IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 21019/2019

In the matter between:

DEBPORAH ANNE VŐGLER **First Plaintiff**
ID [….]

MARKO ILLYA VŐGLER **Second Plaintiff**
ID: [….]

and

FIRST FOR WOMEN (PTY) LIMITED **First Defendant**
(1998/004804/07)

TELESURE INVESTMENT HOLDINGS **Second Defendant**
(1998/013847/07)

LIPCO GROUP (PTY) LIMITED **Third Defendant**
(2001/014508/07)

JUDGMENT DELIVERED ELECTRONICALLY: TUESDAY, 18 MAY 2021

NZIWENI AJ

Introduction

[1] On the 22nd of November 2019 the Plaintiffs issued combined summons, against all three Defendants, claiming R21 022 122.65 in damages. The present Applicants, who are the Plaintiffs in the main action, have brought this opposed application, seeking leave to amend their particulars of claim in terms of Rule 28 of the Uniform Rules of Court. For the sake of convenience I shall refer to the parties as the Plaintiffs and the Defendants, respectively.

[2] On the 7th of July 2020 the Plaintiffs gave notice that they intended to amend their particulars of claim as follows:

'1. By adding a new heading before paragraph 6 which should read as follows: "**NATURE AND BASIS OF THE CLAIMS".**

2. By inserting a new paragraph 6 with the words:

Plaintiff's claims are based on a breach of contract alternatively delict (negligence) alternatively breach of contract and delict as is set out more fully in the particulars of claim herein below.

3. By renumbering the paragraphs consequent upon the insertion of the new paragraph.'

[3] No exception, in terms of Uniform Rule 23 (1), was taken against the particulars of claim. The First and Second Defendants are not opposing the application for amendment. Only the Third Defendant is taking issue with the Plaintiff's intended amendment.

[4] In the notice of objection to the contemplated amendment, the objections taken are couched in the following terms:

'2 The particulars of claim, were (*sic*) the proposed amendment to be effected, would be excipiable and lacking of averments necessary to sustain a cause of action against the Third Defendant.

3. In respect of the primary claim, being the plaintiffs' claim against the third defendant for damages arising out of breach of contract, the particulars fo (sic) claim do not contain any, alternatively, adequate averments of material fact alleging:

3.1 That any contract existed between the plaintiff and the third defendant;

3.2 What the terms of the alleged contract were;

3.3 What term(s) of the contract was/were breached;

3.4 The manner in which such term(s) was/were breached; and

3.5 A casual connection between the alleged breach(es) and the damages allegedly suffered, and in particular…

4. In respect of the alternative claim in delict:

4.1 The Plaintiffs' proposed alternative claim is a claim for pure economic loss in delict against the third defendant. The proposed alternative claim does not contain a clear and concise statement of the material facts from which wrongfulness is alleged to have arisen and thus lacks averments necessary to sustain a claim in law.

4.2 The Plaintiff makes certain allegations of negligent conduct on the part of Justin McBride. The particulars of claim do not contain any, alternatively, "to have been committed by Justine McBride…

5. In the circumstances, the plaintiffs' proposed amendment is bad in law, discloses no cause of action against the third defendant, and would render the particulars of claim vague and embarrassing and/or lacking averments necessary to sustain a claim in law.

6. The third defendant would thus be prejudiced if amendment were to be allowed.'

[5] Inasmuch as it appears that the notice of objection raises numerous issues, in my mind, the critical issues to be determined by this court are: whether the particulars of claim in their current state lack the necessary averments to sustain a cause of action against the Third Defendant, whether the contemplated amendment should be allowed and, if so, whether that would render the pleading excipiable?

[6] What is apparent from the particulars of claim is that the First Defendant, First for Women (PTY) Ltd, an Insurance Company, has a direct contractual relationship with the First Plaintiff.

The legal principles

[7] Rule 28 (10) of the Uniform Rules provides:

'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.'

[8] In *Gerber N.O. and another v Beta Electrical CC t/a Feedcrow* (4589/2017) [2020] ZAECGHC 128 (24 November 2020) the following was stated at para 37:

'There is no prudence in allowing an amendment that would place the pleadings in a worse situation than they are. The role of the pleadings is to properly outline issues, not only for the parties, but also for the court. Pleadings that render it difficult to understand the cause on which the claim or defence is based stand in the way of justice, and therefore an amendment that carries a possibility of such an eventuality must be discouraged early on, even before the other party confronts it with an exception.'

[9] It is trite that when leave to amend is sought, the court will always be predisposed to grant such, unless leave is sought in bad faith or would cause an injustice to the other party which cannot be cured by an appropriate cost order. See *Moolman v Estate Moolman and Another* 1927 CPD 27, at p 29.

[10] The determination of real disputes and merits is the overriding function of the courts, instead of being bogged down on technical or procedural aspects, which only serve to delay the proceedings. See *BMW Financial Services (SA) (Pty) Ltd v Harding and another* [2007] 4 ALL SA 716 (C) para 5; *Four Tower Investments (Pty) Ltd v André's Motors* 2005 (3) SA 39 (N) at 43G-H.

[11] In *Whittaker v Roos and Another* 1911 T.P.D. 1092, at p 1102-1103, WESSELS J stated:

'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. . . .But we all know, at the same time, that mistakes are made in pleadings, and it would be a very grave injustice, if for a slip of the pen, or error of judgment, or the misreading of a 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 will see what the real position is between the parties.'

[12] Rule 18 (4) of the Uniform Rules provide as follows:

'Every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim, defence or answer to any pleading, as the case may be, with sufficient particularity to enable the opposite party to reply thereto.'

[13] By all accounts, an application for an amendment is not a *pro forma* exercise. It will not be easily granted as a matter of course.

Proposed amendment based on Contractual claim

[14] It is quite apparent that the proposed amendment plainly states, amongst others, that the Plaintiffs' claims are framed on a breach of contract, alternatively on delict. The contemplated amendment seeks firstly to base the relationship with the Defendants on a purported contract. I pause to mention that, gleaning from the particulars of claim in their current form, it becomes abundantly clear that the Plaintiffs are asserting that an agreement was only entered into by and between the First Plaintiff and the First Defendant.

[15] Similarly there is no iota of indication in the contemplated amendment that the Third Defendant ever entered into an agreement of any sorts with the Plaintiffs. This leads to the inevitable conclusion that the existence of a contract between the Third Defendant and the Plaintiffs was never alleged in the pleadings.

[16] Somewhat surprisingly, the Plaintiffs propose an amended which seeks to allege that their claims are based on a breach of contract, alternatively delict

(negligence), alternatively breach of contract and delict. The proposed amendment further states that the claims are based on contract; alternatively breach of contract and delict 'as is set out more fully in the particulars of claim herein below'.

[17] In the first place, the assertion that the contractual claim is set out fully in the particulars of claim is not correct. As I pointed out previously, the particulars of claim are silent on the terms of contract, or existence of a contract between the Third Defendant and the Plaintiffs. Equally important, no term is pleaded that the Third Defendant was or is contractually obligated to the Plaintiffs. That is not the end of the matter; there are absolutely no facts in the particulars of claim that make out a cause of action for breach against the Third Defendant. Consequently, when it comes to the Third Defendant, the contemplated amendment is incompatible with the particulars of claim, since the pleading lacks the necessary averments to justify the granting of such an amendment.

[18] In the case of *Jowell v Bramwell – Jones and Others* 1998 (1) SA 836 (W), the following was stated at 913E-G:

'The plaintiff is required to furnish an outline of his case. That does not mean that the defendant is entitled to a framework like a cross-word puzzle in which every gap can be filled by logical deduction. The outline may be asymmetrical and possess rough edges not obvious until actually explored by evidence. Provided the defendant is given a clear idea of the material facts which are necessary to make the cause of action intelligible, the plaintiff will have satisfied the requirements.'

[19] It may also be argued that the Third Defendant can simply plead to the proposed amendment that there is no agreement between them. For obvious reasons, under the circumstances of this case, the Third Defendant cannot even plead a simple bare denial, because, amongst others, the terms of the contract and whether the parties have a contractual relationship are material facts and not matters of evidence. In terms of the Uniform Rules, such facts need to be fully pleaded. The Plaintiffs, in this regard, bear the onus to plead all averments necessary to succeed in their claim. Surely it is not sufficient for the Plaintiffs to allege that the cause of action is based on contract, alternatively delict, alternatively delict and contract.

[20] Everything stated herein above, must be seen in light of the contemplated amendment and the particulars of claim. Upon consideration of the formulated claims, they contain no factual allegations that the Third Defendant breached any terms of contract between them. Equally so, the particulars of claim contain no specific allegations of breaches of any agreement, or that the damages claimed are for contractual damages stemming from any agreement. It is thus not clear from the particulars of claim which terms of the contract were breached by the Third Defendant and how. It's my view that in the circumstances the contemplated amendment does not help the Third Defendant to see the wood from the trees.

[21] Furthermore, it is significant to note that an examination of the particulars of claim reveal that the factual allegations are couched in conflated general terms. Hence, it is largely unclear which aspects relate to the contractual claim and which relate to the delictual claim.

[22] Surely, the Plaintiffs cannot simply throw together whatever facts in the particulars of claim and then expect that a defendant should simply separate the wheat from the chaff and plead. It cannot be expected from the Third Defendant to unravel and make sense of a mountain of jumbled up allegations. The amendment sought requires of the Third Defendant to piece together, from the pleaded facts, which facts relate to the contractual claim. In *Roberts Construction Co Ltd v Dominion Earth-Works (Pty) Ltd* 1968 (3) SA 255 (A), at 263A, the following was stated:

'The plaintiff is certainly not entitled to plead a jumble of facts and force the second defendant to sort them judiciously and fit them together in an attempt to determine the real basis of the claim.'

[23] In this regard, the Plaintiffs' contractual claim, as far as the Third Defendant is concerned, lacks particularity. Undoubtedly, if a party wants to pursue two claims in the alternative it should be clear from the particulars of claim where such claims are set out.

[24] The key question to be answered here would be: on what basis do the Plaintiffs want to plead that there is a breach of contract between them and the Third Defendant. From the allegations made in the particulars of claim, it does not appear to me that the Plaintiffs rely on a contract to found their cause of action. Consequently, it is an essential fact that in this matter, the invocation of a claim based on a breach of contract between the Third Defendant and the Plaintiffs will make no sense whatsoever. Equally important and true is this: if the amendment sought is granted, it will mean that the contractual claim by the Plaintiffs against the Third Defendant is based on an un-pleaded contractual relationship. On its own, this is indeed problematic in many areas. Quite clearly, in this regard, the particulars of claim are lacking essential averments.

Proposed amendment based on Delictual claim

[25] In *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 (1) SA 475 (A), at 496H-I, it was stated that:

'The mere fact that the respondent might have framed his action in contract therefore does not *per se* debar him from claiming in delict. All that he need show is that the facts pleaded establish a cause of action in delict. . . . The fundamental question for decision is accordingly whether the respondent has alleged sufficient facts to constitute a cause of action for damages in delict.'

[26] Upon careful consideration of the particulars of claim it is evident that the material factual allegations are chiefly alleging negligence. However, the formulation of the particulars of claim does not sufficiently convey and set out the facts upon which reliance is placed for a delictual claim against the Third Defendant.

[27] The Plaintiffs in their particulars of claim *inter alia* state that the legal representatives appointed by the Third Defendant, to handle his matters, were negligent and/or incompetent. In paragraph 36 of the particulars of claim the Plaintiffs also allege that:

‘Several doctors involved in the treatment of the second Plaintiff’s treatment advised that the stress and aguish caused by the incompetence of Mc Bride and the third Defendant had become too much and literally broke him.’

In para 54 of the particulars of claim the Plaintiffs aver that:

They will not be able to receive anything from Sentigol because of incompetence, alternatively negligence of the service providers appointed by third Defendant.

In para 57 of the particulars of claim the Plaintiffs allege that:

‘First, Second and Third Defendants are directly responsible for the inevitable loss of compensation to Plaintiffs. In addition, the negligence and/or incompetence of the appointed service providers to First and second Defendants together with the grievous lack of oversights by the First and Second Defendants over the work of Third Defendant, has caused irreparable harm to Plaintiffs’ prospects of finding work again and therefore earn income in future.’

In paragraph 67 the following allegation is contained in the particulars of claim:

‘This loss is once more as a direct result of the negligence and/or incompetence of Third Respondent which was appointed by the First and Second Defendants who are therefore vicariously liable for the damages suffered in the amount of R3 300 000.00.’

[28] Upon a benevolent consideration of the particulars of claim, it becomes clear that the Plaintiffs are alleging that the legal representatives appointed by the Third Defendant were negligent. There is no allegation in the particulars of claim that suggests either that the Third Defendant was negligent, in breach of a duty of care, or whether it acted wrongfully when employing legal representatives for the Plaintiffs. The Plaintiffs have failed to allege facts that assert that a duty of care was owed by Third Defendant to the Plaintiffs. Expressed differently, there is no delictual duty of care defined, or which can be inferred from the allegations in the particulars of claim, on the part of the third Defendant.

[29] When the Plaintiffs state in the particulars of claim that the First, Second and Third Defendants are directly responsible for the loss of compensation to Plaintiffs,

they are plainly drawing conclusions. However, they do not set out clearly why they make such a general allegation and from what they draw such a conclusion. The particulars of claim do not reveal on what basis the Plaintiffs impugn fault on the part of the Third Defendant.

[30] In *Trope v South African Reserve Bank and Another and Two Other Cases* 1992 (3) SA 208(T), at 214D, the following was enunciated:

'. . . it is incumbent on a plaintiff to plead all the facts on which he wishes to rely to enable the Court to decide whether policy considerations and the *boni mores* warrant that liability should extend to the case in question.'

[31] It appears the Plaintiffs have divided their claims into two categories. The first claim pertains to the amount of R21 022 122.65, the second claim pertains to the amount of R3 300 000.

[32] If regard is had to the first claim, one will notice that in paras 54 and 55 of the particulars of claim, negligence is alleged only in respect of the service provider. Furthermore, in para 57, the Plaintiffs simply make an allegation that the First, Second, and Third Defendants are directly responsible for the inevitable loss of compensation to the Plaintiffs. The Plaintiffs further state that there was a lack of oversight over the work of the Third Defendants by the First and Second Defendants. It is equally plain that these facts do not allege that the Third Defendant committed actionable negligence.

[33] Regarding para 57, there are no facts upon which wrongfulness related to delict, as far as the Third Defendant is concerned, can be deduced. Consequently, it is difficult to infer wrongfulness from the loss suffered. In Fourway *Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* 2009 (2) SA 150 (SCA), para 14, the court opined:

'The proposition that a plaintiff claiming pure economic loss must allege wrongfulness, and plead the facts relied upon to support that essential allegation, is in principle well founded. In fact, the absence of such allegations may render the particulars of claim excipiable on the basis that no cause of action had been disclosed. . .'

[34] In my view, it is insufficient for the Plaintiffs, when it comes to the Third Defendant, to simply state that the Third Defendant is directly responsible for the inevitable loss of compensation to the Plaintiffs. Needless to say the particulars of claim should lay down and define the nature and the extent of the responsibility of the Third Defendant in delict.

[35] The second claim against the Defendants appears to be the one of R3 300 000. The Plaintiffs, in para 64 of the particulars of claim, state the following:

'The case was then referred back to Third Respondent's employee, Carl Botman, the same person who had mishandled the labour matter and started the whole sequence of events with negligence, bad advice and utter unprofessional conduct leading to Plaintiffs' unfair dismissal.'

[36] The facts as pleaded in the particulars of claim fail to reveal how the Third Defendant had been negligent when it comes to this claim. The facts and details pleaded only state that the Plaintiffs were not happy with the appointment of Botman and informed the Third Defendant about that. It is further stated that the Third Defendant made no further progress with this matter. As far as the Third Defendant is concerned, it is not clear on what acts the allegation of negligence against the Third Defendant is based.

[37] For instance, there is no allegation in the particulars of claim that the Third Defendant is vicariously liable for the negligence or the conduct of Carl Botman, its employee. Similarly, the Plaintiffs also did not set out material facts that impugn vicarious liability on the part of the Third Defendant.

[38] Likewise, it is not clear what the Plaintiffs mean or try to convey when they state, in para 66, that:

'To date, Third Defendant has made no further progress to this matter and in the meantime Sentigol has been placed under provisional liquidation with the result that Plaintiffs have no prospects of ever recovering that which is justly due to them.'

[39] In para 67 of the particulars of claim it is stated that:

‘This loss is once more as a direct result of the negligence and / or incompetence of the Third Respondent which was appointed by the First and Second Defendants who are therefore vicarious liable for the damages suffered in the amount of R3 300 000.00.’

[40] Once again, in para 67, the Plaintiffs are drawing conclusions which are not supported clearly by the material facts pleaded.

[41] *Buchner and Another v Johannesburg Consolidated Investment Co Ltd* 1995 (1) SA 215 (T), at 216H-J & 217E-G, stated the following:

‘I emphasise the words “shall contain a clear and concise statement of the material facts”.

The necessity to plead material facts does not have its origin in this Rule. It is fundamental to the judicial process that the facts have to be established. The Court, on the established facts, then applies the rules of law and draws conclusions as regards the rights and obligations of the parties and gives judgment. A summons which propounds the plaintiff's own conclusions and opinions instead of the material facts is defective. Such a summons does not set out a cause of action. It would be wrong if a Court were to endorse a plaintiff's opinion by elevating it to a judgment without first scrutinising the facts upon which the opinion is based.

. . .

The conclusion that the appellants are liable can only be reached or justified if those terms support the conclusion set out in the summons. . . . I realise that the exposition of the facts contained in a summons is no more than the pleader's opinion, or of his averment as to what the facts are. If such a statement is not disputed those alleged facts have to be accepted as proven. An opinion or conclusion as to what the parties' liabilities are, even if undisputed, does not become a statement of fact and a failure to dispute the conclusion is of no consequence.’

[42] As far as the Third Defendant is concerned, it is entirely unclear as to why the Plaintiffs would want to amend the particulars of claim and allege that the claim against the Third Defendant is based on contract, alternatively delict, alternatively delict and contract. From the foregoing it is plain that the Plaintiffs, in the particulars

of claim, do not identify issues in an intelligible and lucid manner, as required by the Uniform Rules of Court, in order to allow the Third Defendant to plead thereto.

[43] Based on the above I do not even consider it necessary to traverse the aspect of concurrent liability.

Conclusion

[44] Currently, the particulars of claim are contained in 22 pages, to which is attached 249 pages as annexures, which has made the particulars of claim unduly prolix. Regrettably in this matter, I highly foresee that in future there is still going to be an endless succession of applications seeking leave to amend the pleadings.

[45] I must say that as they stand, the particulars of claim are inelegant, not the best model of clarity, both in form and substance. The amendment sought, against the backdrop of the particulars in their current form, require the Third Defendant to take a blind plunge into the unknown.

[46] As alluded to hereinabove, a party is not entitled to an amendment as a matter of course. Certainly there are limits within which an amendment can be granted. Without doubt, there should be a factual basis supporting the allegations proposed to be introduced by the Plaintiffs. However, as things currently stand in the present matter, there is absolutely no foundation for the amendments sought by the Plaintiffs. Put differently, the facts pleaded in the particulars of claim do not support the contemplated amendment sought.

[47] At the risk of repeating myself, I must emphasise that the right to seek an amendment is not absolute. Amendments are remedial in nature. The procedure is designed to remedy deficiencies and inadequacies in a pleading and not to create them. The amendment proposed in the current application, will further complicate the case instead of clarifying issues between the parties. Considering the particulars of claim and the proposed amendment, all in all the picture that emerges is unmistakably murky.

[48] Counsel on behalf of the Plaintiffs maintained staunchly that leave to amend, in this instance, should be granted, because no evidence was presented to show that the application was brought made *mala fide*. I really did not quite grasp the contention made on behalf of the Plaintiffs. I suspect that this contention is predicated on the premise that as a rule an amendment should be granted.

[49] It is indeed so that the Third Defendant does not aver that the amendment is sought in bad faith. Interestingly though, the contention by the Plaintiffs' counsel completely ignores the fact that, if there is no evidence of bad faith on the part of the applicant seeking leave to amend, it does not automatically follow that the leave sought should be granted. Clearly, it can never be a one size fits all approach. Jurisprudence has established that besides the fact that the contemplated amendment should be in good faith, or should not cause an injustice, the applicant should also demonstrate, amongst others, that the proposed amendment merits attention and raises an issue which requires to be adjudicated. Hence, it is normally said that an amendment is not to be had merely for the asking, meaning a party cannot claim an amendment as a matter of right. It is my view that there is no merit in the submission made on behalf of the Plaintiffs, and the contention struck this court as the last kick at the can.

[50] I happen to agree wholeheartedly with the counsel on behalf of the Third Defendant that, under the prevailing circumstances, the introduction of the proposed amendment would render the pleading excipiable.

[51] It suffices to state that an amendment which will make the pleading increasingly murky should not be allowed. See *Gerber N.O*. supra. It will definitely be senselessness to grant the Plaintiffs leave to amend, considering the pleadings and the proposed amendment. If the amendment is allowed it will lead to injustice to the Third Defendant, which cannot be compensated by an appropriate cost order. The interest of justice does not require that the amendment sought in the notice of amendment should be granted.

[52] In the result the following order is made:

a. The application for an amendment in terms of the notice of motion dated the 7th of July 2020 is dismissed with costs.

b. Such costs to include the services of a Counsel.

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CN NZIWENI

Acting Judge of the High Court

APPEARANCES

Counsel for the Plaintiff:	Adv C Kilowan
Counsel for the Defendant:	Adv D Van Reenen