

SOUTH AFRICA / JUDGMENT

Gihwala and Others v Meyeridricks (2009/27949) [2013] ZAGPJHC 164 (27 June 2013) [2013] ZAGPJHC 164

COURT

South Gauteng High Court, Johannesburg

BEFORE

D Dosio

CASE / FILE NUMBER

2009/27949

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NOT REPORTABLE

SOUTH GAUTENG HIGH COURT

JOHANNESBURG

CASE NO: 2009/27949

DATE:27/06/2013

In the matter between:

DINES CHANDRA MANILAL GIHWALA1st APPLICANT/PLAINTIFF

GEORGE NICHOLAS PAPADAKIS N.O.2nd APPLICANT/PLAINTIFF

LEGATUS TRUST (PTY) LIMITED3rd APPLICANT/PLAINTIFF

and

RH MEYERIDRICKSRESPONDENT/ DEFENDANT

J U D G M E N T

DOSIO, AJ:

INTRODUCTION

- [1] This is an opposed application in terms of which the plaintiffs seek to amend their particulars of claim, in terms of rule 28 of the uniform rules.

- [2] The parties are as follows; the first plaintiff is Dines Chandra Manilal Gihwala N.O., an attorney, and the second plaintiff is George Nicholas Papadakis N.O, the managing director of Gobodo Forensic & Investigative Accounting (Pty). The third plaintiff is a company, called Legatus Trust (Pty) Ltd. The defendant is RH Meyeridricks, who is an adult business man.

THE PROPOSED AMENDMENT

- [3] The plaintiff's action is founded upon section 424 of the Companies Act, No 61 of 1973, which was still applicable at the time of the institution of the action.
- [4] Paragraph 20 of the particulars of claim reads as follows:

"20. At all relevant times during the period April 2004 to August 2005 the defendant knowingly and intentionally conducted the affairs of the third plaintiff recklessly and with the intent to defraud the investor principals, being creditors of the third plaintiff in that:

20.1 the third plaintiff misappropriated all or portion of the interest earned by and/or derived from the investment of the investor principals funds in the Corporate Saver account;

20.2 failed to account accurately to the investor principals at regular intervals or at all;

20.3 failed to disclose to the investor principals that third plaintiff received an amount of R1 464 709-49, in the aggregate, being interest earned on the investor principals funds in the Corporate Saver Account, whilst it was owing to the individual investor principals;

20.4 failed to accurately reflect the changes levied against the individual investor principals investments;

20.5 unlawfully retained a portion of the interest earned on the Corporate Saver account balance in an amount of not less than R1 464 709-49 which was due to the investor principals."

- [5] The plaintiffs' proposed amendments are the following:

[6] Deleting "April 2004" in paragraph 20 and substituting it with "February 2002."

[7] Deleting the amount "R1,464,709,49" in paragraph 20.3 and substituting it with the amount "R5,558,416.54".

[8] The defendant objects to this, in that no explanation has been afforded for amending the date to "February 2002", or changing the amount to "R5,758,416.54".

[9] Deleting the word "changes" in paragraph 20.4 and substituting it with the word "charges".

[10] Deleting the word "retained" in paragraph 20.5 and substituting it with the word "misappropriated".

[11] The defendant objects to this as no explanation has been afforded for introducing the allegation of "misappropriation" of monies.

[12] Deleting the amount "R1,464,709.49" in paragraph 22 and substituting it with

“R5,758,416.54”.

[13] Deleting in prayer 1 of claim 1 the amount “R1,464,709.49” and substituting it with “R5,758,416.54”.

[14] The defendant objects to this in that the proposed amendment in respect to claim1 has in fact become prescribed, in terms of section 11(d) of the Prescription Act,68 of 1969, as it commenced running by no later than 3 August 2006 and summons was served upon the defendant on 4 August 2009.

[15] Deleting paragraph 24, which reads:

“During the aforesaid period third plaintiff made payment to defendant and/or defendant’s nominees in the amount of R986 000,00”.

and substituting it with:

“During the aforesaid period third plaintiff, represented by the defendant, made payment to defendant and/or defendant’s nominees in the amount of R5,691,830.00”.

[16] The defendant objects to this on the basis that no particularity has been furnished of the calculation of the amount, or of who the “defendant’s nominees” are. It is, accordingly, contended that the defendant would be embarrassed in pleading thereto.

[17] Deleting paragraph 25, which reads:

“The payment to defendant and/or defendant’s nominees was made ultra vires alternatively, was made by third plaintiff in the bona fide and reasonable but mistaken belief that it was owing to defendant, alternatively was intentionally and unlawfully misappropriated by defendant from third plaintiff”.

and substituting it with:

“The payment from the third plaintiff to defendant and/or defendant’s nominees, was made ultra vires, alternatively, was made by third plaintiff, represented by defendant, in the bona fide and reasonable but mistaken belief that it was owing to defendant, alternatively the payment by the third plaintiff to the defendant and/or defendant’s nominees was intentionally and unlawfully misappropriated by defendant from third plaintiff”.

[18] The defendant objects to this on the basis that it has not been pleaded why it is alleged that the payment was ultra vires. In addition, no facts have been pleaded as to why the belief was “bona fide” or “reasonable” or why it was “mistaken”. It is, consequently, contended that the defendant would be embarrassed in pleading to such averments.

[19] Adding after paragraph 25:

“25 (bis) As a consequence of the conduct referred to in paragraph 25 above, of the third plaintiff, third plaintiff has suffered damages and defendant has been enriched at the expense of the third plaintiff in the amount of R5,691,830.00”.

- [20] The defendant objects to this on the basis that no particularity has been furnished as to the calculation of the amount of R5,691,830.00, or and as to how the defendant has been enriched at the expense of the third plaintiff. It is, accordingly, contended that the defendant will be embarrassed in pleading thereto.
- [21] Deleting in paragraph 26 the amount “R986,000.00” and substituting it with “R5,691,830.00”.
- [22] Deleting the amount “R986,000.00” in prayer 1 of claim 2 and substituting it with the amount “R5,691,830.00”.
- [23] The defendant objects to this on the basis that the plaintiffs have failed to address the defendant’s second special plea of prescription in relation to Claim 2.
- [24] The defendant’s objections are founded, essentially, on three grounds:
- i. The plaintiffs have failed to comply with the rules relating to pleading. In that the proposed amendments perpetuate particulars of claim which fail to comply with rule 18(4) of the uniform rules.
 - ii. The proposed amendments result in and/or perpetuate a pleading that is excipiable as being vague and embarrassing.
 - iii. No explanation or affidavit has been provided for the proposed amendments, particularly in view of the defendant’s special plea of prescription.
- [25] Plaintiff’s counsel submitted that in the original formulation of the particulars of claim the defendant never requested an additional explanation for the calculation of the amount claimed. In addition, the facts and circumstances surrounding the debts have not changed and are not affected by the proposed amendment. He submitted, further, that to require a further explanation in respect to the amended amount in order to enable the defendant to plead is ill-founded.
- [26] He submitted that the objections raised in respect of the wording, “defendant’s nominees”, is ill-founded as such a reference was in the original particulars and was not introduced in the application for the amendment. The defendant has already pleaded thereto.
- [27] Plaintiff’s counsel pointed out that the objections raised by the defendant relating to the point of prescription, have already been raised in the defendant’s plea and that the plaintiff has replicated thereto.
- [28] Plaintiff’s counsel submitted that the issue pertaining to the payment being ultra vires, referred to in paragraph 25, has already been pleaded to by the defendant. Nothing new is being introduced by means of the proposed amendment.

FACTS OF THE MAIN ACTION

[29] During the period April 1999 to November 2005 the defendant was a director of the third plaintiff. The third plaintiff acted as nominee for various deceased estates and trusts, as executor and trustee respectively. On 5 December 2001, the third plaintiff, duly represented by the defendant, entered into a written agreement with BOE Corporate, a division of BOE Bank Ltd (“BOE”).

BOE allowed the third plaintiff to operate an account styled “Specific Corporate Saver Accounts” on behalf of the clients of the third plaintiff, being deceased estates and trusts (referred to hereafter as “Investor principals”).

[30] At all relevant times the defendant acted for and on behalf of the third plaintiff and owed the third plaintiff a fiduciary duty.

[31] The defendant was tasked with ensuring that the investor principal funds were properly administered, and that the third plaintiff in acting as trustee of the investor principals, complied with the provisions of the Trust Property Control Act No. 47 of 1988.

[32] It is the contention of the plaintiffs that the defendant knowingly and intentionally conducted the affairs of the third plaintiff recklessly and with the intention of defrauding the investor principals.

THE LEGAL PRINCIPLES PERTAINING TO AMENDMENTS

[33] Rule 28 reads as follows:

“28(1) Any party desiring to amend any pleading or document other than a sworn statement, filed in connection with any proceedings, shall notify all other parties of his intention to amend and shall furnish particulars of the amendment.”

[34] In the commentary to Erasmus, Superior Court Practice, the learned authors Farlam, Fichardt and Van Loggerenberg at page B1-177 state;

“the party desiring to amend must set out in his notice of particulars of his proposed amendment”.

[35] In the case of Swartz v Van der Walt t/a Sentraten 1998 (1) SA 53 (W), Claasen J stated at page 57 C-D that;

“1. ...in cases where a mere word or figure requires amendment, it would be totally absurd to file a notice of motion supported by an affidavit to secure such amendments. Affidavits would only be necessary in more substantial amendments, such as the withdrawal of admissions.

2. The legislator must also be deemed to have taken into consideration that many an amendment is sought and granted during the course of a trial. If such amendments are in all cases to be brought on notice of motion, and supported by affidavits, trial proceedings will be needlessly interrupted and become inordinately protracted. I cannot believe that the legislator had such a result in mind when framing the new Rule 28(4).”

[36] It was stated by Claassen J *supra* at page 57 G-J that an application for leave to amend pleadings is an interlocutory application which is “incidental to pending proceedings” as contemplated in rule 6(11). In terms of rule 6(11) such applications are brought “on notice” and not on “notice of motion”, and the former does not require a supporting affidavit unless the particular circumstances so required.

[37] A court hearing an application for amendment has a discretion whether to grant it or not. Such discretion must be exercised judicially.¹

[38] The party requesting the amendment has the onus to establish that the other party will not be prejudiced by it.

[39] In the case of *Zarug v Parvathie* NO 1962 (3) SA 872 (D), Henochsberg J stated at 876 A-B;

“...the Court will allow an amendment, even though it may be a drastic one, if it raises no new question that the other party should not be prepared to meet.”

And further at 876 B-C

“No matter how negligent or careless the mistake or omission may have been and no matter how late the application for amendment may be made, the application can be granted if the necessity for the amendment has arisen through some reasonable cause, even though it be a bona fide mistake.”

[40] In the case of *GMF Kontrakteurs (EDMS) BPK and Another v Pretoria City Council* 1978 (2) SA 219 (T), Franklin J, at page 223 stated;

“...no amendment will be allowed in circumstances which will cause the other party such prejudice as cannot be cured by an order for costs and, where appropriate, a postponement. Where there is real doubt as to whether or not prejudice or injustice will be caused to the other party if the amendment is allowed, it should be refused, ...”

[41] In the case of *Sentrachem Ltd v Prinsloo* 1997 (2) SA 1 (A), the Appellate Division laid down the test as being the following;

“Die eintlike toets is om te bepaal of die eiser nog steeds dieselfde, of wesenlike dieselfde skuld probeer afdwing. Die skuld of vorderingsreg moet minstens uit die oorspronklike dagvaarding kenbaar wees, sodat ‘n daaropvolgende wysiging eintlik sou neerkom op die opklaring van ‘n gebrekkige of onvolkome pleitstuk waarin die vorderingsreg, waarop daar deurgaans gesteun is, uiteengesit word... So ‘n wysiging sal uiteraard nie ‘n ander vorderingsreg naas die oorspronklike kan inbring nie, of ‘n vorderingsreg wat in die oorspronklike dagvaarding prematuur of voorbarig was [kan] red nie, of ... ‘n nuwe party tot die geding [kan] voeg nie.”

[42] In the case of *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) Corbett JA, stated on page 836 D;

“Where the plaintiff seeks by way of amendment to augment his claim for damages, he will be precluded from doing so by prescription if the new claim is based upon a new cause of action and the relevant prescriptive period has run, but not if it was part and parcel of the original cause of action and merely represents a fresh quantification of the original claim or the addition of a further item of damages.”

- [43] Plaintiff’s counsel contends that the pleas of prescription by the defendant were raised prior to the proposed amendment. The defendant will bear the onus to prove that the claims have prescribed and the question of prescription cannot be determined with reference to the pleadings alone and will have to be determined at the trial.

EVALUATION

- [44] This court has considered whether this amendment sought by the plaintiff has been made mala fide, and whether it will cause some injustice to the defendant if it is granted.

- [45] Rule 18(4) of the uniform rules states;

“(4) Every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim, ... with sufficient particularity to enable the opposite party to reply thereto.”

- [46] This court is satisfied that the amendments will retain the substance of the original nature of the particulars of claim and that the defendant will be able to respond thereto without embarrassment.

- [47] In the light of the nature of the objections raised, the court has further considered the following:

- i. Whether the plaintiff seeks to correct an arithmetical calculation.
- ii. Whether the real issues in the case have been imperfectly or ambiguously expressed in the pleadings and whether the amendment will cure that.
- iii. Whether the amendment would serve to introduce a new cause of action.

- [48] The defendant’s counsel submitted that this amendment relating to the amount is not merely an arithmetical change, but creates a new cause of action. He submitted that the extension of the date to February 2002 serves to increase the quantum. As such, there should have been an affidavit setting out clearly why the quantum was wrong. Each alleged misappropriation he argues, would be a new cause of action.

- [49] Plaintiff’s counsel contended that it matters not that the amendment pertaining to the dates goes back in time. It is not necessary to give a breakdown as to how the new amounts have been calculated. Although the period of the misconduct changes, the same cause of action, namely the conduct of the defendant remains the same. It merely extends the reckless and fraudulent conduct of the defendant by a further two (2) years.

[50] This court cannot find any grounds to suggest that this request to amend the particulars of claim is mala fide. This court accepts that the plaintiff's proposed amendment to augment the claim for damages is part and parcel of the original

cause of action and is merely a fresh quantification of the original claim.

[51] One of the real issues in this case may have been imperfectly stated by using the word "retained". The word "misappropriate" will place the true issue on record for adjudication.

[52] The objections raised by the defendant pertaining to prescription in respect of both claims will be addressed at the trial. For present purposes the amendment will not affect the defendant's plea or render the summons excipiable.

[53] This court cannot see any prejudice to the defendant in allowing the amendments.

[54] The application to amend the summons in these circumstances did not require a supporting affidavit.

[55] In the premises, the following order is made;

1. The application for the amendment of the plaintiff's particulars of claim in accordance with the plaintiff's notice of amendment dated 30 May 2012 is granted.
2. The plaintiff is to pay the costs occasioned by the amendment, except that the defendant is to pay the costs of the opposition including the costs of senior counsel.

D. DOSIO

ACTING JUDGE OF THE SOUTH GAUTENG

HIGH COURT, JOHANNESBURG

APPEARANCES:

COUNSEL FOR THE PLAINTIFF: ADV. P. DANIELS SC

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1 Robinson v Randfontein Estates Gold Mining Company Ltd 1921 AD 168 at 243

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