1IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

Date: 26 November 2007

CASE NO. 26125/04

In the matter between :

NEDBANKLTD	Plaintiff
and	
PETCH MANUFACTURING (PTY) LTD	First Defendant
BUILDERS DEPOT NORTHRIDING (PTY) LTD	Second Defendant
BUILDERSDEPOTHOLDINGS(Pty)LTD	Third Defendant
BUILDERS DEPOT PROPERTIES (PTY) LTD	Fourth Defendant
NUMSA INVESTMENT COMPANY (PTY) LTD	Fifth Defendant

JUDGMENT

VAN ROOYEN AJ

[1]This is an Application by the Defendants in terms of Rule 28 (4) to amend their Plea and Counterclaim, in consequence upon the Plaintiff's Notice of Objection in terms of Rule 28 (3).

[2] The basis of the objection is that the proposed amendments are excipiable and lack sufficient averments to constitute a cause of action, alternatively, contains matter which is vague and embarrassing.

[3] The primary object of allowing an amendment is 'to obtain a proper ventilation of the

dispute between the parties, to determine the real issues between them, so that justice may be done'.See: Erasmus *Superior Court Practice* B1 - 178 and the cases cited in note 5.

[4] The general approach to be adopted in applications for amendment has been set out in numerous judgments. The vital consideration is that an amendment will not be allowed in circumstances which will cause the other party such prejudice as cannot be cured by an order for costs and, where appropriate, a postponement. See Erasmus *Superior Court Practice* B1 - 178 and the cases cited in note 7. Watermeyer J states as follows *in Moolman v Estate Moolman* 1927 CPD 27 at 29:

'... 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, in other words, unless the parties cannot be put back for the purposes of justice in the same position as they were when the pleadings which it is sought to amend were filed.'

[5]The power of the Court to allow material amendments is, accordingly, limited only by considerations of prejudice or injustice to the opponent. Prejudice in this context embraces prejudice to the rights of a party in regard to the subject-matter of the litigation, provided there is a causal connection which is not too remote between the amendment of the pleading and the prejudice to the other party's rights. See Erasmus *Superior Court Practice* B1 - 179 and the cases cited in notes 1 and 2.

[6]The *onus* is on the party seeking the amendment to establish that the other party will not be prejudiced by it. See Erasmus *Superior Court Practice* B1 - 179 and the cases cited in 6.The Court will exercise its discretion whether or not to grant an amendment in the light of the following guidelines:

(1) Where the real issue in a case is imperfectly or ambiguously expressed in the pleadings, an amendment designed to place on record the true issue will be allowed. See Erasmus *Superior Court Practice* B1 - 180 and the cases cited in note 1

(2) Save in exceptional cases, where the balance of convenience or some such reason might render another course desirable, an amendment ought not to be allowed where its introduction into the pleading would render such pleading excipiable. The issue proposed to be introduced by the amendment must, accordingly, be a triable issue. A

triable issue is one which, if it can be proved by the evidence foreshadowed in the application for the amendment, will be viable or relevant, or which, as a matter of probability, will be proved by the evidence so foreshadowed. Where the Plaintiff's Particulars of Claim do not disclose a cause of action, an amendment of the Defendant's pleas thereto would be an exercise in futility. See: Erasmus *Superior Court Practice* B1 - 183 and the cases cited in notes 2, 3 and 4.

Amendments

[7] By way of summary, the defendants have amended their plea in the following respects:

(1)First special plea – since the plaintiff has written off the debts as a result of a Reserve Bank rule, the claim had been abandoned by the plaintiff and had fallen away; this was communicated to the defendants and accepted.

(2) Alternatively to the above, the second to fifth defendants did not pass any resolutions authorizing the signing of the deeds of suretyship upon which the plaintiff relies. The signing was also *ultra vires* the powers of the second to fifth respondents. No purported approval or ratification could give validity to the deeds.

(3) Second special plea – the fifth defendant, acting on behalf of the other defendants, entered into a written agreement with Old Mutual Health Care(Pty) Ltd ("OMH"), the latter acting with the express, implied or tacit consent and authority of the plaintiff. The purpose of the agreement was to create one of the largest health care plans in the world. In terms thereof the plaintiff would enjoy a substantial benefit, albeit not by way of shareholding. The disputes between the plaintiff and the defendants had, accordingly, to be resolved by OMH, which is a subsidiary in the group of the plaintiff's majority shareholder, Old Mutual Group. The agreement provided for a compromise or *transactio* as well as a moratorium of the debts of the defendants. A rectification of the agreement is also sought in the second special plea.

(4) The fifth defendant has put forward a conditional counterclaim consisting of a number of small claims. The basis for the claim for damages is premised on the contention that an oral agreement was concluded in terms whereof a business plan was implemented for the provision of financial products and services to the fifth defendant's membership. The remainder is based on an alleged misrepresentation made to it by the plaintiff in respect of a development known as Morgan Creek 186 in which the fifth defendant invested and was actively involved in. The defendants also aver that as a result of the plaintiff's failure to negotiate in good faith, it was impossible for the plaintiff and the defendants to reach an agreement as was envisaged by the memorandum of

understanding. There is also a claim for R65000 in respect of services rendered by a quantity surveyor.

Evaluation

[8] The plaintiff's action against the first defendant is based on monies lent and advanced to the first defendant in terms of an overdraft facility granted to the first defendant by the plaintiff in January 2003. The claim against the second to fifth defendants is based on various suretyships signed by the second to fifth defendants in favour of all debts and obligations owed by first defendant to the plaintiff. Mr *Wasserman*, for the plaintiff, argued that the defendants' special plea is without any merit as a result of clause 9 of the suretyship agreements which reads as follows:

> "No waiver of any of the terms and conditions of this suretyship shall be binding for any purpose unless expressed in writing and signed by the party giving the same, and such waiver shall be effective only in his specific instance and for the purpose given."

To my mind the above clause only has relevance to conduct of the creditor vis-à-vis the surety. However, the pre-condition for the existence and continuation of a contract of surety is the existence of a principal debt. Suretyship being an accessory obligation, the surety is no longer bound when there is no principal debtor for whom he is obliged - see *Colonial Government v Edenborough and Others* (1886) 4 SC at 296 *per* De Villiers CJ (with whom Dwyer and Smith JJ concurred); also see *Millman NO & Stein NO v Kamfer; Millmann NO & Stein NO & Engelbrecht* 1993 (1) SA 305(C). The plea is, accordingly, sustainable for purposes of a trial. Of course, evidence will have to be led as to the exact effect of the write-off referred to and whether it might not have been a mere book entry with no consequence as to the existence of the debt. Nevertheless, that is for the trial court to decide.

[9] The alternative defence that the persons who signed were not duly authorized and had acted *ultra vires*, of course, introduces the doctrine of ostensible authority. I do not believe that insufficient facts were pleaded to support the application of that doctrine. See *South African Broadcasting Corporation v Coop and Others* 2006(2) SA 217(SCA) per Navsa JA. Also see *Glofinco v Absa Bank Ltd t/a United Bank* 2002(6) SA 217(SCA) per Nienaber JA.

[10] As to the second special plea, I agree with Mr *Nowitz* that the question as to whether OMH acted as an intermediary or as a representative of the plaintiff is a matter

which is triable. Whether the application for rectification would succeed would depend on the evidence before the trial court. The memorandum itself might counter such a rectification; but that is a matter for the trial court to decide. The mere fact that OMH is not a party to the present proceedings does not exclude the fifth defendant from applying for rectification. Of course, rectification may only take place if the parties to the document had agreed on a certain matter, but the document did not reflect their common intention. An afterthought is insufficient. In *Soil Fumigation Services Lowveld CC v Chemfit Products (Pty) Ltd* 2004(6) SA 29(SCA) at para [21] Brand JA, accordingly, states as follows:

"Though this deserves some credit for ingenuity, it is clear that the remedy of rectification is not one which easily lends itself to a fallback position by way of afterthought. It is a settled principle that a party who seeks rectification must show facts entitling him to that relief 'in the clearest and most satisfactory manner' (per Bristowe J in *Bushby v Guardian Assurance Co* 1915 WLD 65 at 71; see also *Bardopoulos and Macrides v Miltiadous* 1947 (4) SA 860 (W) at 863 and *Levin v Zoutendijk* 1979 (3) SA 1145 (W) at 1147H - 1148A). In essence, a claimant for rectification must prove that the written agreement does not correctly express what the parties had intended to set out therein. (See eg *Meyer v Merchants' Trust Ltd* 1942 AD 244 at 253.) In the opposing affidavit there is no suggestion whatsoever of any common intention different from the one recorded in clause 1 of the credit agreement. Consequently, the argument based on rectification cannot succeed."

[11] Whether clause 9 of the memorandum of understanding between the plaintiff and the fifth defendant amounts to a compromise or *transactio* is in dispute between the parties. Mr *Wasserman* argued that Gildenhuys J had already on the 6th October 2006, in a matter between the plaintiff and the first defendant (case 338/06), held that clause 9 did not amount to a compromise. The matter was, accordingly, *res judicata*. On the other hand Mr *Nowitz* argued that the matter was not *res judicata* and that Gildenhuys J made no finding *in this matter,* nor did he consider any of the averments set out in the proposed amendment. The judgment of Gildenhuys J has, according to Mr *Nowitz*, no greater weight than an unreported judgment in another matter, on the same document. What distinguishes the present from the previous matter, is that in the present matter (unlike the matter considered by Gildenhuys J), there are the additional and crucial averments pertaining to rectification. I agree with Mr *Nowitz,* subject, of course, to what the trial court may find on the facts.

[12] A further objection is that there are no facts and/or circumstances pleaded, which justify the inference of a moratorium having been agreed upon. There is no merit to this objection, having regard to the proposed amendments and the factual consequences thereof. All depends on the success of the application for rectification, which is defined sufficiently in the amended plea.

[13] The conditional counterclaim of the fifth defendant for damages is based on a memorandum of understanding between the plaintiff and the fifth defendant according to which the latter would become a BEE partner of it in setting up a Peoples Bank. The MOU required that the parties negotiate *bona fide* towards finalizing the arrangement. The plaintiff decided not to continue with the project after a number of years. In the mean time the fifth defendant was, according to the conditional counterclaim, put to enormous costs. The plaintiff counters this counter claim by stating that it was part of the arrangement that nothing would be binding before finalization by way of contract. Although the omission to negotiate *bona fide* is a rather nebulous concept and it is true that the arrangement made everything subject to a final contract, the issue of what *bona fide* negotiation means – judged by the facts - and damages are triable matters, which should be fully ventilated in a trial. That an agreement to negotiate in good faith is recognized in our law in matters where reasonable certainty can be ascribed to the words within the context of the contract, appears from *Southenport Developments (Pty) Ltd v Transnet Ltd* 2005(2) SA 202(SCA) at para [15] *et seq per* Ponnan JA.

[14] In so far as Morgan Creek is concerned, the counterclaim is based on misrepresentation. On behalf of the plaintiff it was argued that the fifth defendant has not made any allegations to give rise to an actionable misrepresentation against the plaintiff. I do not agree. The pleadings mention a number of acts by allegedly duly authorised representatives of the plaintiff and this would be fully fleshed out in a trial.

In the result the objections of the plaintiff are dismissed with costs.

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JCW van Rooyen 30 January 2008

Acting Judge of the High Court

For the Plaintiff : JG Wasserman SC (with him HJ Smith) instructed by Cliffe Dekker Inc, Johannesburg.

For the Defendants: M Nowitz, instructed by Nowitz Attorneys, Johannesburg.