

SOUTH AFRICA / JUDGMENT

Vallun v Malan and Another (47599/2021) [2023] ZAGPPHC 611 (31 July 2023)

[2023] ZAGPPHC 611

COURT

North Gauteng High Court, Pretoria

BEFORE

Nyathi

CASE / FILE NUMBER

47599/2021

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IN THE HIGH COURT
OF SOUTH AFRICA
GAUTENG DIVISION,
PRETORIA

CASE NO 47599/2021

(1)

REPORTABLE: NO

(2) OF

INTEREST TO OTHER JUDGES: NO

(3)

REVISED: NO

Date: 31 July 2023

In the matter between:

MELANIE
VALLUN
Plaintiff
And
CHARLENE
MALAN
1st
Defendant
FRANCOIS
VERNON VALLUN
2nd
Defendant

JUDGMENT

NYATHI J

A.

INTRODUCTION

- [1] This is an opposed application to amend the plaintiff's particulars of claim. The proposed amendment pertains mainly to the citation of the court as well as paragraphs 5, 6, 7 and 8 of the particulars of claim.
- [2] In its combined summons and particulars of claim, the plaintiff had cited the court as "... DIVISION OF PRETORIA, GAUTENG". Plaintiff now seeks to rectify that to read: "...GAUTENG DIVISION, PRETORIA". It is inconceivable how a formalistic amendment such as this can be objected to, or how it can inconvenience the defendant. It is accordingly granted.
- [3] The plaintiff further seeks to effect material amendments firstly, to paragraphs 5, by substituting the paragraph with the following paragraph:

"On or about 21- August 2017 and at Pretoria the Plaintiff, in person, and the First Defendant, in person, concluded a written agreement

which was duly signed by the Plaintiff and the First Defendant for the purchase and sale of the Defendants' entire respective members'

interest in Sunset View Family Resort CC with registration number 1994/015586/23 (hereinafter referred to as the "Close Corporation"). The Second Defendant did not sign the agreement ("POC3") even though he was part of the negotiations in respect of the agreement and even though he duly agreed to the terms and conditions of annexure "POC3". A copy of the written agreement is attached hereto marked annexure "POC3".[1]

- [4] Paragraph 6 of the particulars of claim would, be substituted to read as follows:

"On or about 21 February 2021 and at Pretoria the Plaintiff, in person, the First Defendant, in person, and Second Defendant in person

concluded a further agreement in respect of the sale of the of the (sic) First Defendant and Second Defendant's, a copy of which is annexed hereto marked annexure "POC4".[2]

- [5] The above are just two of the proposed amendments that are subject of this application for leave to amend. I propose to deal with them at this stage for purposes of expediency.
- [6] The respondents objected to this application on the basis that the amendment, if granted, would still result in pleadings that are excipiable, more particularly the respondents state that the proposed amendments will render the plaintiff's particulars of claim vague and embarrassing, alternatively, still lack the necessary averments to sustain a cause of action.

B.

BACKGROUND

- [7] According to the plaintiff, summons was issued on 21 September 2021 and served soon thereafter.
- [8] A notice of intention to defend was filed on 19 October 2021.
- [9] On 17 November 2021 the defendants delivered a notice to remove a cause of complaint. No response was ever received to this notice.
- [10] On 9 December 2021 the plaintiff filed a notice of intention to amend.
- [11] On 20 December 2021 the defendants filed a notice in terms of Rule 28(3).
- [12] On 16 May 2022 the plaintiff filed another notice to amend. (This notice to amend is appended to the ‘founding affidavit in support of the application’).
- [13] On 30 May 2022 the defendants filed a notice in terms of Rule 28(3).
- [14] The applicant brought the current application on 13 June 2022.

C. THE DEFENDANTS’ BASIS OF OBJECTION

- [15] Defendants allege that the original particulars of claim and summons are excipiable and are in fact a nullity altogether which the intended amendment does not address. The proposed amendments that the plaintiff seeks does not cure such defects, in fact it renders it further excipiable.
- [16] Plaintiff had been afforded ample opportunity to remove the causes of complaint and has failed to amend the offending pleading accordingly.
- [17] The plaintiff section is based on an alleged agreement between the parties. According to the plaintiff the agreement was at the same time written, verbal, tacit and implied, wherein the plaintiff seeks restitution based on an alleged suspensive condition that has apparently not been fulfilled.
- [18] The defendants’ objection to the proposed amendment is that if allowed, it will render the particulars of claim vague and embarrassing, alternatively that it lacks the necessary averments to sustain a cause of action which will result in an exception being taken.

D. THE LEGAL PRINCIPLES APPLICABLE TO AMENDMENTS

- [19] The procedure for effecting an amendment to any pleadings is provided for in Rule 28 of the Uniform Rules of Court.
- [20] 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.”[3]

[21] The principles governing applications for the amendment of pleadings were succinctly summarized by White J in *Commercial Union Assurance Co. Ltd v Waymark N.O.*[4] as follows:

The court has discretion whether to grant or refuse an amendment. An amendment cannot be granted for the mere asking, some explanation

must be offered therefore. The applicant must show *prima facie* that the amendment has something deserving of consideration, a triable issue. The modern tendency lies in favour of an amendment if such facilitates the proper ventilation of the disputes between the parties. The party seeking the amendment must not be *mala fide*. The amendment must not cause an injustice to the other side which cannot be compensated by costs. The amendment should not be refused

simply to punish the applicant for neglect.

A mere loss of the opportunity of gaining time is no reason, in itself, for refusing the application. If the amendment is not sought timeously, some reason must be given for the delay.

[22] The granting or refusal of an application for the amendment of a pleading is a matter for the discretion of the court, to be exercised

judicially, in light of all the facts and circumstances before it.[5]

[23] A leading case in this regard is *Moolman v Estate Moolman*[6] where Watermeyer J said:

"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 it is sought to amend was filed."

[24] The practical rule is that an amendment will not be allowed if the application to amend is made *mala fide* or if the amendment will cause the other party prejudice which cannot be cured by a cost order and, where appropriate, a postponement.

[25] The power of the Court to allow material amendments accordingly is limited only by considerations of prejudice or injustice to the opponent.

[26] The Rules of court contain the elementary principles of pleadings. Wessels J, as he then was, stated these general principles as follows in *Benson and Simpson v Robinson*[7]:

"The plaintiff must not set out the evidence upon which he relies, but he must state clearly and concisely on what facts he bases his claim and he must do so with such exactness that the defendant will know the nature of the facts which are to be proved against him so that he may adequately meet him in court and tender evidence to disprove the plaintiff's allegations."

[27] Rule 18(4) of the Uniform Rules of Court itself provides that:

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

E. ANALYSIS AND DISCUSSION

[28] The plaintiff's cause of action is based on the restitutio in integrum which is claimed because of the non-fulfilment of a suspensive condition. To this end the material facts required to be pleaded by the plaintiff in the proposed amendment are specific and explicit. Whether these have been pleaded or not has to be decided.

[29] The defendants attack the particulars of action in broad sweeping terms. They allege that the particulars of claim are vague and embarrassing, alternatively do not disclose a cause of action. These allegations are crafted in general terms and weaved to fit in with the general legal principles without stating any specifics by which the plaintiffs have erred in drafting pleadings so poor that they do not understand the case they have to meet, and consequently plead thereto.

[30] The principle pertaining to an objection that a pleading is vague and embarrassing is settled in law. In *Jowell v Bramwell-Jones* it was held that an exception that a pleading is vague and embarrassing must not be directed at a particular paragraph within a

cause of action; but should go to the whole cause of action, which must be demonstrated to be vague and embarrassing.

[31] In *Levithan v Newhaven Holiday Enterprises CC*[8] it was held that an exception that a pleading is vague or embarrassing will not be allowed unless the excipient will be seriously prejudiced if the

offending allegations were not expunged. The effect of this is that the exception can be taken only if the vagueness relates to the cause of action.

[32] From a careful reading of the original particulars of claim as a whole, and of the proposed amendment in its totality, and having regards to the defendants' lengthy objections, I find no merit for the assertions that the amended pleading will be vague and embarrassing.

[33] I also cannot see any prejudice that may befall the defendant should the amendment be granted. The application for amendment must accordingly succeed.

[34] The following order is made:

(a) The plaintiff is granted leave to amend its particulars of claim as per its notice in terms of Rule 28(1) dated 16 May 2022.

(b) The defendants are ordered to pay the costs of this application on a party and party scale.

J.S. NYATHI

Judge of the High Court

Gauteng Division, Pretoria

Date of hearing: 08 February 2023

Date of Judgment: 31 July 2023

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Delivery: This judgment was handed down electronically by circulation to the parties' legal representatives by email and uploaded on the CaseLines electronic platform. The date for hand-down is deemed to be 31 July 2023.

[1] Notice of intention to amend dated 16 May 2022 filed under Caselines 002-42

[2] Notice of intention to amend dated 16 May 2022 filed under Caselines 002-42

[3] Cross v Ferreira 1950

(3) SA 443 (C) at 447.

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

[5] Caxton Ltd v Reeva Forman (Pty) Ltd 1990 (3) SA 547 (A).

[6] 1927 CPD 27 at 29.

[7] Benson and Simpson v Robinson 1917 WLD 126 at p.130.

[8] Levithan v Newhaven Holiday Enterprises CC 1991

(2) SA 297 (C).

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