

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURGCase Number: **42558/2014**

(1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**
(3) REVISED:

28/11/2017

DATE

A handwritten signature in black ink, appearing to be "J. Lowenthal", is written over a horizontal line.

SIGNATURE

In the matter between:

NORMAN DROR LOWENTHAL

Plaintiff

and

STREET GUARANTEE (PROPRIETARY) LIMITED
DORON JEREMY DEFRIES
JEFFREY LIONEL FROMMFirst Defendant
Second Defendant
Third Defendant

JUDGMENT

FISHER J:

INTRODUCTION

[1] The Plaintiff seeks leave to amend his particulars of claim in terms of his notice of amendment dated 24 April 2017. This involves the insertion of a new Claim A and inclusion of attachments to be marked as “**POC1**” to “**POC16**”. The Defendants have objected to the Plaintiff’s notice of amendment, by way of a notice of objection dated 5 May 2017.

PROCEDURAL BACKGROUND

[2] The Defendants initially excepted to Claim A of the Plaintiff’s (amended) particulars of claim which exception was upheld in part by this court *per* Gautschi AJ, who granted an order on 17 February 2017 striking out such Claim A and granting the Plaintiff an opportunity to amend his particulars of claim within 20 days of the date of the order.

[3] The Plaintiff then delivered a notice of amendment on 13 March 2017, within 16 days of the date of the order of Gautschi AJ, in terms of which the Plaintiff sought to amend certain paragraphs of Claim A.

[4] The Defendants objected to the aforesaid notice of amendment on the basis, essentially, that since Claim A had been struck out in its entirety, the Plaintiff could not amend only certain paragraphs of Claim A and, instead, the whole of Claim A had to be amended.

[5] The Plaintiff reacted to the Defendants' aforesaid objection on 28 March 2017 (within 10 days of the Defendants' objection) by way of a notice of amendment in terms of which the whole of Claim A was sought to be amended. The Defendants objected on 6 April 2017 to the Plaintiff's aforesaid notice of amendment. The Plaintiff reacted to the Defendants' aforesaid objection by way of the notice of amendment pursuant to which the Plaintiff now seeks leave to amend. This was objected to – hence the necessity for this application.

LEGAL PRINCIPLES

[6] It is axiomatic that the legal principles applicable to the taking of an exception on the basis of a pleading being vague and embarrassing are apposite when considering objections to amendments on this basis. An excipient must show vagueness amounting to embarrassment and embarrassment amounting to prejudice. The vagueness and embarrassment must strike at the root of the cause of action as pleaded.

[7] The court must not look too critically at the pleadings nor should it adopt an overly technical approach¹. Prejudice to a litigant facing an embarrassing pleading must lie ultimately in an inability to prepare properly to meet an opponent's case².

THE OBJECTION

[8] The notice of objection contained 4 grounds of objection. The fourth ground was abandoned at the hearing. I will deal with the remaining grounds of objection in turn.

[9] The first ground of objection is that the Plaintiff failed to comply with the order of Gautschi AJ of 17 February 2017 in that the Plaintiff "*failed to amend his Particulars of Claim within 20 days*". The Defendants contend that the Plaintiff is thus precluded from amending his particulars of claim.

¹ Standard Bank of SA Ltd v Hunkydory Inv 194 (Pty) Ltd (No 1) 2010 (1) SA 627 (C) para [9] at 630.

² Standard Bank of SA Ltd v Hunkydory Inv 194 (Pty) Ltd (No 1) *supra* para [10] at 630.

[10] The relevant part of the order Gautschi AJ reads as follows:

“3. The Plaintiff is afforded an opportunity to amend his particulars of claim, using rule 28, within 20 days of the date of this order.”

[11] This order plainly affords the Plaintiff the opportunity to seek to amend his particulars of claim within 20 days of the date of the order by serving a notice of amendment in terms of Rule 28(1), which the Defendants could then elect to react to by way of a notice of objection or not. It clearly does not mean, as the Defendants seem to suggest, that the Plaintiff had to deliver, within the 20 days, an already amended particulars of claim and that no further amendment would then be allowed. Mr Hollander for the Plaintiffs asserts that the Defendants' interpretation of the order is nonsensical. I am inclined to agree. In addition, the approach taken by this objection loses sight of the fact that the rules of court allow amendment of pleadings at any stage up to judgment (see rule 28(10)).

[12] The second ground is in essence that the amendment would render the pleadings vague and embarrassing. The Plaintiff clearly pleads oral amendments to the written loan agreement 2 in issue on the pleadings (which agreement does not contain a *“no variation”* clause). The Plaintiff does not, as contended for by the Defendants, plead separate and distinct oral agreements. This is abundantly clear from the notice of amendment. The objections raised, in essence flow, from an obtuse lack of appreciation of the pleaded case which is proposed.

[13] The Defendants go still further and complain in their answering affidavit that the Plaintiff seeks to make *“reference to extrinsic evidence”* and *“seeks to introduce parol evidence which contradicts the definitions and terms of Loan Agreement 2”*. These further objections, apart from having no merit, are not even raised in the Defendants' notice of objection.

[14] The third ground is likewise an attempt to contend for vagueness and embarrassment. It is identical in its terms save that it applies to a similar proposed amendment to loan agreement 3. In this loan agreement there was allegedly a third party, Mr Fechter who is stated to be a joint lender. There is a further objection on

the basis that there has been no cession from Mr Fetcher, pleaded in relation to additional sums claimed.

[15] The Plaintiff pleads an oral cession by Fetcher to the Plaintiff of "*all rights accruing to him*" a written cession of "*any and all rights and claims he may have in and to any amounts loaned, or to be loaned in terms of Loan Agreement 3 . . .*". On a reading of the proposed pleading these pleaded cessions include the additional sums lent and advanced by the Plaintiff and Fetcher to the First Defendant. The Plaintiff's complaint that no cession regarding these additional sums has been pleaded is, again, without foundation.

[16] In conclusion, the Plaintiff is entitled to the amendment sought and there is no merit in any of the objections. The Defendants have not shown that they are prejudiced in any manner whatsoever. The Defendants should not have opposed the amendment and as such they should bear the costs.

ORDER

I thus make the following order:

1. The Plaintiff is given leave to amend his Particulars of claim in terms of his notice dated 24 April 2017;
2. The costs of this application are to be paid jointly and severally by the Defendants.



FISHER J

HIGH COURT JUDGE

GAUTENG LOCAL DIVISION

DATE OF HEARING:

08/11/2017

DATE OF JUDGMENT AND ORDER:

28/11/2017

LEGAL REPRESENTATIVES:

FOR THE PLAINTIFF:

Adv L Hollander instructed by
Schindlers Attorneys.

FOR THE DEFENDANTS:

Adv B Maselle instructed by
Judin Combrinck Inc.