures to their summons complied with Rule 18(6) of the Supreme Court Act; however upon having been afforded the opportunity of insight into the various original Loan Agreements as set out above in my paragraph 6 hereto; “there were notable differences; the page numbering being in different places on the page, the paragraph numbers and lines similarly being in different positions on the page and differences in the type setting and program upon which the documentation was generated”.

24. This is a factor which the Plaintiff will ultimately have to deal with at trial and I am advised that the onus will fall on the Plaintiff to prove that they indeed have *locus standi* to have commenced enforcement proceedings, the Defendants disputing that the Plaintiff is the legal holder of the respective agreements and thereby having no basis upon which to have begun the present proceedings with are before the Honourable Court.'

[18] When all is said and done, it would appear that the defendants admit having signed the original documents upon which the plaintiff sues, but take the position that because the form of the copies attached to the particulars of claim differ to some extent from the form of the originals, they are not true copies as required by rule 18 (6) of the uniform rules.[11] As indicated above, they accept that the content of the originals – which they have inspected and take no issue with – and the content of the agreements attached to the particulars of claim are identical.

[19] In the plaintiff's answering affidavit, Ms Cassandra Wiggill, a manager employed by the plaintiff, makes the point that 'in this application Defendants admit signature of the documentation upon which Plaintiff's claims are founded and Defendants do not seek to withdraw their admissions as to the signature of that documentation but rather purport to variously deny the content of the documentation admittedly signed by them without more'.

[20] She also says that the defendants' allegations in their founding affidavit do not address the objections raised by the plaintiffs:

'21. Instead generalised and non-specific allegations are made that there are discrepancies between the copies of documents attached to Plaintiff's Particulars of Claim and the original documentation made available to Ms CARRUTHERS. These discrepancies are claimed to relate not to the content of the documentation or to the Defendants' signatures of that documentation but to the appearance in from, type and spacing. Those allegations are followed by reckless and groundless allegations of fraud and forgery on the part of the Plaintiff.

22. What is striking is that the proposed amendments do not make such allegations.

[11] Rule 18(6) provides: 'A party who in his pleading relies upon a contract shall state whether the contract is written or oral and when, where and by whom it was concluded, and if the contract is written a true copy thereof or of the part relied on in the pleading shall be annexed to the pleading.'

23. In my comparison of the copies of the documentation annexed to Plaintiff's Particulars of Claim with the originals nothing of what the Defendants allege is apparent or sustainable. Plainly in copying (and I have no idea how many times the documents now in Ms CARRUTHERS's possession have been copied) there may be a slightly different appearance but the form, content and the presence of the Defendants' signatures are all consistent.'

[21] The trial was postponed, eventually, when an affidavit was filed on behalf of the defendants that made extremely serious allegations that the agreements upon which the plaintiff sued appeared to have been 'manufactured' and 'have been fraudulently utilised in these proceedings'; that the plaintiff never disclosed to the court that it was relying on 'manufactured copies of the various original agreements'; and that the signature of Mr Ashbury Davenport had been forged.

[22] But even amidst this flurry of allegations, the defendants take no issue with the originals of the agreements, which they have inspected:

'The above being the position; consideration of the various agreements which have been manufactured whereupon my signature has been placed, I cannot help but to concern myself with respect to the authenticity of any of the documents attached thereto. Specifically in light of the fact that photocopies can easily be manipulated; which an original agreement cannot be.'

[23] What stands out in the notice of amendment is that there is no mention of the 'manufacture' of documents by the plaintiff, or of the 'manipulation' of documents, or of fraud, or of forgery. It is noteworthy too that, having inspected the original agreements, there is no suggestion by the defendants that they have been 'manufactured' or 'manipulated' or forged. As indicated in the passage from the defendants' affidavit quoted above, and Ms Carruthers' statement during argument, their position is to the contrary – the originals are unimpeachable. In these circumstances, I cannot imagine why the plaintiff would 'manufacture' or 'manipulate' or forge copies of the original agreements. The suggestion is outlandish.

[24] In summary: the defendants admit signing each and every document that the plaintiff relies upon; have inspected the originals of each; take no issue with the

originals; admit that the content of the agreements attached to the particulars of claim accords with the content of the originals; and do not seek to amend their plea to include any of the serious allegations that they made earlier of fraud or forgery on the part of the plaintiff. Instead, their complaint now seems to be that the plaintiff has not complied with rule 18(6) of the uniform rules.

[25] In the founding affidavit there is simply no satisfactory explanation as to why the admissions made in the plea, and added to in an amended plea were made and there is, in the light of the factors that I summarised above, also no satisfactory explanation – to the extent that the founding affidavit may be said to contain any explanation worthy of the name – as to why the defendants now seek to withdraw those admissions. The defendants have failed to establish that their application for leave to amend has been brought bona fide. That being so, there is no need to consider the question of prejudice to the plaintiff.

[26] The application for leave to amend, insofar as the withdrawal of admissions is concerned, must therefore fail.

The attack on the plaintiff's standing

[27] The defendants now wish to plead, in respect of every agreement on which the plaintiff relies, that it has no standing to enforce those agreements because it is not the 'legal holder of the respective Credit agreements'. I have no idea what this is meant to mean but there are other grounds upon which this aspect of the application for leave to amend must fail.

[28] It is not only the withdrawal of an admission that requires a proper explanation: every application for leave to amend requires this as part of the applicant's obligation to establish that the application is bona fide.[12] For the same reasons that the application for leave to amend involving the withdrawal of the admissions is not bona fide, so too is the application for leave to amend in respect of the plaintiff's lack of standing. Secondly, because the allegations of a lack of

[12] See, for instance, the passage from *Moolman's* case (note 2) and *Zarug's* case (note 7) quoted above.

standing as a result of the plaintiff not being the holder of the agreements is meaningless, the amended plea would be excipiable on the basis, at the very least, that it is vague and embarrassing.[13] Thirdly, once the admissions made in the current plea stand, as they must, the proposed amendments as to the plaintiff's standing will be excipiable because they will be in conflict with the admissions in respect of the agreements.[14]

[29] Consequently, the application for leave to amend, insofar as the attack on the plaintiff's standing is concerned, must also fail.

Costs

[30] The process of postponing the trial took three days and, it would appear, the allegations of fraud and forgery only emerged, on oath at any rate, on the third day. That apparently played a role in Alkema J granting the postponement. He reserved the costs for this court or the trial court to determine. In my view, I am best suited to deal with the issue.

[31] Ms Wiggill, in her affidavit, states that the application for the postponement was made from the bar on the first day. When it was opposed, it was postponed to the following day so that a formal application could be made. On that day it was opposed on the basis that no defence was disclosed and again was postponed to the following day. On the third day a supplementary affidavit was filed that made the allegations of documents being 'manufactured' and 'manipulated' and of fraud and forgery. The matter was postponed precisely so that the defendants' plea could be amended in the light of the serious allegations of impropriety on the part of the plaintiff.

[32] These serious allegations play no part in the notice of amendment and, most importantly, there is no allegation that the contents of the agreements attached to the particulars of claim differ from the contents of the originals which the defendants have inspected.

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[13] *Manyatshe v South African Post Office Ltd* [2008] 4 All SA 458 (T) para 5.
[14] *Trope v South African Reserve Bank & another* 1992 (3) SA 208 (T) at 211E.

[33] In these circumstances, and because the defendants sought an indulgence when applying for the postponement, they must pay the plaintiff's costs of 4, 5 and 6 November 2013. Because the application for leave to amend fails on the basis that it has not been brought bona fide, the defendants are liable for the costs of this application.

The order

[34] I make the following order.

(a) The application for leave to amend the defendants' plea is dismissed with costs.

(b) The defendants are directed, jointly and severally, to pay the plaintiff's costs occasioned by the postponement of the trial on 4, 5 and 6 November 2013.

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C Plasket

Judge of the High Court

APPEARANCES

For the defendants (as applicants): B Carruthers of Carruthers Attorneys, Port Elizabeth and Wheeldon, Rushmere and Cole, Grahamstown

For the plaintiff (as respondent): D De La Harpe, instructed by Pagdens, Port Elizabeth and Neville Borman & Botha, Grahamstown