

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

Case No: 11680/2012

In the matter between:

BRUCE HEAFIELD

PLAINTIFF

and

RODEL FINANCIAL SERVICES (PTY) LTD

DEFENDANT

ORDER

- 1 The application to amend is granted.
- 2 The plaintiff is to pay the defendant's costs occasioned by the amendment.

JUDGMENT

Delivered on: 15 June 2022

Masipa J:

Introduction

[1] This is an application by the plaintiff in the action for leave to amend its particulars of claim. The application is in terms of Uniform rule 28. This is pursuant of the notice of intention to amend that he filed on 31 July 2020 which notice was objected to by the defendant.

The facts

[2] The plaintiff, a businessperson, instituted action against the defendant, a financial service provider (hereinafter referred to as 'the parties') following a loan agreement concluded between the parties on 22 December 2006, which included three suretyships in favour of the plaintiff. The loan is said to have also been secured by a written mortgage bond registered on 7 March 2007.

[3] The agreement is subject to the National Credit Act, 2005 ('the NCA') and National Credit Regulations, 2006 ('the Regulations'). It was pleaded that the agreement was a mortgage agreement and in terms of Regulation 42(1), the maximum interest rate applicable is calculated as $[(RR \times 2,2) + 5\%]$ per year (as at the date of the application), with 'RR' being the Reserve Bank Repurchase Rate ('the Repo Rate'). At the time the agreement was concluded, the Repo Rate was 9,00% and increased up to 12,00% by 13 June 2008. It then decreased overtime and as at 13 August 2009 was 7,00%.

[4] Sometime before 2009, the defendant instituted proceedings against the plaintiff and others in the Gauteng Local Division of the High Court, Johannesburg for payment of R22 633 138.62 plus interest at the rate of 0,1% per day from 1 April 2008 to date of payment. On 30 June 2009, judgment was granted directing the plaintiff to pay the defendant R18 796 000 and interest aforesaid calculated from 11 March 2008 to date of payment. The judge signed a copy of the judgment on 20 March 2009.

[5] According to the plaintiff, the judgment debt was paid with interest. However, the plaintiff contends that interest was incorrectly calculated. He contends that the interest amounted to 36,5% and was in excess of the lawful and permissible rates in terms of the NCA. Accordingly, the interest the defendant could claim was not regulated by the agreement. Interest was therefore to be calculated at the prescribed rate of interest.

[6] The plaintiff contends that the prescribed rate of interest was 15,5% per annum and is not variable interest. The plaintiff mistakenly and reasonably believed that interest stipulated and granted by the High Court, Johannesburg was correct and paid to the defendant the total sum of R32 220 000.53. This comprised of an unlawful interest amount of R13 424 005.54 which amount the defendant owes to the plaintiff.

[7] If the principle of set off is applied, the defendant is indebted to the plaintiff in the sum of R8 531 123.51 and the relief was accordingly sought. All this appeared in the plaintiff's amended particulars of claim dated 25 July 2019.

[8] In addition to this, there was a conditional claim by the plaintiff based on the same facts. At paragraph 2 of the conditional claim, the plaintiff contends that interest for R18 798 000 at the rate of 0.1% per day calculated from 11 March 2008 to date of payment amounts to R11 578 336. Further, that acting on the bona fide belief that interest was correct, the plaintiff paid the defendant an amount of R34 797 622.83

[9] As an alternative plea, it is contended that Lazy Jukskei Realisation, a business entity belonging to the plaintiff paid an amount of R34 797 622.83 on behalf of the plaintiff the plaintiff under a bona fide but mistaken and reasonable belief that the interest payable pursuant to the judgment against the plaintiff was correctly reflected. On 28 September 2012, Lazy Jukskei Realisation ceded its rights, title and claim to the plaintiff.

[10] The interest paid was R16 001 662.83 when in fact, the actual amount was R11 578 336. The result was that the defendant was overpaid and has been enriched for R4 423 286.83 which amount is payable to the plaintiff. The prayer is for payment of that amount, interest at the rate of 15.5% per annum calculated from 17 November 2009 to date of payment, costs of suit and alternative relief.

[11] The defendant pleaded to the amended particulars of claim on or about 15 August 2019. It raised, amongst others, two special pleas. The first special plea was that the order by the Johannesburg High Court, now South Gauteng High Court, does not state whether interest is compound interest capitalised monthly as provided for in the agreement or whether it is simple interest. The defendant contends that the order is ambiguous or contains a patent error. Secondly, that the interest rate falls foul of the NCA and its regulations as alleged by the plaintiff and contains a patent error.

[12] The second special plea is that the plaintiff alleges that he made final payment of the judgment debt with interest. In an application for leave to appeal before the Constitutional Court by the plaintiff and three other entities, the Constitutional Court found that payment was made by two of those entities being Wehmeyer and De Witt (Pty) Limited ('Wehmeyer') and Zevenfontein Farm (Pty) Limited ('Zevenfontein') and not the plaintiff. The defendant contends that the plaintiff lacks *locus standi* in this action.

[13] The third special plea was that of *res judicata*. This is on the basis that the plaintiff and defendant were parties in previous application and action proceedings. The issues in these matters were finally determined by a ruling in the Constitutional Court. The issue as to who made payment to the defendant were essential elements of the judgment and order. The defendant avers that the principles of *res judicata* and estoppel should be strictly applied since it will not be in the interest of justice and against the 'once and for all' rule and lead to a rehearing of the already determined issues.

[14] The fourth special plea relates to prescription. This is on the basis that according to the plaintiff, payment was effected with 0.1% interest on 13 November 2009. The issue raised by the plaintiff that interest granted falls foul of the NCA is raised more than ten years after the judgment, which is a lengthy period. The defendant avers that the plaintiff's claim prescribed.

[15] In respect of the main plea, the defendant denies that the plaintiff has *locus standi* and contends that two sureties secured the loan and the security was registered with the registrar of deeds. Also, that only some prescripts of the NCA were in operation when the contract was concluded. Section 105 of the NCA, setting the maximum rate of interest, came into effect on 1 June 2007.

[16] The defendant contends that application in the Johannesburg High Court was based on the agreement between the parties. Further, that the judgment of the Johannesburg High Court was based on these facts and payment was effected with full knowledge of the facts and bona fide belief that it was due and in terms of the judgment, interest was compound. The judgment of Johannesburg High Court by

Bashall AJ, was neither rescinded or varied but there was an appeal (which was dismissed) *Heafield and Others v Rodel Financial Services (Pty) Ltd* (A5038/2010) [2011] ZAGPJHC 82 (3 March 2011).

[17] The defendant also filed a plea to the conditional claim raising firstly the issue of *locus standi*. They set out that interest on the facility agreement was agreed and charged at the rate of 0,1% per day calculated daily and capitalised monthly in areas. The defendant sought and was granted judgment in terms of the agreement. As alternative, the defendant contends that the judgment was not clear and refers to its special plea.

[18] The defendant admits that payment was made but denies that it was made by the plaintiff. In amplification, the defendant pleads that payment was made with full knowledge of and in the bona fide belief that the interest due in terms of the judgment was compound interest. There was correspondence exchanged between the parties' respective legal representative setting out the interest payable, amongst other things. Accordingly, payment made by the payers was not in error since they were made aware of this by way of letter of 31 August 2009. The said error was not excusable.

[19] The defendant contends that in any event, the payers payment was not *condictio indebit* and the payers were not impoverished by making the payment of compound interest. The defendant denies that payment of the judgment amount plus interest was paid by Lazy Jukskei Realisation on behalf of the plaintiff.

The amendments

[20] According to the plaintiff, he seeks to amend his entire particulars of claim and substitute it with new particulars of claim. However, a reading of the intended amendments reveal that the amendment is mainly in respect of amending his residential address which is not objected to by the defendant. The defendant refers to paragraphs 4 and 5 of the current amended particulars of claim the purpose of which is unclear since no amendment is sought on both these paragraphs. For purposes of considering this application, it is necessary to mention the 2019 amended particulars of claim and its reference to the suretyship agreements by

Wehmeyer and Zevenfontein. The 2019 particulars refer to the plaintiff and two other parties, without citing the companies by name, whereas the amendments sought at paragraph 4 of these particulars is aimed to make specific reference, by name, of these companies.

[21] The plaintiff seeks to introduce the provisions of item 5 of schedule 3 of the NCA, which deals with the applicable maximum finance rate set in terms of the Usury Act 73 of 1968. In addition, the plaintiff sets out how it continued to apply despite being repealed by the NCA on 1 June 2006, such continuing to operate until the Minister prescribed a maximum rate in terms of s 105 of the NCA. The defendant objects to this amendment and contends that it fails to plead the alleged maximum rate of interest applicable in terms of the Usury Act. In the proposed paragraph 10, the plaintiff pleads that s 105 and the regulations promulgated thereunder came into effect 1 June 2007. He pleads further that from 1 June 2007, interest rates, which was permissibly raised in terms of the agreement, was governed by the NCA.

[22] There is an amendment sought to the old paragraph 10 by the introduction of the maximum interest rate applicable in terms of the NCA and the regulations being 9% as at 8 December 2006 with the remaining period up to 13 August 2009 remaining the same as the 2019 amendment. The defendant contends that the written agreement was concluded on 22 December 2006. According to the plaintiff's proposed amendment, the Usury Act and s105 of the NCA governed the maximum interest rate.

[23] At the proposed paragraph 17, the plaintiff deals with the legal proceedings, which came before the court in Gauteng by the parties and sets out the terms of the court order. No objection is raised in respect of this amendment. The interest, which was to be charged by the defendant, had to be calculated from 11 March 2008. This meant that the maximum prescribed interest could not exceed the rate prescribed in the NCA. There appears to be no objection to this amendment. The subsequent paragraphs propose amendments relating to how the interest should be calculated referring to the prescribed rate of interest, the Usury Act and the NCA.

[24] Paragraph 22 of the proposed amendment seeks to explain why Lazy Jukskei Realisation effected payment of the judgment debt together with interest on behalf of Wehmeyer and Zevenfontein. At paragraph 38, the proposed amendment introduces the oral cession between the plaintiff, Wehmeyer and Zevenfontein. This is objected to on the basis that it seeks to introduce a new cause of action raised approximately eight years after summons in this matter was issued when the proposed cession would have prescribed.

[25] As regards the proposed amendment to setting out the 0.1% interest as unlawful, void ab initio or unenforceable and the amendment that the interest awarded in the judgment should be treated as *pro non scripto*. Alternatively, that it be replaced by the prescribed rate of 15.5% in paragraphs 23 to 25 and paragraphs 34 to 35 and 40, the objection was to the effect that this is a belated amendment, which was more than 11 years since the granting of the judgment.

[26] The defendant contends that the plaintiff seeks to challenge the order by Bashall AJ while it is trite that upon pronouncing on the judgment, Bashall AJ became *functus officio* subject only to variation or rescission by way of appeal. While the issue of variation and rescission are correct, it is unclear why these would be by way of appeal since an appeal is a separate process and a party seeking to rescind or vary a judgment does not have to invoke appeal proceedings. The defendant contends that since the judgment was subject to appeal up to the Constitutional Court, then the granting of the amendments would be prejudicial to it. In addition, the plaintiff, in introducing the amendments, seeks to introduce new defences not previously raised.

The law and Analysis

[27] Rule 28 regulates amendments to pleadings. It is common cause that the procedural requirements as set out in the rule have been complied with. As a rule, amendments to pleadings and documents will be allowed except where there is mala fide or the amendment would result in prejudice or injustice to that other party which cannot be compensated by a cost order. In determining whether to grant an amendment, the court must be satisfied that parties are placed in the position they would have been in if the intended amendment been present in the original papers.

See *Moolman v Estate Moolman and Another* 1927 CPD 27 at 29; *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC) para 9 and *Imperial Bank Ltd v Barnard and Others* NNO 2013 (5) SA 612 (SCA) para 8.

[28] Pleadings are aimed at placing relevant facts before the court for the proper ventilation of disputes. Accordingly, necessary amendments aimed at ensuring that the real issues are properly before the court should be allowed. See *Trans-Drakensberg Bank Ltd (Under Judicial Management) v Combined Engineering (Pty) Ltd and Another* 1967 (3) SA 632 (D) at 638A. When an amendment application is brought, the court determining whether to grant or refuse an amendment is not called upon to determine the facts or the merits of the main dispute. Its function is to ensure that correct facts are placed before the court determining the dispute. Where it is necessary that an amendment is effected to ensure that the real issues are placed before court, then this should be allowed.

[29] In *Magnum Simplex International (Pty) Ltd v MEC Provincial Treasury, Provincial Government of Limpopo* [2018] ZASCA 78 para 9, the court stated that before an amendment is granted, there must be some explanation why there is a wish to amend if a case has already been made out in the pleadings. As set out in *Trans-Drakensberg*¹, an explanation must be provided why there is a wish to change or add to the pleadings where a case is already made out. The applicant must show prima facie that a triable issue is being introduced. In *Myers v Abramson* 1951 (3) SA 438 (C) at 449H, the court stated that since it was permissible to allow the introduction of a new cause of action by way of an amendment, there was no reason why amendments should be limited to instances where there is some evidence to support the cause of action contained in the proposed amendment.

[30] The only perimeter to the court's power to allow material amendments is a consideration of prejudice or injustice to the opponent. See *Rosner v Lydia Swanepoel Trust* 1998 (2) SA 123 (W) at 127D-G. Where an award for costs cannot cure the prejudice, then the amendment must be refused. See *South African Post*

¹ *Trans-Drakensberg Bank Ltd (Under Judicial Management) v Combined Engineering (Pty) Ltd and Another* at 641A.

Office Ltd v Chairperson, Western Cape Provincial Tender Board and Others 2001 (2) SA 675 (C) at 24.3. In determining the issue of prejudice, in *Amod v South African Mutual Fire & General Insurance Co Ltd* 1971 (2) SA 611 (N) at 615, it was held that prejudice cannot be found to exist where an amendment will have the effect of defeating the other party's claim or defence.

[31] In *Moolman*, the court found that it was prejudicial to refuse an amendment where a party made a mistake in the pleadings by demanding too little or by admitting that a defendant has paid a portion of the debt when he has not. It gave an opponent an unfair advantage, which justice and fair dealing would not allow. Justice is served by allowing an amendment and placing the parties in the position they would have been had the issue been correctly pleaded in the first instance. If this is the aim of the amendment then there can be no prejudice.

[32] Where, because of an admission in a plea, a party had not used rights that he had at the time when the pleadings were originally filed and the rights had since lapsed, then an amendment withdrawing the admission will not be allowed. See *South British Insurance Co Ltd v Glisson* 1963 (1) SA 289 (D).

[33] The determination of the special pleas is not for the court determining the grant or refusal of an application to amend. Accordingly, the issue of the existence of any patent error, the lack of jurisdiction or the plea of *res judicata* or prescription will be determined at the appropriate time. The same applies to the issue of *locus standi* raised in respect of the main plea. It may be correct that the better route, which the plaintiff ought to have taken, was the rescission or variation procedure.

[34] What this court must determine as set out in the authorities referred to above is whether the grant of this application will result in prejudice or an injustice which cannot be compensated with a cost order. On the facts of this case, it cannot be said that there is any mala fide.

[35] What the plaintiff seeks to do is to ensure that real issues are properly before the court as set out in *Trans-Drakensberg*. The main issue between the parties, being whether the interest granted by the Johannesburg High Court was correct and

to prove the cession by Wehmeyer and Zevenfontein. A further issue being the correct amount, if any, overpaid. The defendant has a right to file an amended plea thereafter. Since they have been paid, there can be no prejudice suffered by them or any injustice, which cannot be cured by an order for costs.

[36] The plaintiff provides sufficient explanation why the intended amendment is sought and accordingly satisfies the requirement set out in *Magnum Simplex* since an appropriate cost order cures any prejudice., Whatever right which the defendant had being mainly the raising of special plea, can still be pursued. Accordingly, there is no reason why the application should not be granted.

Order

- 1 The application to amend is granted.
- 2 The plaintiff is to pay the defendant's costs occasioned by the amendment.

MASIPA J

APPEARANCE DETAILS:

For the Plaintiff:	Mr C Thompson
Instructed by:	Martin Van Vuuren Attorneys
For the Defendant:	Mr ADW Aldworth
Instructed by:	DSM Attorneys
Matter heard on:	11 February 2022
Judgment delivered on:	15 June 2022