

SOUTH AFRICA / JUDGMENT

Nedbank Limited v Haresh (11969/2015) [2022] ZAKZDHC 19 (11 May 2022)

[2022] ZAKZDHC 19

COURT

Kwazulu-Natal High Court, Durban

BEFORE

Reddi

CASE / FILE NUMBER

11969/2015

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IN

THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL

LOCAL DIVISION, DURBAN

CASE

NO: 11969/2015

In

the matter between:

NEDBANK
LIMITED
PLAINTIFF
and
OUDERAJH
HARESH
DEFENDANT
ORDER
It

is ordered that:

1

The plaintiff is granted leave to amend its Particulars of Claim and Reply to Request for Further Particulars in terms of the plaintiff's

notices of intention to amend dated 19 November 2021;

2

The defendant's Rule 30 (1) application dated 15 September 2020 is dismissed;

3

The defendant's Rule 30(1) application dated 29 November 2021 is dismissed;

4

The plaintiff is to pay the costs of all three applications.

JUDGMENT

REDDI AJ

[1] This matter has had a long and chequered history. Originating from an acknowledgement of debt (hereafter 'AOD') signed on 30 March 2011, now the centre of a dispute in a part-heard trial postponed sine die on 19 October 2021, the parties currently seek relief under three opposed interlocutory applications the details of which appear

below.

[2] It is common cause that at the part-heard trial, the plaintiff's witness's testimony concerning the basis of the underlying debt, the approximate period when it arose, and the circumstances in which the AOD was signed were at variance with the plaintiff's pleadings and notices. Consequently, the plaintiff sought and was granted a postponement to seek to amend its pleadings and notices to try and harmonise the evidence and the documents.

[3] In furtherance of this aim is the first of the three interlocutory applications, namely, the plaintiff's opposed rule 28(4) application to amend: (i) its particulars of claim and (ii) its reply to the defendant's request for further particulars.

[4] The proposed amendments to the particulars of claim are two-fold. The first aspect relates to certain specific terms of the AOD, and the second to a reduction in the quantum of the claim.

[5] The proposed amendments to the reply to the defendant's request for further particulars relate first to how the underlying debt

originated and, secondly, to the calculation of the amended quantum.

[6] Conversely, the defendant has lodged two opposed rule 30(1) applications, the first relating to the plaintiff's amended reply to a rule 37(4) notice, dated 15 September 2020. The defendant seeks to set aside the amended reply served on 26 November 2021.

[7] In the second rule 30(1) application, the defendant seeks to set aside the plaintiff's supplementary affidavit, dated 29 November

2021.

[8] I deal with the three applications separately.

The plaintiff's rule 28(4) application

[9] It is apposite at this stage to consider the purpose of rule 28. All Alloys (Pty) Ltd v Du Preez 2013 JDR 1648 (GSJ) paragraph 15 is instructive. In this case, the court iterated what is now commonplace, that rule 28 is intended to regulate the amendment of pleadings and documents in respect of which the parties' procedural rights in proceedings may be affected. The notification requirement in rule 28(1) grants the other party to the proceedings an opportunity to object to the intended amendment under the provisions of rule 28(4).[1] Objections customarily arise if a party may be prejudiced in the conduct or outcome of the proceedings because of the amendment or its timing.

[10] The principles governing the granting or refusal of an amendment have been expounded in several cases.[2] The key principles evident in these cases were also echoed by the Constitutional Court in Affordable Medicines Trust and Others v Minister of Health and Others [2005] ZACC 3; 2006

(3) SA 247 (CC). Referring with approval to Moolman v Estate Moolman and Another 1927 CPD 27 at 29, the court, in paragraph 9, indicated that:

'the practical rule that emerges ... is that amendments will always be allowed unless the amendment is mala fide (made in bad faith) or unless the amendment will cause an injustice to the other side which cannot be cured by an appropriate order for costs, or "unless the parties cannot be put back for the purposes of justice in the same position as they were when the pleading which it is sought to amend was filed"'

[11] The essence of these principles was recently crystalised by the Constitutional Court in Ascendis Animal Health (Pty) Ltd v Merck Sharp Dohme Corporation and Others 2020 (1) SA 327 (CC) in paragraph 89 when it stated that rule 28 'is an enabling rule and amendments should generally be allowed unless there is good cause for not allowing an amendment'.

[12] Flowing from the sentiments expressed by the Constitutional Court, the question in each case is, what do the interests of justice

demand? The critical consideration in assessing if an amendment should be allowed is whether, in weighing all relevant issues, the interests of justice favour the granting of the proposed amendment sought.

- [13] In granting an amendment, the fundamental goal 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.' [3] However, as was stated in *Commercial Union Assurance Co Ltd v Waymark NO 1995*
- (2) SA 73 (Tk) at 77, the ultimate decision of whether to grant an amendment is an issue at the discretion of a judicial officer, which discretion must be exercised wisely after deliberating on all relevant legal and factual considerations.
- [14] While the prevailing legal position favours granting amendments under rule 28, except for those instances specified in *Affordable Medicines Trust and Others v Minister of Health and Others*, not all amendments qualify to be made formally. The ambit of rule 28(1) is restricted to 'a pleading or document other than a sworn statement, filed in connection with any proceedings'.
- [15] In determining whether the reference to 'a pleading' in rule 28 includes further particulars for trial, the court in *All Alloys (Pty) Ltd v Du Preez*, quoting from *The New Shorter Oxford English Dictionary on Historical Principles*, 1993 edition, said this in paragraph 9:

"Pleading" has a technical meaning in litigation. It means "a formal written (formerly oral) statement in a civil action prepared by each side and setting out the cause of action or the defence."

The court stated that the goal of pleadings is to set out the causes of action and defences to it and delineate the issues between the litigants. [4] Therefore, since further particulars for trial relate to previously pleaded issues and are supplied after the close of pleadings, they do not form part of the pleadings as they do not raise further or new issues between the parties. [5]

- [16] The sentiments expressed above reflect the views of the Supreme Court of Appeal in *Ruslyn Mining and Plant Hire v Alexkor* [2012] 1 ALL SA 317 (SCA) in paragraph 18 when it said this:

'Further particulars for trial are not pleadings. The opportunity to request them arises after the close of pleadings: Uniform Rule 21(2). They are limited to obtaining information that is strictly necessary to prepare for trial. They do not set up a cause of action or defence by which a party is, in the absence of amendment or tacit concurrence, bound and by which the limits of his evidence are circumscribed. Nor can they change an existing cause of action or create a new one...'

- [17] Even if not a pleading, further particulars may yet fall within the ambit of rule 28 if they can be defined as a 'document...filed

in connection with any proceedings.' However, it would seem not, based on the court's approach in *All Alloy* in paragraph 14, where it advocated for the word 'document' to be given 'a more circumscribed reach' than its 'ordinary grammatical

meaning.' To bolster its interpretation of why further particulars do not fall within the circumscribed definition of a 'document,' the court interrogated the basis of the notification requirement in rule 28(1). It concluded that this requirement existed to provide the other party with an opportunity to object to the intended amendment. If a right to object to an intended amendment to a document is non-existent, then the mechanisms of rule 28 would be irrelevant, thus making it meaningless to provide notice in terms of rule

28(1).[6]

[18] However, the meaning attributed to 'document' in *All Alloys* is not universally shared. For instance, in *Gainsford NO and Others v Jawmend Rossi Capital (Pty) Limited* [2013] JOL 30679 (GSJ) in paragraph 23, the court preferred the ordinary grammatical meaning of 'document' when it concluded that further particulars fell within the realm of the rule 28 provisions for being a document as envisaged by the rule.

[19] A brief exposition of the current legal position on certain germane aspects of rule 28 completed, I turn now to the plaintiff's rule 28 application to amend its particulars of claim and its reply to the defendant's request for further particulars.

[20] Regarding the particulars of claim, the plaintiff seeks to amend this document to accord with the payment terms in the AOD, which originated as blank spaces later filled in and signed by all authorised parties. The plaintiff also seeks to amend the list of payments allegedly made by the defendant in meeting his obligations under the AOD. The effect of this last amendment would be to reduce to R426 000 the quantum of the plaintiff's claim in the action. If the proposed amendments are permitted, the plaintiff's prayer would also be amended to reflect this change.

[21] One of the defendant's objections to the amendments to the particulars of claim centres on the non-variation clause in the AOD, which he claims would be breached if the amendment to the filled-in and signed payment terms were allowed. In response, plaintiff's

counsel, Ms Meyers, has submitted that the non-variation clause would only have relevance should either party seek to amend the AOD after it had been signed. This was not the contention in this matter. Therefore, according to Ms Meyers, the proposed amendments to the particulars of claim are neither excipiable nor do they fall foul of the parole evidence rule, as alleged by the defendant.

[22] I agree with Ms Meyer's submissions on the issue of the non-variation clause. Moreover, the proposed amendment does not change the cause of action in this case. Therefore, the defendant's submission that the plaintiff's proposed amendments to the particulars of claim would launch new issues and a new case regarding the underlying transaction is without basis. Equally without basis is the defendant's objection to the amendment to paragraph 5 of the particulars of claim and prayer (a). If permitted, the effect of these proposed amendments would be to reduce the plaintiff's claim from R520 000 to R426 000. It is difficult to envisage what, if any, prejudice the defendant will suffer if this amendment were to be

authorised. No prejudice of relevance has been averred except for the claim that to allow the amendment would bar the defendant from taking the plea of prescription. My view on the issue is that the plea of prescription is a matter for decision by the trial court. Moreover, it is not clear how granting this amendment will affect the plea of prescription. However, since this is an evidentiary issue, it falls to be determined by the trial court and not this court.

[23] I must consider if allowing the amendments will facilitate a proper airing of the dispute between the parties to enable the real issues between them to be identified, thus ensuring justice is served.[7] Distilling from the principles articulated by the Constitutional Court in *Affordable Medicines Trust and Others v Minister of Health and Others*

[2005] ZACC 3; 2006 (3) SA 247 (CC) and *Ascendis Animal Health (Pty) Ltd v Merck Sharp Dohme Corporation and Others* 2020 (1) SA 327 (CC), my primary consideration in assessing if the plaintiff's rule 28 application should succeed is whether, in weighing all relevant issues, the interests of justice favour that I grant the amendments.

[24] It is trite that amendments should not be permitted when a costs order or a postponement cannot remediate any resultant prejudice to the other party.[8] I do not consider the circumstances of this case to be such that a costs order against the plaintiff would not adequately address any resultant prejudice occasioned to the defendant, such as the trial duration being lengthened. In weighing the benefits to the interests of justice if the amendments to the particulars of claim are allowed against any consequent prejudice to the defendant, I believe it to be in the interests of justice that the amendments be allowed.

[25] I now turn to the second aspect of the plaintiff's rule 28(4) application, namely the proposed amendment to the further particulars

in reply to the defendant's request. These proposed amendments relate to two aspects: (i) how the underlying debt arose; and (ii) the calculation of the amended quantum. Before assessing whether the proposed amendments should be allowed, this court should first

consider whether the application process for approval followed in this instance is appropriate.

[26] The defendant's submission is that the application process pursued regarding the proposed amendments to the further particulars was wrong. Defendant's counsel, Mr Kissoon Singh, submitted that under the guidelines established by the Supreme Court of Appeal in *Ruslyn*, later echoed in *All Alloys*, rule 28 is an inappropriate mechanism to effect amendments to further particulars. I believe this argument is not without merit.

[27] It is now settled in our law that further particulars do not constitute pleadings.[9] However, no such certainty exists regarding whether they can be defined as 'a document for the purpose of proceedings, which would

bring them into the ambit of rule 28.[10] My view is that the purpose served by rule 28 conjoined with the role of further particulars for trial provides direction on how the latter should be interpreted when determining if the formal application route should be followed. Under rule 21,

further particulars are limited to obtaining strictly necessary information to prepare for trial. Further particulars do not set up a cause of action or defence that constrains a party and determines the parameters of their evidence in the absence of amendment or tacit agreement. Nor can they modify an existing cause of action or generate a new one. Thus, any resultant prejudice to the other party arising from an amendment to further particulars is not as consequential as amendments to particulars of claim. Hence, it may be excessive in the circumstances and inappropriate and pointless to seek formal approval to amend this type of document, especially once the trial is underway. It should be enough for counsel to inform her opponent of the amendment as soon as she becomes aware that the evidence may differ materially from the details in the further particulars. This matter can then become an issue for the other party to raise with the trial court.

[28] Based on the reasoning above, I believe there was no need for the plaintiff to have included the proposed amendments to its further particulars in its rule 28 application. However, since the issue regarding whether further particulars can be defined as a document under rule 28 is yet to be settled, it would be an injudicious exercise of discretion for me, for this reason alone, to dismiss the amendment application merely because I believe the application need not have been brought under rule 28.

[29] As mentioned in paragraph [22] above, the defendant's claim of prejudice centres on the assertion that the proposed amendments would have the effect of introducing a new cause of action or changing the cause of action. This claim is without merit. The cause of action in this matter is the disputed AOD by the defendant. The proposed amendments to both the particulars of claim and the further particulars, if allowed, do not create a new cause of action, nor do they change the disputed cause of action. The crux of the proposed amendments to the further particulars relates to how the debt occurred. This is a matter of evidence and does not change the cause of action, which remains the AOD. Accordingly, the defendant's claim of prejudice arising from the proposed amendments' interference with the cause of action is without a legitimate basis. Should prejudice be occasioned due to the proposed amendments needing additional or new evidentiary aspects to be traversed by the defendant, I believe an appropriate costs order would mulct such prejudice.

[31] In line with the principle that in amendment applications, the emphasis is on achieving a result that would ensure proper ventilation of the fundamental issues between the litigants to satisfy the interests of justice, the court finds in favour of the

plaintiff regarding the proposed amendments to the further particulars.

The defendant's rule 30(1) application relating to the plaintiff's amended reply to a rule 37(4) notice

[32] In an affidavit filed on 28 April 2022 by the plaintiff's correspondence attorney of record, Priyasha Moodley, the plaintiff

sought to withdraw the amended pages of its particulars of claim served on 26 November 2021 and the amended pages of its reply to the defendant's request for further particulars also served on 26 November 2021. Ms Moodley claimed that both sets of amended pages had been served in error. The court accepts Ms Moodley's affidavit supporting the withdrawal application and grants the plaintiff's two withdrawal requests.

[33] Since the offending amendments have been withdrawn, the irregularity complained of by the defendant in this rule 30(1) application falls away. Nevertheless, an appropriate cost order will address any prejudice to the defendant attendant to the issue up to this stage.

The defendant's rule 30(1) application to set aside the plaintiff's supplementary affidavit of 29 November 2021

[34] The defendant is seeking an order to set aside the plaintiff's supplementary affidavit, dated 29 November 2021, filed in terms of rule 35(3). The defendant's submission is that the affidavit is irregular and pro non scripto. He also contends that the plaintiff has neither applied for nor obtained the leave of the court to supplement its affidavit of 6 July 2021 and has failed to establish any grounds for leave to supplement.

[35] In challenging the application for the proposed amendments to the further particulars, the defendant has focused primarily on the contents of the supporting affidavit by the plaintiff's attorney on record, Ms A Lorgat, and how it was deposed. The supplementary

affidavit of Mr F Matala, which is the bedrock of the proposed amendments to the further particulars, was also attacked on similar

grounds.

[36] Ms Lorgat is the plaintiff's attorney on record and integrally involved in the matter. Her affidavit is a summary of the information

she had. Given the circumstances, the content of her affidavit reflects this. Much of what the defendant's counsel has raised about

the affidavits, particularly that of Mr Matlala, is related to the merits of the case and are matters for argument at the trial.

Although strong criticism can be levelled against the plaintiff, which this court categorically does, for the cavalier manner in which it has approached the presentation of this matter, this does not affect the validity of Mr Matlala's supplementary affidavit. As was correctly pointed out by the plaintiff's counsel, the only way to correct an affidavit is to make another affidavit. Furthermore, as mentioned above, Mr Matlala's affidavit goes to the heart of the further particulars. Since this court has granted the plaintiff's

application to amend its further particulars, it would be illogical to find the affidavits objectionable.

[37] In the context of the normative values of the South African constitution, an overly formalistic approach to the achievement of justice must be discouraged. This thinking should also be evident in the adjudication of formal requests of the nature of the three interlocutory applications in this matter. In weighing the applications before it, the focus of this court has been on assessing, in each instance, what would best serve the interests of justice. This same approach informs the costs orders that the court has made in this matter. It must also be mentioned that a more cautious approach by the plaintiff in its presentation of this case would have obviated the need for the indulgences it has sought, which range from the rule 28(4) application to the withdrawal of its amended reply to a rule 37(4) notice, dated 15 September 2020, served on 26 November 2021. As a consequence of some of this, the defendant was compelled to launch the two rule 30(1) applications. Both parties have expended considerable costs as a result. However, in light of the foregoing, this is a liability that the plaintiff alone will have to remediate.

Order

[38] I accordingly make the following order:

4 The plaintiff is to pay the costs of all three applications.

[1] Ibid.

[2] See for instance *Commercial Union Assurance Co Ltd v Waymark* NO 1995 (2) SA 73 (TK) at 76D-76I. See also *Caxton Ltd and Others v Reeva Forman (Pty) Ltd and Another*

[1990] ZASCA 47; 1990 (3) SA 547 (A) at 565G-566A.

[3] *Dreyer v Metsimaholo Local Municipality* (5899/2017) [2021] ZAFSHC 186 (23 August 2021) para 35; See also *Cross v Ferreira* 1950 (3) SA 443 (C) at 447 and *Trans-Drakensberg Bank Ltd (under Judicial Management) v Combined Engineering (Pty) Ltd and Another* 1967 (3) SA 632 (D) at 638.

[4] *All Alloys* para 11.

[5] *Ibid* para 10.

[6] *Ibid* para 16.

[7] *Cross v Ferreira* 1950 (3) SA 443 (C) at 447.

[8] See for instance *Trans-Drakensberg Bank Ltd (Under Judicial Management) v Combined Engineering (Pty) Ltd and Another* 1967

(3) SA 632 (D) which discusses the issue extensively.

[9] *Ruslyn Mining & Plant Hire v Alexkor* [2012] ALL SA 317 (SCA) para 18.

[10] See All Alloys (Pty) Ltd v Du Preez 2013 JDR 1648 (GSJ) which advocates for a circumscribed definition of document to exclude further particulars. In contrast, in

Gainsford NO and Others v Jawmend Rossi Capital (Pty) Limited

[2013] JOL 30679 (GSJ) para 23, the court stated that further particulars could be defined as a 'document' under rule 28.

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