

REPUBLIC OF SOUTH AFRICA



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

Case Numbers: **19386/2022**

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED: YES/NO
25/11/2024	
DATE	SIGNATURE

In the matter between:

RUDOLF JOHN FULS t/a JOHN RUDOLF FULS
LEGAL COST CONSULTANT

Applicant

And

GLINNIS COHEN ATTORNEYS

Respondent

JUDGMENT

SENYATSI J

Introduction

- [1] Two applications are before me in which the applicant applies, in terms of Rule 28(4), for leave to amend his particulars of claim and if his application is not successful, then the respondent excepts to the particulars of claim based on five grounds which are set out below.

Background

- [2] The main action concerns a claim, instituted by the applicant, a legal cost consultant, against the respondent, a practising attorney, for money judgment of R1.6 million which the applicant alleged he is entitled to in terms of the agreement he concluded with the respondent.
- [3] In terms of the alleged agreement, the applicant alleges that he is entitled to charge 15% plus VAT on the amount he saves by challenging the bill of costs taxed in matters he is asked to challenge. In the main action, so avers the applicant, he was required to challenge a bill of costs involving SAFA when the respondent was served a bill of costs in the sum of R12,7 million for taxation. The applicant avers he successfully reduced the R12,7 million by R9,7 million by arguing it with the attorney who submitted the bill and eventually the agreed amount was R3.7 million. He contends that he was entitled to charge 15% of the R9,7 million saving.
- [4] After the summons was served, the respondent raised two exceptions and each notice to amend the particulars of claim, each notice of intention to amend the particulars of claim, was met with an objection. The applicant

contends that the previous two notice of intention to amend are not relevant to the present application.

- [5] The applicant, has attempted to amend his particulars of claim on at least four prior occasions. This is the fifth attempt to amend. On each of the four prior occasions, the proposed amendments were objected to by the respondent. The main basis of the objection being the fact that the applicant is not an admitted attorney or advocate and that he cannot therefore appear before the Taxing Master to object to a bill of costs.
- [6] The applicant contends that in the current notice of intention to amend, his cause of action is founded on an agreement entered between the parties in April 2012 and a subsequent instruction on 30 August 2020 in the Fli-Africa Travel (Pty) Ltd v SAFA matter to oppose a bill of costs.
- [7] He states in the proposed amendment that in terms of the agreement:
 - 7.1 The respondent appointed the applicant as its external legal cost consultant to provide all the legal cost consultant services and advice offered by the applicant.
 - 7.2 The parties agreed to a fee structure set out in Annexure A attached to the notice of amendment.
 - 7.3 The respondent specifically appointed the applicant to oppose a bill of costs rendered by Dikotope Attorneys. The applicant avers that he accepted the appointment and rendered services to the respondent in accordance with his appointment.
- [8] He states in the proposed amendment that in terms of the applicant's fee structure and in opposing bills of costs, the applicant would be entitled to charge an amount equal to 15% plus VAT on each amount saved. He contends in the proposed amendment that 15% of the amount of

R9 725 683.05 which is the total saved amount and that accordingly, the amount saved is, so avers the applicant, because of his efforts, services, and advice. He pleads in the proposed amendment that 15% of the amount save is R 1 458 852.52 plus VAT. He furthermore avers that he presented the invoice to the respondent and the latter failed to make payment within 30 days from the date of invoice presentation.

Respondent's objections

- [9] The respondent raised five objections against the proposed amendments, namely:

9.1 The First objection

The respondent contends the agreement relied on by the applicant in the proposed amendment does not entitle him to claim any amount at all in respect of savings procured on the bill of costs that he did not oppose before the Taxing Master and that he did not settle. He relies on section 30 of the Legal Practice Act which states that only attorneys and advocates can appear before the Taxing Master.

9.2 The Second objection

The respondent contends, that the applicant's proposes amendment is not available for the alleged defective performance of a contractual obligation and/or a delictual claim and would render the amendment of the particulars of claim excipiable in that they will continue to fail to disclose any cause of action to support the applicant's claim or any of his alternative claims.

9.3 The Third objection

The respondent contends that the applicant has not pleaded the requirements for the alleged agreement to constitute either an incidental

credit agreement or creditor agreement or the basis for any legal right to claim his fee and interest in terms of an incidental credit agreement or in terms of a credit agreement. In other words, the applicant has failed to make the necessary averments that he is a credit provider and that he is entitled to charge interest.

9.4 The Fourth objection

The respondent also contends that the agreement relied on by the applicant in his proposed amendment does not entitle him to claim a reasonable fee for any of the services which he rendered, nor does it establish a right to claim a reasonable fee in the circumstances in which he did not oppose the bill of costs or settle the bill of costs in the course of taxation before the Taxing Master. She contends that if the amendment is granted, it will render the particulars of claim exceptible on the basis that they do not disclose a cause of action.

9.5 The Fifth Objection

The respondent contends that the agreement is unlawful as the applicant must allege that he is either an attorney or an advocate and that he has failed to make the allegations in his particulars of claim.

Issues

- [10] The parties have not provided a joint practice note as required in terms of the Directive. They remain apart on what the issues for determination are. The respondent on the one hand, raises various issues in her practice note, such as locus standi, whether the oral agreement relied on by him entitles him to charge the fees as claimed and whether it is prudent for the court to pronounce on the exception given that there is counter-application by the

respondent. The applicant on the other hand states in his practice note that the issues to be determined are narrow by reference to his heads of arguments. As I see it, the issue for determination is whether the proposed amendments are a triable issue and whether the proposed amendment will not cause prejudice the respondent.

The legal principles

[11] Both counsels agree on the general principles pertaining to amendments in general because they rely on the same authorities. The amendment of pleadings is regulated by Rule 28 of the Uniform Rules which reads as follows:

“(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.

(2) The notice referred to in subrule (1) shall state that unless written objection to the proposed amendment is delivered within 10 days of delivery of the notice, the amendment will be effected.

(3) An objection to a proposed amendment shall clearly and concisely state the grounds upon which the objection is founded.

...

(9) A party giving notice of amendment in terms of subrule (1) shall, unless the court otherwise directs, be liable for the costs thereby occasioned to any other party.

(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.” (Underlining for own emphasis).

- [12] In this part, the Uniform Rule refers to “at any stage before judgment” regarding the timing of (or stage until when it is conventionally permissible for the Court to grant) leave to amend.¹
- [13] An application for amendment will always be allowed unless it is made *mala fide* or would cause prejudice to the other party which cannot be compensated for by an order for costs or by some other suitable order such as a postponement.²
- [14] In *Trans-Drakensberg Bank Ltd (Under Judicial Management) v Combined Engineering (Pty) Ltd and another*³ and *Commercial Union Assurance Co Ltd v Waymark NO*,⁴ the basic principles to affect the exercise of the discretion of the Court whether to grant or refuse leave to amend were accurately summarized.⁵ It is trite that the discretion – as always – is to be exercised judicially in the light of all the facts and circumstances before a Court.⁶
- [15] An amendment application will be refused if the amendment would introduce a pleading which is excipiable– either because it is impermissibly

¹ *PKX Capital (Pty) Ltd v Isago At N12 Development (Pty) Ltd* [2023] ZAGPPHC 646 (7 August 2023) at para 23.

² *Imperial Bank Ltd v Barnard and others NNO* 2013 (5) SA 612 (SCA) at para 8.

³ 1967 (3) SA 632 (D) at 640H-641C.

⁴ 1995 (2) SA 73 (Tk) at 77F-I.

⁵ *Caxton Ltd and others v Reeve Forman (Pty) Ltd and another* 1990 (3) SA 547 (A) at 565G and *Benjamin v Sobac South African Building and Construction (Pty) Ltd* 1989 (4) SA 940 (C) at 957G-H. See generally Cilliers, AC, Loots, C and Nel, HC. Herbstein and Van Winsen: Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa, 5th edition, Jutastat e-publications (last updated: 30 November 2021) (hereafter Herbstein & Van Winsen Civil Practice) at 675-693.

⁶ *GMF Kontrakteurs (Edms) Bpk and another v Pretoria City Council* 1978 (2) SA 219 (T) at 222B-D; *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd en 'n ander* 2002 (2) SA 447 (SCA) *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd* 2002 SA 447 (SCA) at par 33. See generally Herbstein & Van Winsen Civil Practice at 676.

vague or because it discloses no cause of action.⁷ Another example of prejudice is where a party, through an amendment, seeks to withdraw an admission.⁸

- [16] The example of the type of prejudice falling into this category given in *Imperial Bank Ltd v Barnard and others NNO*⁹, was an amendment which seeks to introduce a claim which has prescribed. Another example of prejudice which would lead to the refusal of an amendment is if the amendment would introduce a pleading which is excipiable – either because it is impermissibly vague or because it discloses no cause of action.¹⁰ Another example of prejudice is where a party, through an amendment, seeks to withdraw an admission¹¹ (but even then only in limited cases; for example where the plaintiff for some reason no longer has access to the evidence to prove its response to a fact previously admitted by the defendant).

⁷ *Imperial Bank Ltd v Barnard and others NNO* 2013 (5) SA 612 (SCA) para 8.

⁸ *Small Enterprise Finance Agency Soc v Razoscan (Pty) Ltd* 2022 JDR 0508 (GP) at para 6.9

⁹ *Imperial Bank Ltd v Barnard and others NNO* 2013 (5) SA 612 (SCA).

¹⁰ *Recycling and Economic Development Initiative of South Africa v Electronic Media Network* 2022 JDR 0456 (GJ) at para 8

¹¹ *Small Enterprise Finance Agency Soc v Razoscan (Pty) Ltd* 2022 JDR 0508 (GP) at para 6.9

[17] In *Blaauwberg Meat Wholesalers CC v Anglo Dutch Meats (Exports) Ltd*¹² the Court said the following about amendment of pleadings: “Amendments are regulated by a wide and generous discretion which leans towards the proper ventilation of disputes and are granted according to a body of rules developed in that context. Whether there has been compliance with a statutory injunction depends upon the application of principles wholly unrelated to the rules just mentioned and without the exercise of a discretion, principles which were expressed by Van Winsen AJA in the well-known passage from *Maharaj and Others v Rampersad* 1964 (4) SA 638 (A) at 646C-E as follows:

“The enquiry, I suggest, is not so much whether there has been “exact” or “substantial” compliance with this injunction but rather whether there has been compliance therewith. This enquiry postulates an application of the injunction to the facts and a resultant comparison between what the position is, and what according to the requirement of the injunction it ought to be. It is quite conceivable that a court might hold that, even though the position as it is not identical with that which it ought to be, the injunction has nevertheless been complied with. In deciding whether there has been compliance with the injunction the object sought to be achieved by the injunction and the question of whether the object has been achieved are of importance. Cf *J.E.M. Motors Ltd v Boutle and Another* 1961 (2) SA 310, at pp. 327-8.”

[18] In *Summer Season Trading v City of Tshwane*¹³, Basson J pointed out that:

¹² ZASCA 144; [2004] 1 All SA 129 (SCA); 2004 (3) SA 160 (SCA)

¹³ 2021 JDR 0291 (GP).

“The decision of *Affordable Medicines Trust and Others v Minister of Health and Others*¹⁴, the Constitutional Court echoed the well-known principles developed over many years but added that the question ultimately should always be ‘what do the interest of justice demand?’ As the Court said in *Affordable Medicines*: ‘The principles governing the granting or refusal of an amendment have been set out in a number of cases.’ There is a useful collection of these cases and the governing principles in *Commercial Union Assurance Co Ltd v Waymark NO*¹⁵. The practical rule that emerges from these cases is that amendments will always be allowed unless the amendment is mala fide (made in bad faith) or unless the amendment will cause an injustice to the other side which cannot be cured by an appropriate order for costs, or ‘unless the parties cannot be put back for the purposes of justice in the same position as they were when the pleading which it is sought to amend was filed’. These principles apply equally to a notice of motion. The question in each case, therefore, is, what do the interests of justice demand?”

- [19] In *Living Hands (Pty) Limited and Another v Ditz and Others*¹⁶ Makgoka J (as he then was) summarized the general principles on exception as follows:

“[15] Before I consider the exceptions, an overview of the applicable general principles distilled from case law is necessary:

- (a) In considering an exception that a pleading does not sustain a cause of action, the court will accept, as true, the allegations pleaded by the plaintiff to assess whether they disclose a cause of action.

¹⁴ 2006 (3) SA 247 (CC) at para 9.

¹⁵ NO 1995 (2) SA 73 (TkGD)

¹⁶ 2013 (2) SA 368 (GSJ) at 374G, para 15.

- (b) The object of an exception is not to embarrass one's opponent or to take advantage of a technical flaw, but to dispose of the case or a portion thereof in an expeditious manner, or to protect oneself against an embarrassment which is so serious as to merit the costs even of an exception¹⁷
- (c) The purpose of an exception is to raise a substantive question of law which may have the effect of settling the dispute between the parties. If the exception is not taken for that purpose, an excipient should make out a very clear case before it would be allowed to succeed.¹⁸
- (d) An excipient who alleges that a summons does not disclose a cause of action must establish that, upon any construction of the particulars of claim, no cause of action is disclosed.¹⁹
- (e) An over-technical approach should be avoided because it destroys the usefulness of the exception procedure, which is to weed out cases without legal merit.²⁰
- (f) Pleadings must be read as a whole, and an exception cannot be taken to a paragraph or a part of a pleading that is not self-contained.²¹
- (g) Minor blemishes and unradical embarrassments caused by a pleading can and should be cured by further particulars.²²

¹⁷ *Barclays Bank International Ltd v African Diamond Exporters (Pty) Ltd* (2) 1976 (1) SA 100 (W).

¹⁸ *Van der Westhuizen v Le Roux* 1947 (3) SA 385 (C) at 390.

¹⁹ *Fairoaks Investments Holdings (Pty) Ltd v Oliver* [2008] ZASCA 41; 2008 (4) SA 302 (SCA) at para [12].

²⁰ *Jowell v Bramwell-Jones and Others* 1998 (1) SA 836 (W) at 902 J.

²¹ *Jowell* above at 900 J.

²² *Telematrix* at para 13.

Analysis and reasons

[19] The principal point of objection by Mr Miltz SC for the respondent is that the applicant has no locus standi to sue based on contract because he fails to allege whether he is a practising attorney or advocate and by implication whether he is entitled to charge a fee or not in terms of the Legal Practice Act. He relied on *J.J.V.R v Taxing Master, High Court of South Africa (Western Cape Division) and Others*²³. Whilst the case is an authority on appearance before the Taxing Master about the bill of costs, it does not serve as authority as in this case where the applicant avers that he attended to the offices of the attorney who drafted the bill to debate the bill which was allegedly reduced from R12 million to R3,7 million giving rise to the alleged saving of R9,3million. There is in my view a triable issue the facts upon which the averments have been made can be pleaded upon.

[20] While it is plausible to raise this point, that as demonstrated, the facts were different in *Taxing Master* referred to above, as it dealt with the review of the of the Taxing Master's decision. What the submission fails to appreciate is that this is a point that can be raised in a plea and not as an exception and there is no suggestion that the proposed amendment will embarrass the respondent or that she will be prejudiced. Reliance on what the section 30 of the Legal Practice Act provides is too pre-mature because this a point of law that can be determined at trial and not at this stage. The applicant's cause of action is pleaded, namely through an agreement allegedly concluded with the respondent. Accordingly, the objection must fail.

²³ [2023] ZAWCHC 261; [2024] 1 All SA 178 (WCC); 2024 (2) SA 457 (WCC)

- [21] The second objection seeks to attack and isolate certain averments from the proposed amendment. That the applicant's proposed amendment is not available for the alleged defective performance of a contractual obligation and/or a delictual claim and would render the amendment of the particulars of claim excipiable in that they will continue to fail to disclose any cause of action to support the applicant's claim or any of his alternative claims are also without merit because it can be pleaded upon for determination at trial. It is not suggested by the respondent that upon any construction of the disputed averment, that there is no cause of action and that she will be embarrassed by having to plead to the averments. The second objection must also fail.
- [22] As to the third objection that can be summarised as the alleged failure by the applicant to plead the requirements for an incidental agreement or credit agreement that entitles the applicant to charge the fee as alleged, this is taking a technical point that does not help in disposing of the matter. It is the over-technical objection that the courts must guard against. Consequently, the third ground of objection must fail.
- [23] On the fourth ground of objection that the applicant has failed to make the necessary averment that he is a credit provider and that he is entitled to charge interest, the applicant avers in terms of the proposed amendment that in terms of the agreement, he was entitled to charge interest at 2 % on all overdue amounts. In my view, it is not necessary to make the averments as contended by the respondent because it was not the intention of the legislature in terms of the National Credit Act that every conceivable small trader of goods or services had to register as a credit provider²⁴. The

²⁴ *Collotye Labels RSA Pty Ltd v Prinspak CC and Others* [2016] ZAWCHC 159 para 34.

respondent is free to plead that either the averment is correct or not correct. To object to the amendment based on the reason as contended by the respondent does not assist with whether there is a triable issue or not. In any event, the applicant avers that he previously rendered services of similar nature to the respondent for which he was paid. It follows that this ground of objection must also fail because the respondent can plead to the averment as proposed in the amendment.

[24] On the fourth objection that the applicant has failed to plead the cause of action premised on the alternative claim as set out in paragraphs 44 to 46 being the hourly rate claim, it should be remembered that the letter of acceptance by the applicant references to “Advice Fee” based on other charges other than percentage based as set out in paragraph 6.6 of the proposed amendment. The claim is brought as an alternative to the main claim if the Court does not find in favour of the applicant on the main claim. There is nothing embarrassing about the averment and it raises a triable issue. There can certainly in my view, not be doubt that the respondent can plead to those averments. There is no prejudice averred by the respondent and there cannot be any embarrassment to plead. Consequently, this objection ground must fail.

[25] Lastly, I deal with the fifth ground of objection which is that the agreement is unlawful as the applicant must allege that he is either an attorney or an advocate. I see no valid reason the respondent cannot plead that the applicant is not an attorney or an advocate and raise whatever defence she deems fit. In my view, this ground of objection has no merit and must fail.

Order

[26] Having considered the submissions made on behalf of the parties, the following order is made:

- (a) The applicant is granted leave to amend his particulars of claim in accordance with his notice in terms of Rule 28(1) dated 19 October 2023;
- (b) The applicant shall deliver his amended particulars of claim within five days of this order;
- (c) The respondent is to pay the costs of the application on scale B.

A handwritten signature in black ink, consisting of a large, loopy 'S' followed by several vertical strokes, is positioned above a solid horizontal line. A black rectangular redaction box covers the middle portion of the signature.

M. SENYATSI
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Delivered: This Judgment was handed down electronically by circulation to the parties/ their legal representatives by email and by uploading to the electronic file on Case Lines. The date for hand-down is deemed to be **25 November 2024**

Appearances:

For the Applicant: Adv WC Carstens

Instructed by Otto Krause Attorneys

For the Respondent: Adv I Miltz SC

Instructed by Glynnis Cohen Attorneys

Date judgment reserved: 2 September 2024

Date of Judgment: 25 November 2024

