

IN THE KWAZULU-NATAL HIGH COURT  
DURBAN AND COAST LOCAL DIVISION  
REPUBLIC OF SOUTH AFRICA

CASE NO: 5866/2009

In the matter between:

PINTADO TRADING 800 (PTY) LIMITED

Plaintiff

and

FLEET AFRICA (PTY) LIMITED

Defendant

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JUDGMENT

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MADAM HUGHES-MADONDO AJ

This is an application by the plaintiffs seeking leave to amend their particulars of claim in terms of Rule 28 of the Uniform Rules of this Court.

This application arises as a result of the defendants raising an exception to the plaintiff's particulars of claim, averring that these were vague and embarrassing, alternatively,

failed to disclose a cause of action, alternatively irregular. The plaintiffs then filed their notice to amend, to which the defendants raised an objection. The defendants submitted that the proposed amendment did not cure the defect evident in the particulars of claim.

In the particulars of claim the plaintiffs seek a debatement arising from a fiduciary relationship between the parties. On an examination of the pleadings it transpired that on the 8 June 2006, the parties entered into a Memorandum of Understanding (MOU) wherein which they recorded their *intention* “to establish a partnership in the form of a shareholding in a company to be formed, namely Fleet Africa KZN (Pty) Ltd (“BidCo”)”. This company would deliver services and solutions related to Local and Provincial Government Outsourced contracts.

After the signing of the MOU plaintiffs sought and subsequently procured tenders in the name of the company to be formed. On 3 April 2007, the parties signed a shareholder’s agreement. This agreement recorded that:

“The parties wish to record, in a comprehensive agreement, the matters referred to in the MOU. Accordingly, with effect from the signature date, *the parties have agreed to regulate and govern their relationship as shareholders in the Company on the terms contained in this agreement on their basis that this agreement substitutes the MOU with effect from the signature date, on which date the MOU shall be of no further force and effect*”. (Emphasis added)

The exception raised by the defendants is that the particulars of claim were vague, embarrassing, did not make out a cause of action alternatively were irregular. In a

nutshell the amendments sought amount to an insertion of specific paragraphs found in the MOU. The grounds set out for the exception are the exact same grounds set out for the defendants objection to the plaintiffs amendment, that these are “that the particulars of claim as presently formulated are excipiable as being vague or embarrassing or failing to disclose a cause of action alternatively are irregular. The proposed amendment (if granted) does not cure the above defects in the particulars of claim. Rather such amendment exacerbates the manner in which the particulars of claim are excipiable as being vague or embarrassing or failing to disclose a cause of action alternatively as being irregular.”

I do not propose to deal in detail with the objections, save to say, that the crux of the objection is that the plaintiffs have not set out clearly the basis upon which they rely on the legal conclusion sought in their prayer.

The Court has discretion to grant an amendment. This must be exercised judicially in light of the facts and circumstances before it. See *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd* **2002 SA 447 (SCA) @ 462.**

When deciding whether to grant an amendment, the crucial issue is whether the amendment would cause the other party “such prejudice as cannot be cured by an order for costs and where appropriate postponement.” See *Trans-Drakensberg Bank Limited (under judicial management) v Combined Engineering (Pty) Limited and Another* **1967 (3) SA 632 (D) @ 638A-B.**

The defendants argue that if the amendment were to be allowed, this would not cure the defects that exist in the particulars of claim, but would rather exacerbate the excipiability of the particulars of claim.

The courts have refused an amendment which would render the pleadings excipiable. A refusal will only arise where it is clear that the pleadings “would be excipiable” and not “may be excipiable”. If it is arguable that the amendment will render the pleading excipiable then the correct approach is that the amendment should be allowed. See *Crawford-Brunt v Kavnat and Another* **1967 (4) SA 308 (c) @ 310 G-H**.

I am mindful of the fact that at this stage of the proceedings I am not tasked to deal with an exception, but I need to consider on the fact and circumstances before me whether indeed the amendment sought would indeed render the pleadings excipiable. If I conclude that they would, then the amendment will not be allowed, however if I conclude that it’s arguable whether the amendment will render the pleadings excipiable then the amendment will have to be allowed. See *Crawford-Brunt* above.

I turn to consider whether the amendment sought would clearly be excipiable. The plaintiff’s case is that the MOU and the shareholders agreement both created a fiduciary relationship between the parties. This relationship stems from, but is not restricted to a partnership. According to the plaintiffs the partnership arises from the MOU contract. This partnership confers the fiduciary relationship relied upon by the plaintiffs in their

claim for a debatement of account. The plaintiffs seek an order for the production of all relevant documentation relating to all contracts, in KwaZulu Natal, obtained by Fleet Africa KZN (Pty) Ltd, where the defendants or Fleet Africa KZN (Pty) had been a party.

The defendants submit that on a closer look at the particulars of claim and the proposed amendment, the plaintiffs have failed to clearly set out why they are entitled to the relief sought. Further, that the pleadings do not allege whether the entitlement emanates from a fiduciary relationship, as between partners in a partnership or a contractual obligation as is alluded to in the shareholders agreement.

It is common cause that the company Fleet Africa KZN (Pty) Ltd never came into existence. Therefore the shareholders agreement could not have come into force or effect since it was to replace the MOU on the formation of aforesaid company.

Mr Tobias SC who represented the plaintiffs submitted that the parties had stipulated in the MOU that they intended to enter into a partnership. I agree with this submission.

I note that from the outset the intention of the parties was evident from the MOU. The parties agreed to form a partnership in the form of a shareholding company to be formed. In my view, the MOU is the basis of the plaintiffs claim and this is set out in the particulars of claim and the amendment merely reinstates the terms found in the MOU. I cannot see how the defendant can be prejudice by the plaintiff's amendment in this case.

Even though the defendants contend that the amendment does not cure the defect but rather exacerbate it, when I look at the pleadings on a whole, I do not have the facts to consider if indeed these defects are exacerbated because as I said before the objection is similar to the exception which obviously does not deal with these facts. In my view the defendants have not made out a case and it is arguable whether the amendment even renders the pleadings excipiable.

For the reasons above I am in favour to grant the amendment. The defendants are at liberty to except to the amended particulars of claim in order for a Court to deal with the exception.

Nowhere in the plaintiffs pleadings have a tender been made for wasted costs occasioned by the amendment. The plaintiffs are in fact seeking an indulgence from the Court and to cure any prejudice the defendant may suffer, it is prudent that I award a cost order in favour of the defendants.

In the result I make the following order:-

- 1) The application to amend is granted;
- 2) The amendment is to be effected within 10 days from the date of this order;
- 3) The defendants may within 15 days after the amendment is effected, make any consequential adjustment to their papers and also take the steps contemplated in Rule 23 and 30;

- 4) The plaintiffs are ordered to pay the defendants wasted costs occasioned as a result of this application.

HUGHES-MADONDO AJ

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APPEARANCES:

Counsel for the plaintiffs: Mr. D. G Tobias SC

Attorneys for plaintiffs: Shepstone & Wylie

Counsel for the defendants: Mr. C. J Pammenter SC

Attorney for defendants: Fluxmans Inc. c/o Larson Falconer Inc.

Heard on: 23 March 2010

Delivered on: June 2010

