REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 35699/2012

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

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DATE SIGNATURE

In the matter between:

BRADLEY MATTHEW CAULFIELD N.O. First Applicant

SHONA CAULFIELD N.O. Second Applicant

NATURE'S CHOICE PROPERTIES (WADEVILLE) Third Applicant

and

NATURE'S CHOICE HOLDINGS (PTY) LTD Respondent

J U D G M E N T

MASHILE, J:

[1] The Applicants issued summons against the Respondent wherein the First and the Second Plaintiffs, in their capacities as trustees of the Bradcaul

Family Trust, demanded payment of:

1.1 R1 337 969.00

1.2 R300 000.00;

While the Third Applicant claimed payment of:

1.3 R22 630.00.

In addition, all the Plaintiffs claimed payment of interest on the aforesaid amounts at the rate of 15.5% per annum a tempore morae plus costs of suit.

[2] In response to the combined summons, the Respondent served and filed an Exception on 18 March 2013. On 1 August 2013 the Applicants reacted thereto by delivering a Notice of their Intention to Amend as envisaged in Uniform Rule 28. This prompted the Respondent to deliver a Notice of Objection on 6 August 2013. On 16 August 2013 and consequent thereupon the Applicants launched these current proceedings to amend its particulars of claim.

[3] The claims against the Respondent derive from the conclusion of three discrete but entwined written agreements. Other than mentioning that all of them contain a default clause, I do not deem it necessary for purposes of this

judgment to delve into their intricacies. The relevant clauses dealing with default in the first, second and third agreements are 11, 13 and 14 respectively. Their numbering is obviously different but their contents are indistinguishable.

[4] The issues that fall for determination by this court are principally that:

[4.1] Whether or not the Appplicants are entitled to an order permitting them to amend their particulars of claim in the manner described in their Notice of Amendment;

[4.2] Will the amendment undoubtedly remove the source of complaint raised by the Respondent?.

[5] I have been advised that the Exception and the Notice of Intention to Amend are opposite sides of the same coin. The logical way of treating them is to attend to them in the sequence in which they were delivered upon the respective parties. It is correct that if the exception succeeds, it will follow as of necessity that the Application to Amend will fail. Conversely, if the Exception fails the other must succeed.

[6] It is trite that the power of the court to allow amendment is limited only by consideration of prejudice or injustice to the opponent. See Page B1-179 of *Superior Court Practice* by Erasmus, Farlam, Fichardt & Van Loggerenberg. The fact that the outcome of the amendment may result in the one party losing the case is no reason not to allow an amendment.

[7] The general approach is, it would seem, to tolerate amendments especially in instances where the application to amend is not characterised by mala fide and where such amendment will not cause injustice or prejudice to the other party. The amendment will readily be granted in particular, where the injustice or prejudice can be cured by either postponement or costs. See *Devonia Shipping Ltd v MV* Luis *(Yeoman Shipping Co Ltd Intervening)* 1994 (2) SA 363 (C), *O'Sullivan v Heads Model Agency CC* 1995 (4) SA 253 (W) and *Luxavia (Pty) Ltd v Gray Security Services (Pty) Ltd* 2001 (4) SA 211 (W).

[8] However, if excipiability will render a pleading in its amended form indubitably excipiable the general attitude adopted has always been to decline the amendment. See in this regard *Krishke v Road Accident Fund* 2004 (4) SA 358 (W).

[9] Where excipiability of a pleading is only arguable or can be solved by the supply of particulars, then it becomes appropriate to grant the amendment where the other considerations are favourable.

[10] The Plaintiffs instituted the action seeking payment of the amounts

claimed in the particulars of claim. Each agreement contains a default/breach clause, which reads:

> "*In the event of either party (the DEFAULTING PARTY) committing a breach of any of the provisions of this agreements, then the other party (the AGGRIEVED PARTY) shall be entitled to give to the DEFAULTING PARTY written notice to remedy the breach. If the DEFAULTING PARTY fails to comply with that notice within FOURTEEN 14 days of receipt thereof, then, notwithstanding any other provisions of this agreement to the contrary, the AGGRIEVED PARTY shall be entitled to cancel this agreement or to claim specific performance , in either event without prejudice to the AGGRIEVED PARTY'S right to claim damages. The aforegoing is without prejudice to such rights as the AGGRIEVED PARTY may have in terms of this agreement or at law. Notwithstanding the aforegoing , an AGGRIEVED PARTY may only exercise the right of cancellation in relation to a failure to remedy a material breach of a material breach of a material term of this agreement that goes to the very root of this transaction*."

[11] The contention in the Respondent's Exception is fundamentally that in view of the existence of the default clause in all the three agreements, the Applicants were obliged to aver that they have given the Respondent the 14 day period within which to remedy its breach. The absence of the aforesaid critical allegation from the Applicants' particulars of claim means therefore that:

[11.1] The action as presently formulated cannot be sustained;

[11.2] The alleged cause of action is incomplete; and

[11.3] the action was prematurely instituted.

[12] The Applicants responded to the Exception by delivering the Notice of Amendment, which delineates the manner in which they want to amend their particulars of claim. The Notice of Amendment seems to be an acknowledgment or a recognition by the Applicants that the Exception is not without merit as they deal specifically with the complaint raised by the Respondent. Below follows the Applicants' proposed amendment in full:

"*13A.*

13A.1 On a proper interpretation of clause 11 of 'BCV, 13 of 'BC2' and 14 of 'BC3' the trust was *not obliged to give the defendant written notice to remedy any breach when the trusts claim* was *for specific performance, the clause expressly providing inter alia that it was without prejudice to the trust's other rights in terms of the agreement.*

13A.2 In the alternative, and in the event of it being held that it was a precondition to enforcement of the trust's claim herein for such written notice to be provided, then the plaintiff's plead that –

13A.2.1 the defendant, represented by L. MITCHELL, on numerous occasions informed the trust, represented by BRADLEY MATTHEW CAULFIELD, that the defendant was *unwilling to pay further amounts to the trust, including its claim herein;*

13A.2.2 in so doing, on repeated occasions. repudiated its obligations to make payment of the trust's claim herein.

13A.3 On 7 May 2012 the defendant (represented as aforesaid) in relation to the trust's claims instructed the trust not to communicate with the defendant on the subject any further.

13A.4 The said instruction as well as the conduct of the defendant in announcing it was refusing to make any further payment and in repudiating its further obligations under the

> *agreement, constituted* a *waiver by the defendant of any right to receive a written notice*."

[13] The Respondent asserts in response to the proposed amendment that the particulars of claim will remain excipiable even if the court were to allow the amendment. For that reason it objected thereto. I turn now to examine each of the proposed amendments in the order they appear in the Notice of Amendment to test the legitimacy of this argument.

PROPOSED PARAGRAPH 13A.1

[14] The Applicants are importunate that on a proper construction of the default clause, which as I have stated is common to all three agreements, are not obligated to give the Respondent a 14 day written notice to remedy its breach under circumstances where they are seeking specific performance. This argument, as I understand it, is predicated on the basis that it was without prejudice to the Applicants' other rights in terms of the agreement.

[15] This argument does not find favour with me. The clause should be read and understood as it stands. The parties simply wanted the 'aggrieved party' to give notice to the 'defaulting party' prior to commencement of legal proceedings. My understanding of the default clause is that the 14 day notice to the defaulting party is a gateway to any form of action that the aggrieved party may want to take. In other words,

the furnishing of the notice does not confine the aggrieved party to cancellation or specific performance. That is the meaning that should be assigned to the 'without prejudice' portion.

[16] My finding on this proposed amendment means that the allegation that the Applicants gave the Respondent a 14 day written notice was indispensible. Without it the Applicants' action as presently formulated is not sustainable, the alleged cause of action is incomplete and it was premature to institute it. It is incontestable that the particulars of claim will remain excipiable if the court were to allow the amendment as proposed. See the krishke case (supra).

PROPOSED PARAGRAPH 13A.2 & 13A.3

[17] The Applicants plead in the alternative and only in the event that the court concludes as it did on Paragraph 13A.1 of the Notice of Amendment that the allegation was essential for the cause of action to be complete that the Respondent repudiated its obligation to make payment arising from the agreements. The said repudiation, contends the Applicants, constitutes a justification for them not to have given the 14 day written notice to the Respondent calling upon it to remedy the breach.

[17] I cannot go along with this assertion. The point is that a repudiation is a form of a breach besides, as Counsel for the Respondent has argued, the agreement specifically requires the aggrieved party to furnish the

notice. Accepting that it is indeed so, the Applicants were therefore obliged to give the notice as contemplated in the default clause. This argument is for those reasons rejected.

[18] The Respondent further contended that the intended amendment is vague and embarrassing in that the Applicants did not aver that:

18.1 Whether or not any instruction not to communicate with the Defendant was oral or in writing;

18.2 If oral, where the instructions were allegedly given;

18.3 Where the instruction was allegedly received; and

18.4 If in writing, no such writing is identified or annexed.

[19] It is trite that the onus of establishing that a pleading is vague and embarrassing rests with the party making such allegation, the Respondent in this instance. The Respondent must therefore demonstrate "*both vagueness amounting to embarrassment and embarrassment amounting to prejudice*". See ***Badenhorst v Maluti-A-Phofung Municipality [2008] JOL 21078 (O).***

The lack of the allegations referred to in Sub-Paragraphs 14.1 to 14.4 above do not cause the pleading to be vague and embarrassing. It is not ambiguous

such that the Respondent is embarrassed and prejudiced to plead thereto. I agree with the Applicants that the allegations said to have been omitted could easily be obtained by the request of further particulars. However, once I have ruled that the repudiation did not excuse the Applicants from giving the 14 day notice to the Respondent to remedy its breach, it becomes academic to explore this aspect in detail.

PROPOSED PARAGRAPH 13A.4

[20] In a further alternative, the Applicants have also vied that the Respondent has waived its rights to receive the 14 day written notice inviting it to cure the default. This argument concerning waiver is put forward in the face of the provisions of clause 13.2 of BC1, which reads:

> "*No relaxation or indulgence which any party may show the other party shall in any way prejudice or be deemed to be a waiver of such parties rights hereunder*."\

[21] The aforesaid clause is cited as clause 16.2 in the other two agreements, BC2 and BC3. It is hard to grasp on what grounds the Applicants purport to ignore the contents of the clause above. The provisions of that clause are unambiguous and cannot be tossed aside. It is even knottier to comprehend the Applicants' argument in light of the following statement of Nienaber JA in *The Road Accident Fund v R E Mothupi* 2000 (4) SA 38 (SCA):

'Waiver is first and foremost a matter of intention. Whether it is the waiver of a right or a remedy, a privilege or power, an interest or benefit, and

whether in unilateral or bilateral form, the starting point invariably is the will of the party said to have waived it.'

The intention of the parties is unequivocally expressed in Clause 13.2, which I have quoted above. Their intention at the time when they concluded the agreements was that certain actions that could be performed by them should not be construed as waiver.

[22] To the extent that the Respondent's assertion that the proposed amendment is vague and embarrassing under this paragraph is similar to Paragraph 13A.2 and 13A.3, my finding is the same. In consequence I do not believe that it is necessary to restate the position. Lack of those averments does not render the particulars of claim vague and embarrassing. However, as in the case of the repudiation discussed above, my finding that the Respondent did not waive his right to receive the 14 day written notice to cure its default makes it gratuitous to deal with this part because it will not change the outcome.

PROPOSED PARAGRAPH 13A.5

[23] The Notice of Amendment in the court file does not have a proposed amendment numbered 13A.5. I have noted that the heads of both counsel deal with this as though it is part of the notice. For that reason, I have assumed that the court must be in possession of a different notice and

accordingly I shall deal with the paragraph as though it were part of the notice.

[24] The Applicants argue that in consequence of the Respondent's instruction to the Applicants not to communicate any further with it, the 14 day written notice must be deemed to have been fulfilled. If it is correct that the Respondent gave such an instruction, one would have expected the Applicants to send the 14 day written notice warning the Respondent that they will continue with the matter on the basis that there has been fictional fulfilment.

[25] The Applicants' failure to do so must be fatal. Against that background I conclude:

[25.1] The Applicants have failed to give the 14 day written notice to the Respondent calling upon it to remedy its default under circumstances where the provisions of the agreement required them to do so;

[20.2] The alleged repudiation being a breach of the agreement, if anything, required the Applicants to furnish the 14 day written notice to the Respondent. In addition, it should be noted that the default clause is formulated in a peremptory language;

[25.3] The Applicants cannot rely on waiver as it has been specifically excluded in each agreement;

[25.4] The lack of particularity pertaining to how, when and where the repudiation and waiver was communicated does not render the pleading vague and embarrassing as it can still be cured at a later stage. This finding is however academic;

[25.5] Contrary to the Applicants' assertion, the instruction by the Respondent to the Applicants that they were not to communicate with the Respondent anymore constituted a trigger for the 14 day written notice to be sent to the Respondent;

[25.6] In view of the indispensability of the allegation pertaining to the furnishing of the 14 day written notice to the Respondent, the particulars will remain excipiable even if the court were to permit the amendment. See the *Krishke case (supra).*

[26] In the result I make the following order:

1. The Application is dismissed.

2. No order as to costs.

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B MASHILE
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

DATE OF HEARING		: 26 November 2013
DATE OF DELIVERY		: 16 May 2014
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