

**IN THE HIGH COURT OF SOUTH AFRICA**  
**[EASTERN CAPE DIVISION: GRAHAMSTOWN]**

CASE NO4589/2017

In the matter between

**JACOBUS MARTHNUS GERBER (SNR) N.O.**

First Plaintiff

**JACOBUS MARTHINUS GEBER (JNR) N.O.**

Second Plaintiff

And

**BETA ELECTRICAL CC T/A FEEDCROW**

Second Defendant

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**JUDGEMENT**

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**Maswazi AJ**

***Introduction***

[1] The relief sought in this application encapsulates condonation of the late filing of the application for leave to amend and an application for leave to amend particulars of claim. The application is opposed by the Defendant who filed objection to the proposed amendment filed in terms of rule 28(1) necessitating the second part of the relief sought in this application.

[2] Both Plaintiffs are the trustees for the time being of the La Motte Trust a trust registered in terms of the Trust Property Control Act under Master's reference number IT235/2014. Both Plaintiffs reside at La Motte Farm in the

district Molteno, Eastern Cape. I shall from now on refer to the Plaintiffs as the Trust and the defendant as such.

[3]The First defendant is Wesbank (Division of First Rand Bank Limited) a financial institution registered as Bank in terms of the laws of the Republic of South Africa with its registered office at 1<sup>st</sup> Floor, Houghton Place, 51 West Street, Houghton, Johannesburg. The Second Defendant is Beta Electrical cc t/a Feedgrow a close Corporation duly registered in terms of the Company Laws of the Republic. It carries on business at Du Toit Street, Bloemfontein.

### ***Factual Matrix***

[4] On the 5<sup>th</sup> of October 2017, the Trust issued summons against the Defendant and West Bank (A Division of First Rand Limited) claiming as against both defendants a sum of R150 000.00 which the Trust paid to the Wesbank for the purchase of the grow room unit ( Feedgrow Systems also known as the Farm in a Box). Proceedings against Wsbank were later withdrawn and the Trust proceeds against the Close Corporation only.<sup>1</sup>

[5] It is alleged in the particulars that the goods purchased by the Trust were delivered by the Second Defendant in a state that rendered the Trust unable to use same for the purpose for which they were purchased or derive therefrom the expected results.

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<sup>1</sup> *This happened after Wesbank had already filed a plea.*

[6] On the 15<sup>th</sup> of February 2018, the Second Defendant filed its plea in resistance of the Trust's particulars of claim. There was no reply to the plea filed by the Second Defendant, instead the pleadings closed and the parties commenced with the pre-trial processes.

[7] On the 2<sup>nd</sup> of October 2018, the Defendant filed a request for trial particulars. There is no indication that the trial particulars were ever responded to, instead on the 24<sup>th</sup> of October 2018, the Trust filed a notice in terms of rule 36(9)(a) with a list of persons that it intended to call as expert witnesses.

[8] On the 15<sup>th</sup> of March 2019, the Trust filed a notice of withdrawal, withdrawing the action against the Wesbank. This notice of withdrawal was followed by the notice of amendment of the Trust's particulars of claim on the 4<sup>th</sup> of December 2019. The notice of amendment attracted a Defendant's notice of objection thereto dated the 7<sup>th</sup> of February 2020.

[9] It is in the intersection between the Trust's notice of amendment of particulars of claim and the Defendant's notice of objection that issues were joined necessitating an application for leave to amend the particulars which served before me in the opposed court, all parties having filed their respective affidavits in support of the application for leave to amend in respect of the Trust and against the amendment in respect of the Defendant. As a precursor to the relief for leave to amend the particulars, the Trust seeks condonation

for the late filing of the application for leave to amend, there is no opposition to the application for condonation. In any event, the explanation in support of the application for condonation is reasonable and on the well-known principles of condonation application, it should be granted.

[10] It is necessary to set out the particulars as they currently stand and later the changes that were sought to be introduced by the amendment before dealing with the Defendant's basis of objection. The reasons for doing so will be apparent later when I deal with the contentions of the parties.

### ***The Current Particulars of claim***

[11] The particulars of claim as they now stand are not at all a good model of clarity. The urge to amend them is thus understandable. In the current particulars, the Trust pleaded its cause of action as follows after pleading the *locus standi* of the parties and the jurisdiction of the Court;

*"10 At all material times the Second Defendant was acting as the first defendant's agent, in the furtherance of the first Defendant's interests.*

*11. On or about 8 April 2015, online, the Trust and the First Defendant, duly represented by the Second Defendant, entered into a written instalment sale agreement. A copy of the agreement is attached hereto marked as "A". The material terms and conditions of the instalment sale agreement were inter alia that:*

*11.1 The Trust purchased the grow room unit from the Defendant for a purchase price of R350 208.00*

*11.2 Trust paid a deposit of R105 100.00*

*11.3 The Trust would pay the Defendant annual instalments in the amount of R80 814.94.*

11.4 *The first Defendant would remain the owner of the goods at all times"*

[13] Later on in the particulars of claim, the Trust pleads that;

*"12 The further terms of and conditions of which the agreement was subjected to which the parties agreed is attached hereto marked as annexure "C" which is incorporated herein as if specifically pleaded.*

*14. Annexure "A", "B" and "C" are hereafter referred to as the "Agreement"*

[14] At paragraph 15 of the particulars, the following appears;

"15 it was an express, implied and alternatively tacit term of the agreement inter alia that the system would;

15.1 Produce large quantities of quality grass and green feed for livestock in the "sprouting chamber"

15.2 The Green feed would be produced within a shortest time cycle;

15.3 The system/produce would not be affected by season change during the year.

15.4 The system would be delivered free of charge by the Defendant

15.5 The system would be installed and connected by the defendant's qualified and trained technician.

15.7 The system would be installed in a working order."

[15] Further subparagraphs of paragraph 15 of the particulars go on to allege other conditions which the Second Defendant was required to comply with regarding the fitness of the Feedgrow or product for the work it was purchased to carry out. These allegations range from a 12 month guarantee regarding the condition of the product to its capacity to produce feed in large quantities all year round particularly in winter. All these, it is alleged,

constitute guarantees given by the Defendant to the Trust regarding feed grow being fit for the purpose for which it was purchased.

[16] It is further alleged that the Second Defendant made representation that the system (product) would deliver green feed and that this representation was made by the Second Defendant's employee to the Trust and that the Trust relied on the truthfulness of the representation made.

[18] It is also alleged that the representation was material and *"went to the root of the agreement and warrant cancellation"*.

[19] The upshot of the above allegation is that the Trust cancelled the agreement within 6 months of the guarantee period in terms of the Consumer Protection Act, 2008.

[20] The consequence of the cancellation already alluded to above gave rise to the claim as appearing in the prayers to the particulars of claim, namely;

*"1 Cancellation of the agreement;*

*2. Order of restitution made up of as follows;*

*1.1 Payment of the sum of R150 000.00*

*1.2 Payment of all amounts paid to the First Defendant in terms of the instalment sales agreement including costs and interests to date of judgment"*

[21] Also sought in addition to the above prayers is an order that First Defendant, failing it, Second Defendant *"collect the product forming the subject of the instalment sales agreement currently stored on the La Motte Farm, within 14 days from the date of the judgment"*

[22] It appears that a new counsel was then engaged on brief to proceed with the matter and for obvious reasons, the first order of business of the new counsel was to make sense of the particulars, hence the notice of the amendment.

[23] The proposed particulars of claim pursued the theme of the Consumer Protection Act in rather more elegant way than is the case in the current particulars of claim. In addition, instead of an order for "*restitution*" as appearing in paragraph 2 of the prayers in the particulars of claim, the proposed particulars of claim quantified the amount of charges, interests including credit life paid to Wesbank and claimed an amount of R77 239.76 as monies paid to Wesbank.

[24] The capital amount claimed was also adjusted to a sum of R350 208 .00 which was referred to as the purchase price of the product sold in terms of the agreement.

[25] As already alluded above, the Defendant raised an objection to the proposed amendment. In the main, the Defendant's objection was, *firstly*, that the amount in addition to the sum of R150 000.00 claimed in the particulars of claim introduces a new cause of action which has since prescribed, and *secondly*, that the amount of R77 239, 76 is equally a new cause of action and it has prescribed.

[26] It will be recalled that the annexures referred to in the particulars of claim are pleaded as being incorporated into the particulars of claim.

[27] At the hearing Ms Beard who appeared for the Defendant, argued that the difference between the current particulars of claim and the proposed particulars is that the latter introduce a new cause of action which is based in the Consumer Protection act 2008 as opposed to what appears as contractual damages appearing in the current particulars.

[28] In a detailed submission, traversing the current particulars and the annexures attached, Ms Watt, who appeared for the Trust, sought to demonstrate that the amount claimed in the proposed amendment are not known and that all what had happened in the proposed amendment was to quantify them as opposed to claiming a *mandamus* as appearing in the prayers of the particulars of claim.

[29] I proceed to deal with the principle applicable to amendment of pleadings and thereafter decide if the objections are well taken.

### ***Principles Applicable to Amendment of Pleadings***

[30] The starting point is the rules that governs the exercise of a right to amend pleadings. The Uniform Rules of Court, provide;

*“any party desiring to amend any pleading or document other than a sworn statement, filed in connection with any proceedings, shall notify other parties of his intention to amend and shall furnish the particulars of the amendment”.*<sup>2</sup>

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<sup>2</sup> Rule 28(1) of the Uniform Rules applicable to proceedings in the Supreme Court ( High Court)

[31]The rule goes on to provide for the contents of the notice of intention to amend and it states that such a notice must also inform the parties to whom it is directed that if no objection is raised regarding the proposal to amend, the amendment shall be effected. Effecting an amendment means no more than the amending party filing and serving the amended pleading, after which the proceedings will carry on, on the basis of the pleadings as amended.<sup>3</sup>

[32] Where the other party objects to the amendment, the party proposing the amendment has no choice but to seek the warrant of the court to effect such amendment. That application must be sought within ten days from the date the objection is received. However, a party confronted by an objection to an amendment has two choices, he can either make a substantive application to court or set the matter down for leave to amend and make his application orally.<sup>4</sup>

[33]The granting or refusal of amendment is a matter entirely in the discretion of the court which the court must exercise judicially taking into account all the circumstances of the matter and any possible prejudice to any party affected thereby.<sup>5</sup>

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<sup>3</sup> Rule 28(4) of the Uniform Rules

<sup>4</sup> *De Kok v Middelhaven 2018(3) SA 180 (GP)*

<sup>5</sup> *Moolman v Moolman Estates 1927 CPD 27 at 29 see also Callaghan v Callaghan (1882) 2 EDC 251, Levy v Rose 1903 20 SC 189 at 193; Thomas v Thomas 1914 CPD 310 at 311-313, Van Der Walt van Eetveldt v Vorster 1914 EDL 303 at 305-306*

[34] In ***Macduff & Co (In Liquidation) v Johannesburg Consolidated Investments Co Ltd***,<sup>6</sup> it was held that;

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

[35] An amendment is not granted for the asking, the party seeking an amendment is seeking an indulgence and must offer an explanation for why the amendment is required and, more especially if the application for amendment is not timeously made, some reasonably satisfactory account for the delay.<sup>7</sup>

[36] However, it has also been held that delay in applying for the amendment is not, in and of itself, a sufficient ground for refusing amendment and that the vital question is whether the amendment will cause prejudice to the other party.<sup>8</sup>

[37] There has been a considerable wealth of judicial authority in relation to which factors must in principle result in the refusal of the amendment. It has been held, for instance, that where the pleading sought to be amended will

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<sup>6</sup> 1923 TPD 718 at 720

<sup>7</sup> 1926 OPD 191 at 194-195

<sup>8</sup> *Trans-Drankensburg Bank Ltd v Combined Engineering 1967(3) SA 632 at 639* where it was held that "Where the defendant would be no worse off if the amendments were granted with a suitable order as to costs than if the provisional sentence was refused and proceedings were commenced afresh, there is no prejudice or injustice to the defendant in granting the amendment. The mere loss of opportunity of gaining time is in law not prejudice or injustice. Where there is doubt about whether prejudice will result in allowing the amendment it must be refused but it must not be refused to punish the Plaintiff."

become excipiable, the amendment of such a pleading must be refused<sup>9</sup>. This principle, whilst originating before our current constitutional dispensation, remains good law in my view. There is no prudence in allowing an amendment that would place the pleadings in a worse situation than they are. The role of the pleadings is to properly outline issues, not only for the parties, but also for the court. Pleadings that render it difficult to understand the cause on which the claim or defence is based stand in the way of justice, and therefore an amendment that carries a possibility of such an eventuality must be discouraged early on, even before the other party confronts it with an exception.

[38] Closer to the instant case, there has been confusion as to whether an amendment which revives a prescribed claim, ought to be granted.<sup>10</sup> On the other hand, amendment has been allowed to effect a cause of action which had prescribed and in which the effect of the amendment would defeat prescription.<sup>11</sup>

[39] With the above principles in mind, I proceed to consider whether the amendment as proposed seeks to introduce a new cause of action. This is

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<sup>9</sup> *Cross v Ferreira* 1950(3) SA 443 (c) at 449G-450G

<sup>10</sup> *Trans-Africa Insurance v Maluleke* 1956(2) SA 273 at 279A where the Court remarked "But assuming that the summons had either to be cancelled or amended the only reason that could be advanced for not amending it was that an amendment would defeat what might otherwise be a good plea of prescription. In support of the contention that the court should not allow an amendment that would have this effect counsel for the appellant cited the case of *Hilton v Sutton Steam Laundry* 1945(2) A.E.R 425. The case illustrates the English practice of refusing amendment which have the effect of introducing new cause of action or new parties and thus defeating the Statute of Limitation. But assuming that our practice would be the same in such cases, the present one is not of that nature.

<sup>11</sup> *Ramphela v Minister of Law and Order* 1979(4) SA 902 at 904H see also *Cordier v Cordier* 1984(4) SA 524 (C)

necessary as a precursor to the consideration of whether such “new” cause of action has prescribed. Necessarily, if the amendment sought to be introduced by the Trust do not constitute new cause of action, that is the end, prescription does not arise.

***Does the proposed amendment constitute a new cause of action?***

[40] The Trust’s cause of action in the particulars as they stand is for the payment of the sum of R150 000.00 being instalments paid to Wesbank for the feedgrow product. The above amount is a typographical error, that amount should have been R105 100.00 being the deposit paid by the Trust to Second Defendant. There is no contestation between the parties regarding this typographical error.

[41] The amount claimed in the proposed amendment is a sum of R350 208, 00, being the purchase price of the product.

[42] The amount of R77 239, 76 represents the finance charges and interests which were built into the instalment and were paid by the Trust to Wesbank. The cause of action for both the amounts claimed in the particulars of claim and those claimed in the proposed amendment remains the breach by the Defendant of the relevant provisions of the Consumer Protection Act, 2008.

[43] The fact that Plaintiff claimed the amount of finance charges by way of the *mandamus*, does not change its origin, as amount claimed for the breach of contract which also contravenes the provisions of the Consumer Protection

Act. Indeed a party suffering breach of a contract is entitled to choose whether to seek restitution by way of *mandamus* or claim contractual damages. In either event, the cause of action remains breach of contract, only the remedy changes.

[44] Moreover, the Second Defendant was forewarned of the nature of the claim from the very moment the summons was served, it was thus early on, in a position to collect and preserve any relevant information necessary to meet the claim or formulate a defence. There can hardly be prejudice from the amendment as proposed.

[45] Dealing with the definition of the concept "cause of action" in ***Evins v Shied Insurance***,<sup>12</sup> Corbett JA said;

*"the meaning of the expression "cause of action", as used in various statutes defining the jurisdiction of the courts or providing for the limitation of actions and other contexts has often been considered by the Courts. In Mckenzie v Famers' Cooperative Meat Industries Ltd 1922 AD 16 this court held that, in relation to statutory provisions defining the geographical limits of the jurisdiction of a Magistrates Court, "cause of action" meant;*

*".....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"*

*(Per Maasdorp JA at 23) in Abrahams and Sons v SA Railways and Harbours 1933 CPD 626, a case concerning prescription of claim against the Railway Administration, which turned on the question as to when the Plaintiff's cause of action arose, Watermeyer J stated,*

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<sup>12</sup> 1980(2) SA 814 AD at 839D

*"the proper legal meaning of the expression "cause of action" is the entire set of facts which gives rise to an enforceable claim and includes all that the plaintiff must set out in his declaration in order to disclose a cause of action. Such cause of action does arise or accrue until the occurrence of the last of such facts and consequently the last of such facts is sometimes loosely spoken of as the "cause of action"*

[46] I agree with this definition of the concept "cause of action" as authoritatively set out in the latter case. It therefore appears to me that if the Trust were to proceed with the claim as it is in its particulars of claim, it would have to prove a contract of sale that is covered by the provisions of the Consumer Protection Act, 2008 and that Second Defendant breached such provisions and claim remedies that may include payment of the amount specified in the prayers, and the *mandamus* in the form of the payment of the monies that the Trust paid to Wesbank being finance charges and interests as contemplated in prayer two, which shall have been crystallised by evidence.

[47] The facts that the Trust would rely upon in the particulars of claim as they are do not differ at all from the facts that the Trust must prove in the event it proceeds with the claim on the basis of the amended particulars as proposed.

[48] I therefore come to the conclusion that the proposed amendment does not introduce a new cause of action. This conclusion, as I have alluded to above, makes it unnecessary for me to decide the question whether such cause of action has prescribed.

[49]In any event, I am not persuaded that the Second Defendant will be prejudiced by the proposed amendment. If there is a new cause of action introduced through the amendment which has prescribed, a proposition I firmly disagree with, the Second Defendant remains entitled to meet such allegations with a special plea of prescription.

### **Costs**

[50]The Trust seeks an indulgence in the form of an amendment which is not given for the asking but the opposition to the amendment does not, to me, seem to be properly advised. Moreover it was always obvious that the Trust's particulars are inelegant and thus would at some point call for an amendment. This was not done until after the close of pleadings. I am thus not inclined to allow it full costs. Therefore, save for costs incurred prior to the launching of the application for leave to amend and those incurred through the application for condonation, costs ought to follow the result.

[51] In the result the following order shall issue;

- 1. The late filing of the application for leave to amend the particulars of claim attached to the summons dated 5<sup>th</sup> October 2017 is hereby condoned.**
  
- 2. The Trust is hereby granted leave to amend its particulars of claim in terms of the Notice of Intention to Amend dated the 4<sup>th</sup> of December 2019 attached to the founding affidavit marked as "FA2"**

- 3. The Defendant to pay costs of the application, such costs to exclude the costs incurred prior to the filing of the application for leave to amend and costs of the application for condonation, but to include the reserved costs of the 14<sup>th</sup> of July 2020.**

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**B Maswazi**

**Judge of the High Court (acting)**

**Date heard: 12 November 2020**

**Date handed down: 24 November 2020**

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