

SOUTH AFRICA / JUDGMENT

Chard v Old Mutual Insurance Limited (A66/2017) [2025] ZAKZDHC 5 (17 January 2025) [2025] ZAKZDHC 5

COURT

Kwazulu-Natal High Court, Durban

BEFORE

Mathenjwa

CASE / FILE NUMBER

A66/2017

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IN

THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL

DIVISION, DURBAN

(EXERCISING ITS

ADMIRALTY JURISDICTION)

CASE

NO: A66/2017

Name

of the ship: MV “RASCAL”

In

the matter between:

RUSSEL

CHARD

Plaintiff

and

OLD

MUTUAL INSURANCE LIMITED

Defendant

ORDER

In

the premises it is ordered
that:

1.
The application for amendment is dismissed.
2.
The defendant is ordered to pay costs of the application including costs of senior counsel on scale C.

JUDGMENT

Mathenjwa J

- [1] This is an interlocutory application brought by the defendant for leave to amend its plea to the particulars of claim filed by the plaintiff. The relief sought is opposed by the plaintiff.
- [2] The action arises out of a written agreement of insurance concluded by the plaintiff and defendant on 26 June 2007 in terms of which the defendant undertook to indemnify the plaintiff in respect of his Bavaria vessel in respect of defined events including loss or damage to the vessel whilst afloat at the seas, in ports and rivers or on inland waters including docking, undocking, launching and hauling out and accidental loss or damage, including external accidental means, including sinking and negligence of any person whatsoever.

Factual

background

- [3] The plaintiff alleged that on 3 January 2017 the vessel sank at the Durban Marina and its engines became submerged in salt water. The plaintiff informed the defendant of the occurrence of the insured event. The defendant appointed an assessor and a technician to assess the damage to the vessel. The assessor, alternatively the technician, started and operated the engines of the vessel without following the standard procedures for engines which had been submerged in salt water, alternatively without taking reasonable precautions against damage to engines which had been submerged in salt water. The vessel was a total loss as a result of the sinking thereof; alternatively, the sinking thereof and the negligent actions of the assessor and/or the technician who were negligent in a manner described in this paragraph.
- [4] The defendant seeks to amend its plea firstly, by inserting in paragraph 2, paragraph 2(e) to read as follows:

‘It is a warranty of this insurance that you shall take all reasonable steps to maintain the vessel in a proper state of repair and

seaworthiness and that you act reasonably as owner to prevent or minimise any loss or damage.’

Secondly, by inserting in paragraph 3 a new paragraph 3(e) to read as follows:

‘The refusal by the plaintiff to fund replacement lubricant oil for the engines after they were submerged in salt water, alternatively the failure to give an instruction to effect such a replacement when he knew or ought to have known that it should be given, immediately

after the re-floating of the vessel constituted a breach of the express warranty pleaded in 2 (e) above... and breach of the common

law duty on an insured to act prudently and to minimise loss’.

And thirdly by amending the existing paragraph 6 so as to read as follows:

‘The allegations contained in this paragraph are denied. In amplification of that denial and without derogating from the generality thereof:

- (a) Defendant accepts liability to pay the plaintiff the lesser of the reasonable costs or repair of the vessel and the insured amount of R3 000,000,00. In so far as the repairs were occasioned by defined events for which the plaintiff made a claim; except
- (b) In so far as it may be established that the plaintiff breached his warranty to act reasonably as owner to prevent or minimise any loss or damage.’

[5] It is appropriate to point out that the relevant part of the existing paragraph 3 of the plea reads as follows:

‘(a) The engines were subsequent to the re- floating of the vessel, started and operated in accordance with standard procedures applicable in such circumstances;

(b) The engines were rehabilitated and but for required repairs to electronics and wiring, had been salvaged after the submersion;’

and the existing paragraph 6 reads as follows:

‘The allegations contained in this paragraph are denied. In amplification of that denial and without derogating from the generality thereof, defendant accepts liability to pay to plaintiff the lesser of the reasonable costs of repair of the vessel and the insured amount of R 3000.000 in so far as the repairs were occasioned by defined events for which the plaintiff made a claim’.

[6] The amendment sought arises from the defence witness, Mr Vermaak’s concession during cross-examination where he stated that the proper way to attempt to salvage the engines included completely draining of the lubricant oil and his allegation that he wanted to replace the oil; and he had made a request to the plaintiff that the new lube oil be provided but this request was refused. The defendant contended that given the provision of clause 19 of the agreement of insurance which provides that:

‘It is a warranty of this insurance that you shall take all reasonable steps to maintain the vessel in a proper state of repair and

seaworthiness and that you act reasonable as owner to prevent or minimise any loss or damage,’

if it was held that Mr Vermaak's version was accepted, then the plaintiff would be in breach of the warranty which will excuse the defendant from liability entirely. For that reason, the defendant applied for leave to amend its pleadings accordingly.

Parties' contention

[7] The plaintiff contends that the proposed amendment if allowed:

- (a) would render the plea excipiable on the ground that it is vague and embarrassing;
- (b) while the proposed amendment relies on the plaintiff's refusal to fund oil, it lacks particularity;
- (c) the proposed amendment contradicts the defendant's pleadings which states that the engines were subsequent to the re-floating of the vessel, started and operated in accordance with the required standard procedures;
- (d) the proposed amendment if allowed would cause prejudice to the plaintiff,
- (e) the amendment is not bona fide; and
- (f) there is no explanation by the defendant as to why it only sought to bring the amendment at such a late stage of the proceedings.

[8] Counsel for the defendant Mr Wallis SC submitted in argument that there will be no prejudice to the plaintiff if the amendment was granted because the witnesses whose evidence is relevant to the proposed amendment might be recalled at the reconvened trial. Regarding the plaintiff's contention that the proposed amendment was vague in that it does not give particularity of the refusal by the plaintiff to enable the replacement of lube oil, and the mode and time of refusal by the plaintiff, it was submitted on behalf of the defendant that it was apparent from the evidence presented in court that the defendant was not relying on any written documents. Further, it was submitted that the plaintiff's contention that the amendment was mala fide is not sustainable since the amendment was sought consequent upon evidence elicited in the cross-examination.

[9] Counsel for the plaintiff, Mr Voormolen SC submitted that the assertion by the defendant in the proposed amendment in stating that the plaintiff refused to fund replacement lubricant oil for the engines is contrary to its own pleadings on which the defendant relied upon that the engines were properly first aided after the sinking of the vessel and the proper procedures for starting the engines were followed, therefore, the argument went, the proposed amendment does not raise a triable issue. Further, it was submitted on behalf of the plaintiff that the proposed amendment is so vague in that it is impossible to discern what the defendant's case is; and if granted the amendment would be prejudicial to the plaintiff in that it lacks particularity as to whether there was a request in the first place, when and how it was made.

Applicable legal principles

[10] Amendment of pleadings has received extensive judicial attention. The court has a discretion whether to grant an amendment or not, which must be exercised judicially in the light of all the facts and prevailing circumstances.[1] It is trite that the primary object of allowing an amendment is to ‘obtain a proper ventilation of the dispute between the

parties, to determine the real issues between them, so that justice may be done’.[2] An amendment can be made at any stage before judgment in the proceedings. However, an amendment is not for taking, a party seeking the indulgence must explain the reason for bringing the amendment and satisfy the court that the amendment if granted will raise a triable issue.[3]

[11] The test on whether an amendment should be allowed as enunciated in *Moolman v Estate Moolman*[4] has been endorsed by the courts. In *Ascendis Animal Health (Pty) Ltd v Merck Sharp Dohme Corporation and Others*,[5] the Constitutional Court quoted with approval *Moolman* where Watermeyer J stated as follows:[6]

‘The practical rule adopted seems to be that amendments will always be allowed unless the application to amend is mala fide or unless such amendment would cause an injustice to the other side which cannot be compensated by costs, or in other words unless the parties cannot be put back for the purposes of justice in the same position as they were when the pleading which is sought to amend was filed.’

[12] Thus, the general rule is that the amendment should be granted unless if granted the other party will suffer prejudice which cannot be compensated by costs. However, the granting of an amendment is an indulgence to the party asking for it.[7] Thus, the onus rests with the party seeking the amendment to satisfy the court that it is not made mala fide and the other party will not be prejudiced if the amendment is granted.[8]

[13] Where the facts raised in the proposed amendment will not contribute to the determination by the court of the real issues between the parties nor possibly affect the outcome it ought not be granted. In *Trans-Drakensberg Bank Ltd Caney* J stated as follows:[9]

‘Having already made his case in his pleading, if he wishes to change or add to this, he must explain the reason and show prima facie that he has something deserving of consideration, a triable issue; he cannot be allowed to harass his opponent by an amendment which has no foundation. He cannot place on the record an issue for which he has no supporting evidence, where evidence is required, or save perhaps in exceptional circumstances, introduce an exception which would make the pleading excipiable.’

If the amendment which the party proposes would have no significance to the outcome in the case, that party would suffer no prejudice if the amendment is not allowed.[10]

Analysis

[14] Having scathed the factual background and applicable legal principles, I now turn to the grounds of objection. Counsel for both parties in their respective addresses have referred the court to the evidence of Mr Vermaak. Mr Voormolen submitted that the question of exception should not be determined with reference to evidence, but with reference to the pleading alone. I agree with this contention which was endorsed in the Constitutional Court judgment of *Baliso v FirstRand Bank Ltd t/a Westbank*.^[11] In *Baliso Froneman J* stated that 'where an exception is taken a court looks only to the pleading excepted to as it stands, not to facts

outside those stated in it'.^[12] At this stage of the interlocutory application the court does not consider the evidence; the credibility of witnesses in the main action; speculate what could be the plaintiff's response to the defendant's evidence or how such response would impact on the parties evidence.

[15] The proposed amendment to paragraph 3 to the plea provides that the refusal by the plaintiff to fund replacement of the oil, alternatively the failure to give an instruction to effect such a replacement constituted a breach of the express warranty of the insurance agreement. It is apparent from the amendment that there are no averments that the defendant had requested the plaintiff for funds to replace the oil, nor that the plaintiff refused the request. Furthermore, the amendment lacks averments as to where, when, and how the request was made.

[16] Uniform rule 18(4) provides that:

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

This provision of the rule requires parties in litigation to plead with sufficient clarity and particularity of the material facts upon which they rely for their conclusion to enable the other party to plead to the pleading.^[13] It is clear from the proposed amendment that it does not comply with rule 18(4); and lacks sufficient particularity of the material facts upon which the defendant relies for its defence.

[17] During argument, counsel for the defendant argued that if the court determined that the pleading was unclear, it should issue an order with an amendment that addressed the particularity that was lacking. In my view if the court were to grant that order it will grant an order that was not requested and ventilated by the parties in their pleadings. The defendant's pleadings in this application does not make provision for the proposed order and therefore a case was not made in the pleadings for the proposed order. Courts should desist from granting orders that were not requested by the parties. I align myself with the reasoning of Binns- Ward J in *Phanto Props (Pty) Ltd v La Concorde Holdings (Pty) Ltd*^[14] where he stated as follows:

‘By allowing an amended pleading non-compliant with rule 18, a court would necessarily thereby be permitting a pleading to be brought into being that would be deemed, in terms of rule 18(12), to be an irregular step. It seems to me undesirable for a court to make itself party to any such process or procedure.’

[18] In my view if the proposed amendment is granted the plaintiff will be embarrassed when he pleads to a pleading that is not clear and lacks sufficient particularity. He would not know what case to meet and how to reply to the defendant’s plea. Such embarrassment would constitute prejudice to the plaintiff that cannot be compensated by an order of costs. I align myself with the case of Sasol Industries (Pty) Ltd t/a Sasol 1 v Electrical Repair Engineering (Pty) Ltd t/a LH Marthinusen,[15] where the court held that:

‘In my view, if a pleading does not comply with the subrules of Rule 18 requiring specified particulars to be set out, prejudice has, *prima facie*, been established. Cases may well arise where a party would not be prejudiced by the failure to comply with these subrules, or where a pleader would be excused from providing the prescribed particularity because he is unable to do so.’

If granted, the amendment would be deemed an irregular step and the plaintiff will be entitled to act in accordance with rule 30.[16] Also if granted, the amendment will have an adverse effect to the administration of justice. It will militate further unnecessary litigation that will further delay the finalisation of the matter and consequently impede the court’s delivery of justice.

[19] It is instructive that the defendant brought its application late in the proceedings, towards the end of its case. The defendant has explained that the application arose from the concession made by its witness during cross-examination and re-examination. Therefore, I have no reason to draw a conclusion that the defendant was *mala fide* in bringing the application at that late stage of the proceeding.

[20] This brings me to the contradictions between the defendant’s version in its current plea and the proposed amendments. Paragraph 3(a) of the defendant’s current plea states categorically that: “the engines were started and operated in accordance with applicable standard procedures”. By inserting a new paragraph 3(e) the plea will state that a request was made to the plaintiff to fund replacement lubricant oil for the engines to which he refused or alternatively the plaintiff failed to give an instruction to effect such a replacement when he knew or ought to have known that it should be given, immediately after the re-floating of the vessel thereby contradicting the current pleadings which state that the defendant’s agent followed correct procedures when they first aided the vessel. Since it is now accepted by both parties that replacement of lubricant oil is part of the procedure for first aiding engines which had been submerged in salt water, the facts raised in the proposed amendment contradicts the pleadings which states that the proper procedure was followed because the defendant now provides the reason why the proper procedure was not followed. The reason being the refusal of the plaintiff to fund the replacement

of the oil. Therefore, the facts raised in the proposed amendment will not affect the outcome of the case. Thus, the proposed amendment

does not raise a triable issue and therefore is excipiable.

[21] In my view the application for amendment is interwoven. The averments that the plaintiff refused the request for funding of the replacement oil is the thread that holds together all the other proposed amendments. As it falls, the remaining proposed amendments should not stand.

[22] The general rule that costs follow the result should apply in this case. Given the complexity of the matter, it necessitated the employment of senior counsel. Therefore, costs should include costs of senior counsel on scale C.

Order

[23] In the premises it is ordered that:

Date of hearing:

5 December 2024

Date of judgment:

17 January 2025

Appearances:

Plaintiff's counsel: Mr A V Voormolen SC Instructed by: Duvenage Incorporated Richards Bay
Locally represented by: Johan Jooste & Co Durban First respondent's counsel: Mr P J Wallis SC
Instructed by: Norton Rose Fulbright South Africa INC Durban

[1] Robinson v Randfontein Estates Gold Mining Co Ltd 1921 AD 168 at 243.

[2] Trans-Drakensberg Bank Ltd (Under Judicial Management) v Combined Engineering (Pty) Ltd and Another 1967 (3) SA 632 (D) at 638A.

[3] Ibid at 641A.

[4] Moolman v Estate Moolman 1927 CPD 27.

[5] Ascendis Animal Health (Pty) Ltd v Merck Sharp Dohme Corporation and Others 2020

(1) SA 327 (CC) para 89.

[6] Moolman above fn 4 at 29.

[7] Rosenberg v Bitcom 1935 WLD 115 at 117.

[8] Commercial Union Assurance Co Ltd v Waymark NO 1995 (2) SA 73 (TK) at 77F-I.

[9] Trans-Drakensberg Bank Ltd above fn 2 at 641A-B.

- [10] Trope and Others v South African Reserve Bank 1993 (3) SA 264 (A).
- [11] Baliso v FirstRand Bank Ltdt/a Westbank 2017 (1) SA 292 (CC).
- [12] Ibid para 33.
- [13] Trope above fn 10.
- [14] Phanto Props (Pty) Ltd v La Concorde Holdings (Pty) Ltd 2021 JDR 3266 (WCC) at 7.
- [15] Sasol Industries (Pty) Ltd t/a Sasol 1 v Electrical Repair Engineering (Pty) Ltd t/a LH Marthinusen 1992 (4) SA 466 (W) at 470H-I.
- [16] Rule 18(12).
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