

SOUTH AFRICA / JUDGMENT

Statusfin Financial Services (Pty) Limited v Vos and Others (21404/05) [2007] ZAGPHC 195 (11 September 2007) [2007] ZAGPHC 195

COURT

High Courts - Gauteng

BEFORE

Mokgoatlheng

CASE / FILE NUMBER

21404/05

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

NOT REPORTABLE

11

SEPTEMBER 2007

IN THE HIGH COURT OF SOUTH

AFRICA (TRANSVAAL PROVINCIAL DIVISION)

CASE NO:21404/05

In the matter between:

STATUSFIN FINANCIAL SERVICES
(PTY) LIMITED

Applicant

and

GERHARD

VOS

GERHARD VOS N.O. WILLEM JACOBUS

VOS N.O.

JOHANN FRIEDERICH WINNERTZ N.O.

First

Respondent Second Respondent Third Respondent Fourth Respondent

JUDGMENT

MOKGOATLHENG J

INTRODUCTION

The plaintiff (the applicant) has instituted action against the Defendants (the respondents). The defendants have filed an exception to the particulars of claim. Subsequent to the defendant's exception; the plaintiff filed a notice in terms of Rule 28(4) to amend its entire particulars of claim. In this judgment the citations of the parties will be used interchangeably.

2

The defendants filed a notice of objection to the proposed amendment. In their objection, the defendants have set out several grounds of objection; alleging that the proposed amendments are excipiable in that ;-

The plaintiff has failed to set out the necessary averments to sustain a cause of action, alternatively the proposed amendment insofar as it pertains to the First Defendant is vague and embarrassing, that accordingly the first

defendant is prejudiced thereby.

In *Summons, NO v Gilbert Hamer and Co Ltd* 1963 (1) SA 897 (N) at 906 the full bench of the N.PD held through CANEY J that" .

it is desirable not to be bound inflexibly to rules of procedure unless compelled to this by the clear language of the law, and that the present day tendency is away from formalism in procedure and in the direction of assuring that justice is done by allowing, whenever necessary, amendments to pleadings and the admission of further evidence, whether oral or on affidavit, subject to the absence of prejudice to the other party not remediable by an appropriate order

as to costs".

In *Morgan and Ramsay v Cornelius and Holhs* 1910 NPD 262 at 265 Dove-Wilson J stated, "In my opinion the Court ought to allow all such amendments as may be necessary for the purpose of determining in an existing action or proceedings the real question between the parties.

Personally I see no objection to a new ground of action or defence being stated by way of amendment, nor should I in all circumstances object to amendment merely because it goes the length of changing the character of the action, where that is necessary to determine the real question between the parties"

3

The Plaintiffs proposed amendment is a voluminous document. The proposed cause of action is predicated upon the all embracing averments in paragraph 13.2 to 13.5 of in its particulars of claim couched as follows; (13.2);

"Die Eiser pleit verder dat die doel van die pasvermelde ooreenkoms, wat gesluit is op die 3 Maart 2003, alternatiewelik op 23 April 2003, was om 'n ander tussentydse reëling wat die Eiser met die PTK in Januarie 2003 gehad het, te vervang. Die vermelde tussentydse reëling van Januarie 2003 was dat die Eiser 'n sekere groep van die debiteure wat eers oorgeneem was deur die MGK uit hoofde van die eerste ooreenkoms, en toe oorgeneem is deur die Eiser uit hoofde van die tweede ooreenkoms,

weer teruggee het aan die PTK.

6.

(13.3) Die Eiser pleit dat hierdie ooreenkoms van 3 Maart 2003, alternatiewelik 23 April 2003, die tussentydse reëling van Januarie 2003 weer ongedaan maak deurdat alle debiteure van PTK kragtens die vermelde ooreenkoms setel in die Eiser en dat die Eiser geregtig sou wees om die debiteure vir eie rekening in te vorder.

(13.4) By gevolg pleit die Eiser verder dat dit gevolglik irrelevant is watter debiteure in Januarie 2003 teruggee is en watter aangesien;

4

(13.4.1) 'n debiteur wat nie teruggee was nie in elk geval uit hoofde van die eerste en tweede ooreenkomste 'n debiteur was dat die Eiser sou

kon invorder,

en/of

(13.4.2) 'n debiteur wat teruggee is, weer kragtens hierdie vermelde ooreenkoms van 3 Maart 2003, alternatiewelik 23 April 2003, in die Eiser setel en vir eie rekening deur die Eiser ingevorder kan word.

(13.5) Of die Eerste Verweerder derhalwe deel was van die debiteure wat aan vanlik in Januarie 2003 teruggee was of nie, is gevolglik nie ter sake nie".

7. The respondents state that because the applicant failed to allege;

(a) whether the third cession was a written or oral agreement,

(b) who represented, the Applicant and PTK respectively in concluding the third cession,

(c) where the third cession was entered into between the applicant and

PTK,

5

- (d) the terms of the third cession, inter alia, whether the applicant's claim vis-a-vis the First Respondent was one of the claims ceded in terms of the second, third or fourth cession, the proposed amendment is excipiable in that it does not set out the necessary averments to sustain a cause of action alternatively the proposed amendment is vague and embarrassing, and the respondents are accordingly prejudiced by the proposed amendment in that the applicant has failed to allege that claim of PTK against the first respondent was not identified or handed over at the effective date for collection after being ceded to MGK.

In my view the applicants amendment proposed in paragraphs 13 encapsulates all claims which formerly reposed in either MGK or PTK, and these are now ceded to the applicant in terms of the first, second, third and fourth cessions. These claims incorporate pertinently claims against the first and second respondents

- (9) In my view the proposed amendment sets out in the first claim of R73 800.00

the necessary allegations to sustain a cause of action in the proposed amendment in paragraphs 16.17 of the particulars of claim in that all the former rights of PTK and MGK now repose in the applicant. In terms of Annexures (I) and E the applicant correspondingly has a claim against the first respondent in that he was a member of the PTK at the time the debts were incurred when he allegedly entered into a contract with PTK to acquire production credit to produce tobacco in term of, an agreement Annexure "F" which the applicant alleges the first respondent breached by failing to deliver the tobacco.

6

Mr Strydom on behalf of the respondents argued that Annexure "E" does not incorporate an agreement, that in fact is a letter disclosing that on the 8th April 2003 the High Court ordered that the assets of PTK should be sold by tender. In my view this letter further states that

"Statusfin sal dus voortgaan om die debiteure vir eie wins en verlies in the volgende aantal jare probeer vorder.

AFSKRYWING VAN BEDRAE VERSKULDIG

Aangesien PTK nadat daar aan die genoemde hofbevel uitvoering gegee is, geen bates sal he nie, steeds verskeie bedrae aan ander skuldeisers en Statusfin verskuldig sal wees en nie meer verdere sake sal kan do en nie, het ons geen keuse as om te aanvaar dat PTK nie sy skuld aan Statusfin sal kan vereffen

nie Die voorbehoud is dat solank PTK as regsentiteit bly voorbestaan, die organisasie Statusfin sal ondersteun in enige invorderingsaksies weer Statusfin die ondersteuning van die kooperasie mag benodig en dat PTK hiermee om enige dokumente te verskaf en onderteken wat Statusfin op versoekgetuienis sal afle in regsake en indien nodig as party tot enige regsgeding gevoeg te word dokumente waarna hiervoor verwys word sal onder andere sluit, maar nie daartoe beperk wees nie, dokumente waar die pandreg van die kooperasie oor ooste bestaan en Statusfin

'n terme daarvan sekere skulde van kliente kan
vorder" .

It is patent that Annexure "D" and "E" incorporate the agreement which is clearly alleged in the proposed amendment in paragraph 13.1 and 13.2 of the particulars of claim and sets out averments which sustain a cause of action.

7

The respondents objects to the second claim which is based on an application letter dated the 7th September 2001 to PTK for finance in the amount of R230 000.00 to plant a grape crop and states that it is excipiable in that the proposed amendment does not set out the necessary averments to sustain a cause of action alternatively that it is vague and embarrassing because applicant is unable to state whether (a) the agreement is in writing, orally or partly in writing and partly orally, (b) who on behalf of PTK concluded the alleged agreement.

In my view the proposed amendment sets out averments which sustain a cause of action which enable the first respondent to plead to the applicants second
claim.

The first respondent objects to the applicants claim against the second respondents namely that the proposed amendment does not set out averments which sustain a cause of action in tat the former has failed to allege that (a) the sum of R500 000.00 or any other amount was advanced by the applicant to the Gerhard Vos Family Trust in terms of Annexures "I" and "J",

- (b) the term of repayment agreed upon between the Gerhard Vos Family Trust and the applicant in respect of the loan, referred to,
- (c) that the Gerhard Vos Family Trust has failed to comply with the terms of the repayment, and
- (d) the extend of the Gerhard Vos Family Trusts indebtedness to the applicant by virtue of the

loan referred to.

8

The first Respondent in his capacity is the authorized representative of the trustees of the Gerhard Vos Family Trust in terms of a resolution of the trustees made on the 20th August 2003 at Tom-Burke. The first respondent gave power to attorney to Goosen/Fourie and/or Oosthuysen to register a mortgage bond in favour of Status fin Finansiële Dienste (Eiendom) Beperk in respect of the

amount of R500 000.00.

In my view the proposed amendment in paragraph 37 that "Die Eiserpleit dat die vermelde verband 'n skulderkenning en 'n onderneming on te betaal daarstel in terme waarvan die Trust erken dat hy ten gunste van die Eiser aanspreeklik is vir die bedrag van R500 000.00 en onderneem om dit te betaal "paragraphs 32 and 34 read with the power of attorney and the covering mortgage bond, contain averments which sustain a cause of action.

In *Trans-Drakensberg Ban Ltd v Combined Engineering* 1967(3)639 at 638A Caney J held that the primary principle appears that an amendment will be allowed in order to obtain a proper ventilation of the dispute between the parties, to determine the real issues between them, so that justice is done, Overall, however, it is the vital consideration that no amendment will be allowed in circumstances which will cause the other party such prejudice as cannot be cured by an order of costs and, where appropriate, a postponement".

9

In *De Klerk and Another v Du Plessis and Others* 1995(2) SA 40, TPD at 43 para 1 Van Dijkhorst J stated that "The application for amendment was opposed on the ground that the incorporated part of the plea would then be excipiable for a numbers of reasons. An amendment which would render a pleading excipiable should not be allowed. Whether a pleading would or would not become excipiable is a matter of law which should be decided by the Court hearing the application for amendment. It would be incorrect in my view, to hold that it is arguable that the amendment would not render the pleading excip iab le, allow it, and send the parties away to prepare for another battle on exception on the same point. I agree with the views expressed in this respect in *R Mvan de Ghinste and Co(Pty) Ltdv Van de Ghinste* 1980 (1) SA 250 (C) 256 H-259C. In so far as certain remarks in *Crawford-Brunt v Kavnat and another* 1967(4) SA308(C) and *National Union of South Africa Students v Meyer* 1973(1)SA 363T) are susceptible of a different interpretation, I respectfully differ. It follows that where there are conflicting decisions in different divisions on the point of law it would be incorrect to allow the amendment on the basis that it is arguable. I have to follow the decisions to which I am bound or, if there are none, decide the issue".

In *RM Ghinste supra* it was held by King A J, at page 256 para that, "Although there are decisions apparently to the contrary (See *Naiker v Kerdachi* 1933 NPD 599, *Walker v Taylor* 1934 WLD), the great weight of authority in my view favours the proposition that an amendment which would render a pleading excipiable ought not to be allowed However in *Crawford-Brunt v Kavnat and another* 1967(4) SA 308(C) at 310, a distinction was drawn between a pleading which, as amendment "would be" excipiable and one which may be excipiable ".

10

What emerges from these various decisions is that a Court, faced with an objection to a proposed amendment to a pleading on the ground that the pleading as amended would be excipiable, to confine itself to an enquiry as to whether or not the question of excipiability is arguable-ie whether or not the pleading may be excipiable- is an expediency which should be resorted to only in exceptional circumstances. Ordinarily the Court should decide on the question and if the

Court's decision is that the pleading as amended would be excipiable the Court should refuse the application for an amendment.

In Cross v Ferreira 1950(3) 443(C), it 449H it was held that "while the practice is not entirely uniform on this point, the weight by authority seems to favour the view that if the pleading as sought to be amended would be excipiable, this affords a ground upon which the court may, in the exercise of its discretion, refuse the application for amendment" Jajbhay J in Kriscke v Road Accident Fund 2004 (4) SA 358 at 363 B-"held that a pleading which is bad in law lacks averments which are necessary to sustain an action. It follows that an amendment should be refused on the ground of excipiability if it is clear that the

amended pleading will (not may) be excipiable (citation excluded).

Applications for the amendment of pleadings are normally granted if bona fide and if prejudice that cannot be cured by a postponement or an order of costs is

absent.

11

(24) In my view the respondents will not be prejudiced by the proposed amendment, further it has not been shown that the application for amendment is not bona fide.

THE ORDER

- a) The application for condonation is granted, and
- (b) The application for leave for to amend in terms of Rule 28(4) is granted,
- (c) The respondents are ordered to pay the costs of the application jointly and severally.

The applicant is ordered to pay the respondents wasted costs occasioned by the applicants removal of the application for amendment from the roll on the 28th February 2007.

12

COUNSEL FOR THE APPLICANT INSTRUCTED BY

COUNSEL FOR THE 1 ST RESPONDENT INSTRUCTED BY

COUNSEL FOR THE 2ND RESPONDENT INSTRUCTED BY

COUNSEL FOR THE 3RD RESPONDENT INSTRUCTED BY

COUNSEL FOR THE 4TH RESPONDENT INSTRUCTED BY

DATE OF HEARING

DA TE OF JUDGMENT

JUDGE OF THE HIGH COURT

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAGPHC/2007/195.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/statusfin-financial-services-pty-limited-v-vos-and-others-unknown-topic-agphc-2007>

Prepared on 14 October 2026 · Esheria