

SOUTH AFRICA / JUDGMENT

Khourie v Levine and Others (95/06622) [2018] ZAGPJHC 418 (6 June 2018)

[2018] ZAGPJHC 418**COURT**

South Gauteng High Court, Johannesburg

BEFORE

David Unterhalter

CASE / FILE NUMBER

95/06622

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Source record**REPUBLIC OF SOUTH****AFRICA****IN THE HIGH COURT OF****SOUTH AFRICA****GAUTENG LOCAL****DIVISION, JOHANNESBURG****CASE****NO: 95/06622****NOT****REPORTABLE****NOT****OF INTEREST TO OTHER JUDGES****REVISED.****6/6/2018****In the matter between:**

KHOURIE
, PAUL
JOSEPH Plaintiff/Applicant
and
LEVINE,
ALFRED First
Defendant/Respondent
TOWNSHIP REALTORS (SA)
(PTY) LTD Second
Defendant/ Respondent
STEYN, WILLEM J
Third Third
Defendant/ Respondent

JUDGMENT

UNTERHALTER J

INTRODUCTION

This matter has a long history. Happily, the application before me requires the determination of a single issue: should the applicant

(to whom I shall refer as the plaintiff) be permitted to amend his particulars of claim so as to reflect a change to the quantification

of damages. The plaintiff submits that the amendment to the damages claim provides sufficient particularity for the respondents (to whom I shall refer as the defendants) to plead. The defendants say otherwise. They object to the proposed amendment on the basis that the calculations sought to be relied upon are vague and embarrassing, and hence excipiable. An excipiable amendment, they say, is not one that should be permitted to proceed.

The plaintiff's action rests upon a claim in contract, and, alternatively, two claims in delict. These claims, as they stand,

reference an attachment to the particulars of claim, Annexure G, as the basis upon which the damages are quantified. The proposed amendment seeks to delete Annexure G, and in its place rely upon two documents marked "G1" and "G2", in which the revised quantification exercise is to be found. As with Annexure G, the plaintiff's proposed amendments do not distinguish the conceptual distinction between damages for breach of contract and damages in delict. The defendants however make nothing of this in the application before me.

The long history of this matter need not detain me because the defendants made it plain at the outset of the hearing that the delay in bringing this matter to trial has been determined and need not be further considered by me. So too, a defence of prescription to the plaintiff's claim for mora interest is not taken further at this stage.

It will suffice to note the following. The matter was set down for trial before Snyders J in 1999. The parties settled the merits of the action on an agreed basis. The plaintiff did not further prosecute his action in respect of the quantum until he delivered a notice of intention to amend on 25 March 2011. That notice elicited an application from the defendants to dismiss the action on the grounds of unreasonable delay. Boruchowitz J declined the dismissal application, but did not determine the plaintiff's

application to amend. The appeal court would not entertain an appeal from the decision of Boruchowitz J. And accordingly it now falls to this court to determine the application to amend.

THE APPLICATION TO AMEND

The application to amend rests upon a quantification exercise undertaken by a consulting actuary, Mr Jacobson, which is set out in two documents, “G1” and “G2”. Although there are a number of differences between the calculation in “G1” and “G2”, the primary difference is that the date of the calculation in “G1” is as at 1.1.2011; whereas in “G2” all the losses have been discounted back to 1.3.1992. Furthermore, in “G1” an accrued loss and a prospective loss are calculated, whereas in “G2” no prospective loss is relied upon.

The plaintiff explained that the significantly different outcomes reached as to the accrued loss in “G1” and “G2”

arise from different approaches to the calculation of loss. On one approach, the loss is determined as at the date of the breach. On the other approach, a court may take account of facts that come to be known thereafter so as to permit of a more accurate

quantification of prospective loss. This more expansive approach was favoured in Wigham[1], but has not been consistently followed.[2]

This is not an issue I need to resolve because it turns out not to be the target of the defendants’ challenge. Rather, the defendants complain that the calculation of the total loss lacks necessary particularity so as to permit the defendant properly to assess the plaintiff’s quantification of its damages.

In order to understand the challenge made by the defendants, it is necessary to consider the methodology applied by Mr Jacobson to the calculation of the plaintiff’s loss. As I understand his methodology, as reflected in “G1” and “G2”,

Mr Jacobson sets out the total income that would have been earned had the development gone ahead. He deducts from total income the total net borrowings with interest that the developers would have incurred to fund the development. In “G1” this permits of a determination of a total accrued loss (to 1.1.2011), to which is added a prospective loss after 1.1.2011, so as to arrive at a total net loss. In “G2” a similar methodology is used, save that the loss is discounted back to 1.3.1992 and no prospective loss is allowed.

I do recognize that the calculation, whether done by reference to accrued losses or discounted value, does give a breakdown of the various component parts of the development that would have taken place. Thus for example the total income that would have been earned in respect of the development and sale of sectional title units 1-4 and 5 -6 is estimated and is then attributed month by month over a period of years. So too the borrowing together with interest that would have been required to undertake the development is divided between the component parts of the development and the repayments that would have been required are spread month by month over a period of years.

The plaintiffs say of all of this that it gives considerable detail as to the income that would have accrued over time and the liabilities incurred to generate that income; and that this more than suffices for the defendants to understand the plaintiff’s case on quantum and to plead to it.

There is certainly detail given as to how much income it is alleged would have been earned and at what cost by way of borrowings.

The defendants say however that this does not suffice. In essence they complain that while “G1” and “G2” give a detailed account of the income and debt that would have been earned and incurred, these attachments fail to plead facts that support the amounts relied upon. As a result, the defendants are not placed in a position to assess the basis of the loss claimed, and cannot meaningfully plead to it. The defendants rely upon dicta in *Nasionale Aartappel*,^[3] a complex damages case, in which the court found that there was insufficient particularity as to how the plaintiff arrived at the sums it claimed.

The defendants illustrated their difficulty by referring to “Annexure G”, the basis of the quantification claimed by the plaintiff in the case as currently pleaded. Annexure G sets out a loss of profit calculation that makes an assessment of projected income and projected costs. Annexure G also makes plain the planning criteria that are assumed and the assumptions made as the basis for the calculation. So, for example, the schedules to Annexure G state the area of the stand, the allowable coverage, the lettable area and so forth. The assumptions, including the cost of land, cost of servicing a stand, contract escalations and relevant time periods, are made clear. These planning criteria and assumptions are not replicated in “G1” and “G2”.

The plaintiff’s action is also a complex damages case. The merits that have been settled by agreement concede that the plaintiff would have acquired and developed the property as defined in paragraph 9.2 of the plaintiff’s particulars of claim. What stands over for determination is the plaintiff’s claim for damages and the quantum thereof. That determination, as ordered by *Snyders J*, includes the following issues:

- a) The plaintiff’s ability to acquire the property and to undertake the development thereof;
- b) The nature of the development of the property which the plaintiff would have undertaken;

The viability of the development of the property which the plaintiff would have undertaken.

These issues form part of the assessment of damages and, I should say, aspects of causation. The complexity of the matter is all the more evident since the proof of the plaintiff’s loss is predicated upon a counterfactual: what development would have been undertaken had the breach of contract or duty of care not taken place?

In litigation of this kind, in my view, a plaintiff’s claim for damages cannot simply state what losses were incurred. The pleading must go further and set out the essential facts and assumptions relied upon that support the quantum of the loss claimed. This is all the more necessary when the loss is a loss of profits, in respect of a development that did not take place.

The test is ultimately whether the defendant is placed in a position to assess the loss claimed and plead meaningfully to it. That cannot occur if the estimation of the loss does not state plainly from what facts and assumptions the calculations proceed. Without this, the amounts claimed are simply asserted conjecture. And worse, pleadings of this kind encourage the plaintiff to plead

a case for damages on speculative foundations and the defendants to follow suit, often by simply pleading a blanket denial. These are precisely the emaciated pleadings that parties litigating complex cases should be discouraged from using. Rather, both plaintiff and defendants should think through the essential features of their case on damages upon the exchange of pleadings. And not, as so frequently occurs, by way of an iterative process of amendments, requests for further particulars, and expert summaries closer to the date of trial. This I consider is what Rules 18(4) and (10) require in cases of the kind brought by the plaintiff.

Against this standard, and its encapsulation in Rules 18(4) and (10), the proposed amendment falls short. The amendments in “G1”

and “G2” say much of what loss was suffered and when, but says very little as to what essential facts and assumptions

support these claims. An amendment of this kind should not be allowed to proceed because it fails to do what Rule 18 requires and is too vague to allow for a proper assessment of the loss claimed.

The plaintiff points out that the particulars of claim are not devoid of all particularity concerning the property that had been approved for development. But the averments are sparse and are not intelligibly linked to the calculations set out in “G1” and “G2”.

The plaintiff also submitted that the Aartappel case concerned a very different set of claims as to loss. This is to miss the point. It is the principle of pleading in a complex damages case that signifies, not the particular claims of loss made in Aartappel.

For these reasons, I find that the amendment sought by the plaintiff cannot be granted. Of course the plaintiff may formulate an amendment to its claim that is in conformity with the principles of pleading that I have set out.

COSTS AND ORDER

The plaintiff submitted that if the amendment should fail, the plaintiff should be burdened with the costs of one counsel only. In my view, there is sufficient complexity attaching to the pleaded case and the determination of the issues as to amendment to warrant the employment of two counsel. Plainly, since the sole issue that I was ultimately required to resolve was the application to amend, the costs order will pertain to this application only. There has also been unacceptable delays in taking this litigation forward. I do not award attorney and client costs on this occasion. But counsel for the parties accepted that this matter should now be made subject to judicial case management, and I do so direct.

I accordingly make the following order:

The application to amend dated 24 March 2011 is dismissed with costs, the costs to include the costs occasioned by the employment of two counsel.

David Unterhalter

Judge of the High Court

Gauteng Local Division: Johannesburg.

Date of Hearing: 1 June 2018

Judgment delivered: 6 June 2018

Appearances:

Advocate for the Plaintiff/Applicant: K Lavine instructed Fluxmans Inc.

Advocate for the Defendant/Respondent: C H J Badenhorst SC and A W Pullinger instructed by Van der Meer & Schoonbee

[1] Wigham v British Traders Insurance Company Ltd 1963

(3) SA 151 (W).

[2] Wigham was followed in General Accident Insurance Co SA Ltd v Summers 1987 (3) SA 577 but not in Majele v Guardian National Insurance Co Ltd 1986 (4) SA 326 (T) .

[3] Nasionale Aartappel Koöperasie Bpk v Price Waterhouse Coopers Ing en Andere 2001 (2) SA 790 (T).

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