THE REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 7218/2006

In the matter between:

POTTERS MILL INVESTMENTS 14 (PTY) LTD **Plaintiff/Respondent**

And

ABE SWERSKY & ASSOCIATES **1st Defendant/Applicant**

B B SCHOLSBERG N.O. **2nd Defendant/Applicant**

J S SWERSKY N.O. **3rd Defendant/Applicant**

H L SWERSKY N.O. **4th Defendant/Applicant**

Coram: **KOEN AJ**
Heard: **25 January 2016**
Delivered: **1 February 2016**

JUDGMENT

KOEN AJ

[1] During July 2006 the plaintiff instituted an action for damages against a firm of attorneys, Abe Swersky and Associates, as first defendant, and one of the partners in the firm, Mr Swersky, as second defendant. Mr Swersky passed away in 2008 and the executors of his estate have been substituted as defendants in his stead.

[2] In its particulars of claim, framed as a claim in delict, the plaintiff alleged that Mr Swersky had breached a duty of care owed to it in respect of its purchase of a portion of un-subdivided agricultural land from one of Mr Swersky's clients. The particulars of claim went on to allege that the resultant agreement of sale which the plaintiff had concluded with Mr Swersky's client was void for want of compliance with the provisions of the Subdivision of Agricultural Land Act, 70 of 1970 ("the Subdivision Act"). Not that it is relevant for the purposes of this judgment but the duty of care which was said to have been breached was described in broad terms as a duty to have warned the plaintiff that the Subdivision Act was of application, and that any agreement which was concluded would be unenforceable if its provisions were not complied with.

[3] The plaintiff alleged that it had intended to develop the property it had purchased, and claimed that as a result of the breach of the alleged duty of care it had not been able to enforce the sale. It claimed damages in the sum of just over R85 million, being in respect of the loss of profit it alleged it could have realised had the intended development proceeded.

[4] The portion of the particulars of claim relating to non-compliance with the Subdivision Act reads as follows:

"7. The agreement is void as a result of the contravention thereof with the Subdivision of Agricultural Land Act, 70 of 1970 ("the Act") for the following reasons:

7.1 The seller purported, in terms of the agreement, to sell to Plaintiff an as yet undivided portion of the said portion 24 of the relevant farm.

7.2 The property purported to be sold in terms of the agreement constituted "agricultural land" in terms of the Act.

7.3 The Minister of Agriculture had not consented to the sale of the said portion of the farm by the seller to Plaintiff prior to the agreement being concluded.

7.4 In the premises, and pursuant to Section 2(e)(i) of the Act, the agreement is void ab initio and unenforceable."

(The reference to section 2(e)(i) is an obvious typing mistake. It should be to section 3(e)(i) of the Act.)

[5] In their plea, also filed during 2006, the defendants admitted these allegations.

[6] Almost ten years after the action had commenced, during September 2015, in the course of preparing for trial, the defendants' legal team consulted with certain experts. The experts drew their attention to the possibility that the provisions of the Subdivision Act might not be of application to the agreement because the property sold fell within the area of an urban structure plan, being the Hottentots Holland Basin Guide Plan ("the Guide Plan") and because the property was thus excluded from the operation of the Subdivision Act. Subsequent research indicated that this could be the position by virtue of section 27(1)(d) of the Physical Planning Act, 125 of 1991 ("the Planning Act").

[7] This turn of events caused the defendants to reconsider their admission that non-compliance with the Subdivision Act rendered the agreement void. They promptly gave notice of an intention to amend their plea. No longer did the defendants wish their admission of the application of the Subdivision Act to stand, with the consequent legal conclusion that the agreement was void. They now wished to assert that the Planning Act overrode the provisions of the Subdivision Act, and thus to deny that the agreement in question was void. Their proposed new response to paragraph 7 of the particulars of claim read as follows:

"4A.1 It is admitted that in terms of the agreement the seller sold to the plaintiff an as yet undivided portion of portion 24 (a portion of portion 15) of the farm Gustrouw number 918 ("the undivided portion").

4A.2 The defendants admit that the undivided portion so sold was agricultural land as defined in section 1 of the Act.

4A3. It is admitted that at the time of the conclusion of the agreement the Minister of Agriculture had not consented to the sale of the undivided portion.

4A.4 It is denied that the agreement was void as a result of any contravention of the Act and the Plaintiff is put to the proof thereof.

4A.5 In amplification of such denial, and without detracting from its generality, the undivided portion was excluded from the provisions of the Act by virtue of section 27(1)(d) of the Physical Planning Act, 125 of 1991.

4A.6 It was so excluded because:

4A.6.1 the undivided portion fell within the area of an urban structure plan, being the Cape Metropolitan Area Guide Plan (Hottentots Holland basin) ("the Guide Plan");

4A.6.2 the date of commencement of the Guide Plan preceded the date of the agreement;

4A.6.3 in terms of the Guide Plan, the area of land coincidental with the undivided portion was not designated for use for agricultural purposes only.

4A.7 Save for these admissions, the allegations are denied."

[8] The plaintiff objected to the proposed amendment. The notice of objection filed in terms of Rule 28(2) described the basis for the objection as follows:

"1. The amendments are a withdrawal of an admission, which admission was in respect of one of the principal issues in the matter.

2. Defendant is prejudiced by the lateness and materiality of the amendments, which prejudice cannot be cured by an order of costs or a postponement. In particular, Defendant has prepared for trial and has agreed to orders regarding the merits of the matter and procedural aspects on the basis that the issues in dispute are as detailed in the pleadings"

(the reference to "defendant" in paragraph 2 is another typing mistake – it should read plaintiff).

[9] An application by the defendants for leave to amend the plea then followed. It was opposed. It is this application with which this judgment is concerned. For ease of

reading I propose to refer to the protagonists as the plaintiff (the respondent in the application) and the defendants (the applicants in the application).

[10] Before going further it is necessary to make some observations about the nature and scope of the admission in issue. The admission made by the defendants to the effect that non-compliance with the Subdivision Act rendered the agreement void is an admission of nothing more than a legal conclusion which had been postulated by the plaintiff in its particulars of claim. It related to no facts which had been pleaded by the plaintiff. In essence, the admission is nothing more than an admission that the validity of the agreement should be determined with reference to the Subdivision Act, and that in terms of that Act the agreement would be void. That is, of course, quite correct.

[11] Where a plaintiff alleges in a pleading that a particular law governs the case, whereas that law may not, an admission by a defendant that the law referred to governs the case does not make it so. What the law is has always been a matter for the Court to determine, and it is well established that mistakes about the law which the parties make are not binding on a Court. Thus, in *Paddock Motors (Pty) Ltd v Igesund* 1976 (3) SA 16 (AD) the Court observed that it would be *"an intolerable position if a Court were to be precluded from giving the right decision on accepted facts, merely because a party failed to raise a legal point, as a result of an error of law on his part"* (at 23 F–G).

[12] Admissions of fact are not, in my view, quite the same as admissions of law. They are, as was described in *Van Der Bijl and Others v Louw and Another* 1974 (2)

SA 493 (CPD) *"an unequivocal agreement by one party with a statement of fact made by the others, and its effect is to eliminate the production of evidence by the latter to prove that fact"* (at 503 D–E).

[13] It is evident, in my view, that an admission by a defendant that the applicable law is what the plaintiff alleges it to be falls to be treated somewhat differently to the admission of a fact which is necessary for a plaintiff to prove. If a fact is admitted by the defendant the plaintiff need not prove it. Questions of proof do not arise when it comes to the law. The relevant case law should be read, in my opinion, with this in mind.

[14] My attention was drawn by the parties to *Amod v SA Mutual Fire & General Insurance Co.* 1972 (2) SA 611 (N). *Amod* dealt with an application to retract an admission made by a defendant, which was an insurer under the Motor Vehicle Insurance Act, 29 of 1942, that the *"Plaintiff has duly complied with the provisions of sec 11* bis *of the said Act 29 of 1942 and the plaintiff's claim for compensation under sec.11 of the said Act duly set out on the prescribed form and in the manner so prescribed and accompanied by the requisite medical report was delivered to defendant more than 60 days before the commencement of these proceedings."*

[15] Section 11 *bis* of Act 29 of 1942 provided that *"(1) A claim for compensation under sec. 11 shall be set out on the form prescribed by regulation in such manner as may be so prescribed and shall be accompanied by such medical report or reports as may be so prescribed, be sent by registered post or delivered by hand to the registered company at its registered office or local branch office, and the*

registered company shall in the case of delivery by hand, at the time of the delivery, acknowledge receipt thereof and of the date of such receipt in writing."

[16] The *"prescribed form"* in issue in *Amod* required the content of the form to be confirmed on affidavit. This had not been done in *Amod*. At the time the pleadings were drafted case authority in the form of *Landsberg v New India Insurance Co. (Pty) Ltd and Another* 1969 (1) SA 110 (D) existed for the proposition that the requirement that the form be confirmed on affidavit was *ultra vires* and unlawful. On the basis of *Landsberg* the insurer filed a plea which, in essence, accepted that the law did not require the content of the *"prescribed form"* to be confirmed on affidavit. No doubt both parties had relied on *Landsberg* in formulating their pleadings.

[17] However, about two months after the plea had been filed *Landsberg* was overruled by a full bench decision. The full bench held that if the *"prescribed form"* was not confirmed on affidavit then section 11 *bis* had not been complied with. It was in these circumstances that the application to withdraw the admission by the defendant that the plaintiff had complied with the requirements of section 11 *bis* of Act 29 of 1942 was brought.

[18] In order to understand *Amod* a careful analysis of the un-amended pleadings and the proposed amendment is required. As set out above, the plaintiff had stated in the particulars of claim that <u>all</u> of the multiple requirements imposed by section 11 *bis* had been complied with. The insurer admitted this. This much appears from what is said in *Amod* at 612 B–D.

[19] The requirements imposed by section 11 *bis* included the completion of a prescribed form, in a prescribed manner; the submission of the requisite medical report; and the delivery of the form and report to the insurer more than 60 days before the action was instituted. Whether or not these requirements were complied with were questions of fact, and not law, in my view. The proposed amendment was one in which the insurer wished to change tack completely, and place all of those facts in dispute.

[20] It was submitted on behalf of the insurer that the admission in issue was an admission of law and that the Court should not regard itself as being bound by an incorrect admission of law made by the parties. Leon J expressed the view that the admission in question was one which involved both allegations of fact as well as conclusions of law. The learned judge doubted that he was dealing with an admission of law. Having regard to the broad scope of the admission pleaded, I think, with respect, that he was correct. Section 11 *bis* of Act 29 of 1942 required a number of things to be done, and not only that the content of the prescribed form be confirmed on affidavit. The insurer admitted in its original plea that all of the things enumerated in the section had been done. It did so, I assume, because it accepted on the basis of *Landsberg*, at the time the plea was filed, that it could make nothing of the fact that the prescribed form had not been confirmed on affidavit, and because, in fact, all of the other requirements had been fulfilled by the plaintiff.

[21] When *Landsberg* was overruled the insurer wished to withdraw that admission, and by way of a broadly framed denial, placed in dispute that all of the components of section 11 *bis* had been complied with. In the circumstances it seems

to me clear that the withdrawal of the admission in *Amod* related mainly to admissions of fact, and only tangentially to a legal conclusion which flowed automatically if any one of the requirements of section 11 *bis* had not been complied with.

[22] However, for the purposes of deciding the matter before it the Court in *Amod* assumed, without deciding, to treat the admission as being one of law. After discussing those cases which establish the proposition that a Court is not bound by mistakes of law made by the parties the learned judge went on to say that he did not *"understand them to hold that a Court is necessarily obliged in all cases to grant an application for an amendment to a pleading where the application involves the withdrawal of an admission of law"* (at 616 H).

[23] As appears from the judgment, what really happened in *Amod* is that the law which applied when the plea was drafted changed, and the Court not only permitted the plea to be amended after the law had been changed to take account of this, but it also permitted the defendant to deny a number of facts which the defendant had previously admitted. In *Amod* the Court had assumed, and did not hold, that what was in issue was a pure question of law.

[24] I conclude therefore that the facts in *Amod* are quite different from those in this case. *Amod* is not of direct application to cases where the withdrawal of an admission about the law only is sought. In my opinion, because of the different factual context, the statement in *Amod* to the effect *"that, even in the case of the withdrawal of an admission of law, the court is not relieved of its obligation to*

consider whether the granting of the application will unfairly prejudice the other side" (at 617 B–C) should not be understood to mean that prejudice is a consideration where an amendment is sought only so as to place the issues before the Court in the correct legal context.

[25] A party to a case cannot be prejudiced, in my opinion, if the case is determined with reference to the correct law. In the same way that prejudice which might entail a party losing a case has been held not to be prejudice of the kind which might result in an amendment being disallowed, any prejudice which results from an amendment sought for the purpose of placing the issues in the correct legal context cannot be prejudice of the kind which would result in the amendment being disallowed.

[26] If prejudice follows upon an amendment which is intended to raise an overlooked and relevant provision of the law then it must be ameliorated by appropriate procedural orders, such as the granting of postponements and cost orders. To do otherwise would have the intolerable result that a Court might be required to ignore applicable law, and apply inapplicable law, simply because the parties, in ignorance, had agreed that the inapplicable law was applicable.

[27] I should mention that in argument before me counsel for the plaintiff submitted that the admission contained in the plea was an implicit acknowledgement by the defendants of the fact that a Guide Plan did not apply to the property. It was contended, further, that in a loose sense, the defendants had agreed that this was the position, and that they should be held to that agreement. Furthermore, it was

submitted, that whether or not there was a Guide Plan was a fact and thus facts were also in issue and questions of prejudice therefore fell to be taken into account.

[28] I am not persuaded that there was an acknowledgement by the defendants, implicit or otherwise, or an agreement, even in the loose sense adverted to in argument, to this effect. The facts indicate that the question whether a Guide Plan applied or not was simply not considered at all. Moreover, it seems to me that whether or not a Guide Plan was applicable is a matter of law and not fact.

[29] Moreover, this point, at least in the manner formulated above, was not raised in the notice of objection filed by the plaintiff and should not therefore fall to be considered at this stage. *Squid Packers (Pty) Ltd v Robberg Trawlers (Pty) Ltd* 1999 (1) SA 1153 (SE) makes this clear.

[30] Be that as it may, I am satisfied that the failure to make reference to the provisions of the Planning Act in the plea originally filed has been satisfactorily explained. In the founding affidavit filed in support of the application it is stated that none of the defendants or their legal team had been aware of the provisions of the Guide Plan, or its area of application. In answer this allegation is met with a bald denial. This denial, in my view, is not of the kind which gives rise to a genuine dispute of fact and I therefore accept that the provisions of the Planning Act were innocently overlooked by the defendants' legal team.

[31] The affidavits reveal that the defendants' legal team investigated the question whether or not the plaintiff would be able to prove that it would have undertaken the

development of the purchased property, as it had intended to do. In the course of these investigations the plaintiff engaged the services of two experts, both of whom expressed to the defendants' legal team the view that the property might not have been subject to the Subdivision Act on account of the fact that the property fell within the area of a Guide Plan. Further legal research undertaken by the defendants' legal team revealed, according to the affidavit filed in support of the amendment application, that the provisions of the Planning Act were of application. The notice of amendment, which had been prepared in draft by junior counsel the previous day, was settled and immediately served on the plaintiff's attorneys. No questions of inexcusable carelessness or delay arise, in these circumstances.

[32] In *Whittaker v Roos and Another; Morant v Roos and Another* 1911 TPD 1092 at 1102–3 the approach of our Courts to amendments was described as follows: *"This court has the greatest latitude in granting amendments, and it is very necessary that it should have. The object of the court is to do justice between the parties. It is not a game we are playing, in which, if some mistake is made, the forfeit is claimed. We are here for the purpose of seeing that we have a true account of what actually took place, and we are not going to give a decision upon what we know to be wrong facts. It is presumed that when a defendant pleads to a declaration he knows what he's doing, and that, when there is a certain allegation in the declaration he knows that he ought to deny it, and that, if he does not do so, he is taken to admit it. But we all know, at the same time, that mistakes are made in pleadings, and that it would be a very grave injustice, if for a slip of the pen, or error of judgement, or the misreading of the paragraph in pleadings by counsel, litigants were to be mulcted in*

heavy costs. That would be a gross scandal. Therefore, the court will not look to technicalities, but we'll see what the real position is between the parties."

[33] Over a century later, the general approach of our Courts to amendments to pleadings remains the same. It is true that amendments involving the withdrawal of admissions of fact have the potential to cause prejudice to the other party. However, in my view, for the reasons given above, amendments involving the withdrawal of an incorrectly admitted legal consequence are of a different nature. In any event, in this case I do not think that any prejudice of the kind which might militate against the proposed amendment exists. Only the law is prejudiced if cases must be decided on the basis of what the parties might have in ignorance agreed the law to be.

[34] There is one further issue which I think might require clarification. I add, therefore, that this judgment is not intended to constitute a finding that the Planning Act applies. The task of this Court is only to decide whether or not that issue is a triable one as explained in *Commercial Union Assurance Co Ltd v Waymark NO* 1995 (2) SA 73 (Tk) at 77 G–H . I am satisfied that it is.

[35] It follows that I will allow the amendment.

[36] Two further matters require attention. Firstly, each of the protagonists brought applications to strike out various parts of the affidavits filed by the other. In the applications the issues were that inadmissible hearsay evidence had been introduced, and new matter in reply. None of the matter alleged to be hearsay has played any role in the determination of this application. Moreover, none of the new

matter, to the extent that it can be characterised as such, raised in reply, has played any role in the determination of the dispute before me. In the circumstances both applications to strike out are refused.

[37] What remains is the issue of the costs of the applications to strike out and the costs of this application. In regard to the applications to strike out, because neither had any influence on the resolution of the dispute, I intend to make no order as to costs. In regard to the application for leave to amend I take the view that the trial court, which will have a better understanding of the issues and factual disputes than can be had at this stage will be better placed to make a ruling. I think justice will be done in the circumstances, at this stage of the proceedings, for the question of costs to stand over for determination by the trial court.

[38] I therefore make the following order, in which I refer to the parties as the applicants and respondent:

A. The applicants are granted leave to amend their plea in accordance with the notice of intention to amend dated 23 September 2015;

B. The applicants are ordered to file the amended pages of the plea within 5 days from the date of this order;

C. The respondent is given leave, within 10 days of the filing of the amended plea, to make any consequential amendments to the pleadings and documents it has filed as envisaged in Rule 28(8);

D. The applications to strike out are refused. No order as to costs is made in regard to these applications;

E. The costs of the application for leave to amend stand over for determination by the trial court.

KOEN AJ

APPEARANCES

For the Plaintiff/Respondent:	Ms TA Dicker SC
Instructed by:	Barnaschone Attorneys
For the Defendants/Applicants:	Mr I Jamie SC Mr M Edmunds
Instructed by:	Norton Rose Fulbright