


REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)**

Case No: 2020/5184

(1) DELETE WHICHEVER IS NOT APPLICABLE
(2) REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES/NO
18 December 2023
DATE


SIGNATURE

IN THE MATTER BETWEEN:

**FERNRIDGE OFFICE PARK
(PTY) LTD**

PLAINTIFF

AND

ANDREW HONEY

FIRST DEFENDANT

JUSTINE NICOLE HONEY

SECOND DEFENDANT

In Re

ANDREW HONEY

FIRST APPLICANT

JUSTINE NICOLE HONEY

SECOND APPLICANT

AND

**FERNRIDGE OFFICE PARK
(PTY) LTD**

RESPONDENT

JUDGMENT

SIWENDU J

- [1] The applicants seek the court's leave to amend exceptions delivered against the particulars of claim by the respondent. The application raises questions about whether the exceptions are capable of amendment, the modalities thereof and, when such an amendment can be made.
- [2] The main action in which the exceptions are raised was instituted by Fernridge (Pty) Ltd (Fernridge), as the plaintiff. It is the respondent in this application. Mr Andrew Honey (Mr Honey) was the first defendant and Ms Justine Nicole Honey (Ms Honey), the second defendant (the defendants). The defendants are the applicants in the application. Mr Honey passed away after the matter was heard during the preparation of the judgment. He will be substituted by the executor of his estate in due course.
- [3] Fernridge alleged that it concluded a commercial lease agreement (the lease) of the premises at Block 5 First Floor, Fernridge Office Park, 5 Hunter Avenue, Ferndale with Entrepreneur Media SA (Pty) Ltd (the company). During negotiations, the company was represented by Mr Honey. The lease made provision for: (a) basic rental, (b) storage, (c) parking, for a five- year period, commencing on 1 April 2016, terminating on 31 March 2021. Fernridge claims that the company breached terms of the lease by non- payment, thereafter, abandoned the premises in August 2019. The company left its goods stored at the leased premises. It went into voluntary liquidation in November 2019.

- [4] On 17 February 2020, Fernridge instituted the action personally against the defendants. It sought the payment of (a) the arrear rentals and other charges in the sum of R1 744 532.30 up and until 31 August 2019; (b) the current and prospective damages in respect of the loss of rentals, the payment of ancillary charges in the sum of R 847 470.60 from 1 September 2019 up to 29 February 2020, and (c) damages allegedly suffered consequent upon the breach of the lease in the sum of R200522.75 (inclusive of VAT).

The Particulars

- [5] Fernridge premised its claim on various causes of action, which included inter alia, false representation, recklessness, and negligence and on an intention to defraud. It alleged that the defendants:
- (a) ‘wrongfully and unlawfully and in breach of the agreement of lease, abandoned the premises in August 2019.’ By leaving goods at the premises and thereafter going into voluntary liquidation, they precluded Fernridge from selling the goods and mitigating its losses.
 - (b) as a director of Entrepreneur Media SA (Pty) Ltd, Mr Honey ‘lulled the Plaintiff into a false sense of security that the company was able to pay its obligations arising from the terms of the agreement of lease, would sign an acknowledgment of debt in favour of the Plaintiff and that he would personally execute a suretyship agreement in favour of the Plaintiff.’
 - (c) the defendants were aware that the company had been trading in insolvent circumstances. They ‘nevertheless sought recklessly and/or fraudulently to deceive the Plaintiffs representatives by holding out that the Company would pay its outstanding indebtedness failing which, the First Defendant would personally execute a deed of suretyship, which he astutely failed to do.’
- [6] Fernridge also sought an alternative order:

- (a) declaring the defendants personally responsible ‘without any limitation of liability’, for the debt of Entrepreneur Media SA (Pty) Ltd in terms of Section 424 of the Companies Act, 61 of 1973 (the old Act).
- (b) As a second alternative, it claimed that the defendants were guilty of an offence in terms of Section 214(1)(c) read with Section 22(1) of the Companies Act, 71 of 2008 (the new Act). They were knowingly, a party to the recklessly and/or gross negligence carrying on of the business of the Company and/or carried the business of the Company with the intention to defraud the Plaintiff and/or was trading under insolvent circumstances. In the premises, the First and/or Second Defendants are therefore liable to the Plaintiff in the amount of the said loss in terms of Section 218 (2) of the new Act.

The Joint Notice

[7] On 17 April 2020, the defendants delivered a joint notice being a twofold attack of the particulars of claim. The first ground for complaint, brought as Part A, was that the pleadings lack the averments necessary to disclose and/or sustain a valid cause of action in terms of Rule 23 (1) (a). They stated broadly that:

- (a) Clause 10.2.3 of the General Terms and Conditions of Lease provided that neither the Plaintiff nor the Company would be bound by any representation or warranty not expressly recorded in the lease agreement.
- (b) The Particulars fail to plead the averments necessary to sustain a cause of action for fraud or any representation or act performed by Mr Honey to sustain a cause of action against Ms Honey [the second defendant]
- (c) In the total indebtedness of R 2 592 068.90, being arrears rental and ancillary charges and loss of rental and ancillary charges, the company failed to allege that it fulfilled its reciprocal duties under the lease agreement, had failed to

disclose a valid cause of action, insofar as the Plaintiff's cause of action relies upon its claim for arrear rental and ancillary charges, totalling R 1 744 532.30.

- (d) The Plaintiff has failed to disclose a valid cause of action for holding over damages.
- (e) The offence in terms of Section 214(1)(c) read with Section 22(1) of the Companies Act, 2008 relied upon in the particulars is predicated upon "an act or omission by a company calculated to defraud a creditor (...) or with another fraudulent purpose". The particulars are not based on plea of actual conduct and/or omission by the company to defraud the creditor.

[8] The defendants gave Fernridge 5 days to cure the complaint. It also sought an order setting aside the particulars and for Fernridge to pay the costs.

[9] The second ground, brought as Part B was that the pleadings were vague and embarrassing. The defendants contended that:

- (a) The Particulars do not disclose how or when the First Defendant lulled the Plaintiff into a false sense of security.
- (b) 9.4. Paragraph 11 of the Particulars allege that the Defendants (acting in their capacities as directors) held out that the Company would pay its outstanding indebtedness, failing which, the First Defendant would personally execute a deed of suretyship. The Particulars do not disclose how or when such holding out took place.
- (c) 10.2. It is not possible for a party to "recklessly deceive" another party, in the context of the Particulars deceit (as alleged) requires intention, and recklessness in terms of the Act is conduct performed negligently, viz. without intention.
- (d) The particulars do not set out how the amount of indebtedness is calculated or arrived at rendering it difficult for the plaintiff to assess the quantum.

The amendment

[10] The first amendment sought is in respect of the notice delivered in April 2020. The defendants seek the deletion of the following:

‘WHEREFORE the Defendants pray that:

- A. The Plaintiff’s Particulars of Claim be set aside.
- B. The Plaintiff be afforded the period of five (5) days to deliver amended Particulars of Claim, failing which the action shall be deemed to have lapsed;
- C. The Plaintiff be ordered to pay the costs of the exception; and
- D. Further and all alternative relief.’

[11] The second amendment relates to Part A. The defendants seek to introduce four additional exceptions after paragraph 5.5 as follows:

‘6. Sixth Exception - Plaintiff’s action reliant upon section 424 of the repealed Companies Act 61 of 1973.

6.1 In paragraphs 12 to 13.2 of the particulars of claim the plaintiff lays the foundation for the defendants’ liability upon section 424 of the Companies Act 61 of 1973 (“the Old Companies Act”)

6.2 The Old Companies Act has been repealed by the Companies Act 71 of 2008 (the new Companies Act)

6.3 Chapter 14 of the old Companies Act continues to apply only with respect to the winding up and liquidation of companies.

6.4 The plaintiffs claim in the current action is not for the winding up all liquidation of the company and accordingly section 424 of the Old Companies Act does not apply.

7. Seventh Exception - No facts pleaded to underpin conclusions of law and thus no liability under section 424 of the Old Companies Act or section 218 of the New Companies Act.

7.1 In paragraph 14.1 of the particulars of claim the plaintiff alleges that the company carried on its business recklessly and/or with gross negligence and/or with the intention to defraud the plaintiff and/or it was trading under insolvent circumstances.

7.2 The above are all conclusions of law and not allegations of fact -the plaintiff has not alleged conduct on the part of the Company from which the conclusions can be drawn.

7.3 In relation to the plaintiff’s allegation of fraud, the plaintiff has not pleaded:

7.3.1 when any purported fraud was committed;

7.3.2 where the purported fraud was committed;

7.3.3 the nature of the purported fraud;

7.3.4 the difference between the purported fraud committed by the first defendant this is that purportedly committed by the second defendant; and

7.3.5 how the purported fraud by the first defendant and all the second defendant caused the plaintiff harm.

7.4 As such the plaintiff has not made out a case for the liability of the defendants under section 424 of the old Companies Act or section 218 of the new Companies Act

8. Eight exception - No special factual relationship in support of reliance upon section 218 of the new Companies Act

8.1 The plaintiff did not plead any special factual relationship between it and the first and or second defendant.

8.2 As such, the plaintiff has not pleaded anything that suggests the defendants owed it any special duty to do or refrain from doing anything and/or that the plaintiff had any rights or legal interests to assert against the defendants.

8.3 Accordingly, the plaintiff has not pleaded facts from which it could be said that the defendants have acted wrongfully vis -a vis the plaintiff.

8.4 In the premises, the plaintiff has not made out a case against either of the defendants under section 218 of the New Companies Act.

9. Ninth Exception -no causal link between any alleged conduct by the defendants to any harm suffered by the plaintiff in support of the latter's reliance upon section 218 of the new Companies Act.

9.1 The plaintiff did not plead any causal link between any alleged conduct on the part of the defendants and any harm purportedly suffered by the plaintiff.

9.2 Accordingly, the plaintiff has not made out a case against either of the defendants under section 218 often New Companies Act.

Conclusion

10. In the circumstances the plaintiff's particulars of claim lack averments to sustain a cause of action.

WHEREFORE the defendant prays that:

- i. the plaintiff's particulars are struck out;
- ii. the plaintiff is ordered to pay the costs of this exception;

- iii. the plaintiff is granted leave, if so advised to amend its particulars of claim by notice of amendment delivered within 10 days of the date of such order.

[12] The third amendment is in respect of Part B, dealing with the vague and embarrassing complaint. They seek a (a) deletion of paragraph 10 and its subparagraphs, (b) renumbering paragraphs 6 up to including paragraph 9, to be paragraphs 11 to 14 and, for those paragraphs to renumbered according to the new numbering and the insertion of a new paragraph 14.6. The amendment sought is as follows:

'15 Fifth Vague and Embarrassing Complaint - breach of the lease agreement leading to a claim of R 1 744 532. 30 not identified.

- 15.1 In paragraph 6.6 of the particulars of claim the plaintiff alleges that "as at the date of the aforesaid breach the company remained indebted to the plaintiff in respect of the area and other ancillary charges in the sum of R 1 744 532.30 up until 31 August 2019" however:
- 15.2. The plaintiff does not identify what breach it is referring to nor any date prior to the date of August 2019 upon which it is supposedly occurred.
- 15.3 in paragraphs 6.1 to 6.5 of the particulars of claim the plaintiff makes a number of allegations from which the reader must discern a breach however no discernable breach is pleaded –
- 15.3.1 insofar as the breach relied upon is made to be non-payment:
- 15.3.1.1 in paragraph 6.2 the plaintiff does not plead which "financial obligations" the company "consistently failed to meet".
- 15.3.1.2 in paragraph 6.6 the plaintiff does not plead what rentals were allegedly not paid and what "other ancillary charges" it is referring to;
- 15.3.2 in paragraph 6.3 the plaintiff alleges that the first defendant lulled it into a false sense of security and said he would provide the plaintiff with an acknowledgement of debt and personal surety - none of which constitute a breach by the Company;

15.3.3 in paragraph 6.4 the plaintiff alleges that the first defendant “wrongfully refused and/or neglected to sign an acknowledgment of debt” as he undertook to do - which does not constitute a breach by the Company.

15.3.4 in paragraph 6.5 the plaintiff alleges that the company wrongfully and unlawfully abandoned the premises however –

15.3.4.1 the plaintiff has not pleaded that the **plaintiff** was obliged to stay in the premises;

15.3.4.2 furthermore, the plaintiff’s pleadings are contradictory because in the same breath as alleging that the Company abandoned the premises it also alleges that the company kept installed its goods on the premises (which suggests the company was an occupation);

15.3.5 in paragraph 6.5 the plaintiff furthermore alleges that the Company’s seeking and obtaining its own winding- up constituted a breach however in paragraph 9 of the particulars of claim the plaintiff alleges that this happened on 13th November 2019 (which does not support its case in paragraph 6.6 for a breach as at 31 August 2019); and

15.3.6 In paragraph 6.5 the plaintiff alleges that it was precluded from selling the company's office furniture without the company's consent however this does not constitute the breach of the lease agreement-nothing gave the plaintiff the right to sell the company's office furniture without its consent.

15.4. The defendants cannot discern what breach the plaintiff relies upon in support of its cause of action.

16. **Sixth Vague and Embarrassing Complaint – Breach of lease of agreement leading to claim of R 847 470.60 not identified**

16.1 in paragraph 6.7 of the particulars of claim the plaintiff alleges that it has “and will suffer damages” for loss of rentals and ancillary charges in the sum of R 847 470.60 for the period 1 September 2019 to 29 February 2020 however:

16.1.1 the plaintiff has not pleaded a cancellation of the lease;

16.1.2. The plaintiff has not pleaded why it was purportedly entitled to look for a substitute tenant over that period; and

16.1.3 The plaintiff furthermore pleaded that it was able to place a substitute tenant in the premises over that period.

16.2 In the circumstances the defendants cannot descend or not basis the plaintiff claims damages over such period.

17 Seventh Vague and Embarrassing Complaint – Breach of the lease agreement leading to claim of R 200 522.75 not identified

17.1 In paragraph seven of the particulars of claim the plaintiff alleges that as a direct result of the breach of the lease agreement it suffered damages set out in POC2 however:

17.1.1 as per points 1 and 2 above, the plaintiff has not identified a breach;

17.1.2- POC2 appears to relate to work done to and in relation to the premises however the plaintiff has not alleged that the company was obliged to perform any of the items/work referred to in POC 2 and why it would be obliged to do so; and

17.2 insofar as the Company was obligated to perform any work set out in POC 2 in terms of clause 4.5.8 of the lease agreement (as well as paragraph 5.10 of the particulars of claim) the plaintiff was of first of obligated to request the company to do so before it was entitled to effect any such work itself and the plaintiff has not pleaded that it did so.

18. Eight Vague and Embarrassing Complaint Broad allegations of conduct under s214 (1)(c) and 22 of the Companies Act 71 of 2008 contradictory

18.1 In paragraphs 11 and 14.1 of the particulars of claim the plaintiff alleges the business of the Company was carried on recklessly, grossly negligently with the intention to defraud.

18.2 However, the reckless carrying on of business and gross negligence cannot at the same time be fraud and vice versa as the respective requirements of one extinguished the other, ie if conduct qualifies as reckless and/ or grossly negligent it cannot at the same time constitute fraud.

- 18.3 The plaintiff has not pleaded conduct from which the defendants can determine whether the plaintiff is attempting to make out a case for one or the other, let alone has the plaintiff pleaded alternative conduct that could support both sets of claims.

Conclusion

- 19 In the circumstances the defendants cannot determine the basis for the plaintiff's claim and will be prejudiced if they were compelled to plead thereto."

Analysis

- [13] The first issue is whether an exception is capable of amendment. While a notice is not a pleading¹, the exception is regarded as one once it is delivered. That view follows a long line of authorities to this effect.² The defendants rely on the remarks in *Barclays National Bank Ltd v Thompson*³ (*Barclays*) where the Court stated, that 'an exception is a pleading and, if the excipient wished to argue some exception other than that taken, he should have applied to amend the exception.'

- [14] The defendants source their entitlement to the amendment from Rule 28(1) and (10) which in the relevant parts provides that:

'(1) Any party desiring to amend any pleading or document other than a sworn statement, filed in connection with any proceedings, shall notify all other parties of his intention to amend and shall furnish particulars of the amendment.

.....

(10) The court may, notwithstanding anything to the contrary in this rule, at any stage before judgment grant leave to amend any pleading or document on such other terms as to costs or other matters as it deems fit.'

¹ *De Bruyn v Mile Investment 307 (Pty) Ltd & others* [2017] ZAGPPHC 286 paras 25-26

² *Jowell v Bramwell-Jones* 1998 (1) SA 836 (W).

³ 1989 (1) SA 547.

[15] The text of the Rule 28(1) refers to ‘any pleading or document’ and the amendment may be made in relation to ‘any proceedings.’ It confers a broadly stated right to amend documents and pleadings. It would be inconsistent with the import of the Rule to suggest that a document is capable of amendment, while an exception which is a pleading, is not. It must follow that as a pleading, an exception is capable of amendment, so too is the notice, which qualifies as a document under the Rule. Fernridge, correctly does not take issue with this aspect.

[16] Turning to the mechanism and period for seeking the amendment, Fernridge opposed the amendment on grounds of a delay. It contends that Rule 23 (1)(a) provides a specific period within which to bring an exception. The notice to amend was brought 3 years after delivery of the exception, and the defendants flagrantly disregarded the period prescribed by Rule 23 (1)(a). Fernridge contends further that Rule 28 which regulates amendments does not permit an amendment of an exception, therefore, Rule 23 must take precedent above Rule 28.

[17] Fernridge also contends that the defendants abandoned the exception by launching a Rule 35(14) application. An amendment at this late stage is *mala fide* and the defendants had no ‘bona fide intention to proceed with the exception.’ An application for condonation is necessary, as the defendants were required to explain the delay. They merely stated that a new counsel has been appointed, which is not a satisfactory explanation.

[18] The argument that the exception was abandoned cannot be supported. Rule 35 serves a different purpose of discovery, inspection, and production of documents. The notice under Rule 35 preceded the delivery of the exception. Even if its pursuit came to naught, that is not a valid reason to

dismiss the amendment application. Fernridge did not raise an issue of irregularity in any of the proceedings. Instead, filed its heads of argument to force adjudication of the exception, a further step indicating it recognized that the determination of the exception stood in the way of finalising the litigation. Thus, it accepted that the issue was alive and properly before the Court.

[19] As to the gateway and period for seeking the amendment, a contrast between Rule 28 regulating amendments and Rule 23 dealing with exceptions is necessary. Rule 23 (1) states that:

‘(1) Where any pleading is vague and embarrassing, or lacks averments which are necessary to sustain an action or defence, as the case may be, the opposing party may, within the period allowed for filing any subsequent pleading, deliver an exception thereto and may apply to the registrar to set it down for hearing within 15 days after the delivery of such exception: Provided that —

(a) where a party intends to take an exception that a pleading is vague and embarrassing such party shall, by notice, within 10 days of receipt of the pleading, afford the party delivering the pleading, an opportunity to remove the cause of complaint within 15 days of such notice; and

(b) the party excepting shall, within 10 days from the date on which a reply to the notice referred to in paragraph (a) is received, or within 15 days from which such reply is due, deliver the exception.’ [own emphasis]

[20] Since Rule 23(1)(a) regulates the procedure pertaining to the ‘original exceptions.’ It does not resolve the period and procedure for amending an exception. The submissions by Fernridge that the Court should look solely to Rule 23 treats the amendment as if it were the original exception. The consequence is not tenable. Its effect would be that exceptions would not be capable of amendment. That would conflict with the acceptance that an exception as a pleading. Rule 28 does apply to this application. Fernridge’s

submission overlooks the import of Rule 28 (10) which states that an amendment is feasible and can be made at any stage before judgment.

[21] It is trite that the general rule to an application for an amendment is one of latitude, unless the amendment is *mala fide*.⁴ The defendants submit that the right to amend the exception at *any stage* before judgment is unqualified. That view finds support in *Myers v Abramson (Myers)*.⁵ The Court held that:

‘This rule is in the widest possible terms and does not envisage any period before judgment during which the possibility of making an application for amendment is precluded. On the contrary, the use of the word ‘any’ qualifying the word ‘stage’ seems to specifically exclude the possibility of there being some ‘closed’ period during which, before judgment, such applications cannot be brought. The word ‘any’, as was held in *Rex v. Hugo*, 1926 AD 268 at p. 271, is ‘upon the face of it a word of wide and unqualified generality. It may be restricted by the subject matter or the context, but *prima facie* it is unlimited’. There is nothing in the context here to restrict the meaning of the word, and I think that the rule allows the Court to make an amendment if the circumstances warrant it even during the hearing of an application for absolution. Applications for an amendment have been entertained and allowed even after the cases of both plaintiff and defendant have been closed and in certain cases even argued.

....

It may well be that to allow the interposition of an application for an amendment during the hearing of an application for absolution may deprive the party applying for absolution of a tactical advantage he might otherwise enjoy over his opponent, but I do not think that this can outweigh the major concern of the Court to secure the expeditious and most direct determination of the real dispute between the parties.’

⁴ *Moolman v Estate Moolman and Another*, 1927 CPD 27 at 29.

⁵ 1951 (3) SA 438 (C) at 455E – 446G:

- [22] The defendants do not dispute that the amendment was raised approximately 3 years after the delivery of the exception. Their explanation for the delay is that due financial constraints, they did not ‘push the Rule 35 (12) and (14) application or rest of the litigation.’ They waited for the plaintiff to ‘drive the litigation.’ They instructed new counsel who advised them to amend.
- [23] Fernridge on the other hand delivered its heads of argument in the exception on 10 December 2020. On about 15 December 2020, the defendants launched the Rule 35 application. Fernridge delivered its answering affidavit on 27 January 2021. The defendants delivered their reply on 12 February 2021. None of the parties progressed the issue. Fernridge delivered its heads of argument in respect of the application to compel on 11 May 2022, approximately a year after the defendant’s reply.
- [24] The latitude granted to a court dealing with an amendment is constrained by ‘prejudice to the plaintiff which cannot be cured by an adjournment and an appropriate order as to costs.’⁶ I am equally minded that, ‘an amendment cannot be granted for the mere asking thereof: that some explanation must be offered therefor: that this explanation must be in the founding affidavit filed in support of the amendment application: that if the amendment is not sought timeously, some reason must be given for the delay: that- that party seeking the amendment must show *prima facie* that the amendment has something deserving of consideration: ...that the amendment should not be refused simply to punish the applicant for neglect and that mere loss of time is no reason, in itself, for refusing the application.’⁷

⁶ *Kali v Incorporated General Insurance Ltd* 1976 (2) SA 179 (D).

⁷ *Vinpro NPC v President of the Republic of South Africa* (1741/2021) [2021] ZAWCHC 261 (3 December 2021) para 25.

[25] The explanation offered by the defendants cannot be viewed subjectively, but in the context of the litigation. It is not out of the ordinary or implausible for a defendant to adopt the stance that it will wait for the plaintiff to advance the litigation. Fernridge did not follow through with the litigation doggedly either, accounting for half of the delay. The cases on which Fernridge relies do not find application in the present matter. They apply to instances where there has been an objection based on an irregularity.⁸ It did not raise such an issue in this case. Given the stage of the proceedings, and that new dates for the determination of the exception must still be sought, there can be no prejudice to Fernridge if the amendment is allowed.

[26] What merits observation is that the defendants cast the right to the amendment at any stage before judgment too broadly. Their argument does not account for the interlocutory nature of an exception. An exception implicates the issues on which the *lis* will be adjudicated. That restricts the context for determining the amendment. It follows that it must be determined before the judgment in the main action.

[27] It is apparent from Rule 28 that the practicalities of effecting an amendment to an exception are not clear cut. In my view, the reference to an amendment ‘before judgment’ in Rule 28 (10) must be construed in context of the present case, to mean, the judgment in the exception and not the main judgment. Consequently, the practical effects of such an amendment falls within the ambit of the inherent power of the court to regulate its procedure and affairs.⁹

⁸ *Hill NO. and Another v Brown* 2022 JDR 0238 (WCC); *Van Den Heever NO v Potgieter NO and Others* 2022 (6) SA 315 (FB) para 19 —26.

⁹ *Eke v Parsons* 2016 (3) SA 37 (CC).

[28] I have considered the substance of the proposed amendments. The consideration is not to make definitive findings of the exception, but to merely assess whether they *prima facie*, they raise something worthy of consideration. The error in the notice is patent and justifies the deletion sought. The amendment proposed accords with Rule 23 (1) and affords the plaintiff the correct period to remedy the alleged defects if it so wishes.

[29] The addition of further grounds of exception in Part A raise important questions of law. The additions concern the claim for the personal liability in terms of section 424 old Act. They also concern the interplay and application of the provisions of the old Act with section 218 of the new Act to the claim as currently framed by Fernridge. The factual foundation to sustain the claims in terms of section 218 of the new Act as pleaded and the claim for the personal liability of the defendants is not set out.

[30] In so far as the of Part B, dealing with the vague and embarrassing complaint, the amendments sought serve the purpose envisaged by the Rule 23. Fernridge can cure its particulars if it so wishes and resolve the conflict alleged between the particulars and annexures relied upon to sustain its cause of action. In my view, there is *prima facie* something deserving of consideration by a court in the proposed amendments. The efficacy of the exception procedure to avoid the leading of unnecessary evidence will be advanced. There is no discernible prejudice or injustice to Fernridge if the amendments are granted. The period in Rule 23 to cure the defect should Fernridge wish to do so must be applied.

[31] Although the issues raised in the amendment are deserving, and the defendants are successful, the way they dealt with the exception merits that they should bear the costs of this application.

[32] In the result, the following order is made:

- a. The amendments in paragraphs 10, 11 and 12 of the judgment are granted.
- b. The plaintiff has 10 days from the date of the order to amend its particulars of claim if so inclined.
- c. The defendants shall, within 15 days from the date which such reply is due, deliver the exception.
- d. Either party may thereafter approach the Registrar for a date for the determination of the exception thereof.
- e. The defendants are ordered to pay the costs of the application.



NTY SIWENDU

**JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG**

This judgment was handed down electronically by circulation to the parties' legal representatives via email, and release to SAFLII. The date and time for hand down is deemed to be 18 December 2023 at 10: am.

Date of hearing: 17 October 2023

Date delivered: 18 December 2023

Appearances

For the Applicants/Defendants:	Advocate W Strobl
Instructed by:	Andrew Garrant Inc

For the Respondent/Plaintiff:	Advocate N Segal
Instructed by:	Waks Attorneys