

SOUTH AFRICA / JUDGMENT

Varachia v Enver NO (28658/2008)

[2023] ZAGPJHC 878 (7 August 2023)

[2023] ZAGPJHC 878**COURT**

South Gauteng High Court, Johannesburg

BEFORE

Carrim

CASE / FILE NUMBER

28658/2008

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****GAUTENG DIVISION,****JOHANNESBURG****Case****No: 28658/2008****In the matter between:**

SALEM

VARACHIA

Applicant

and

MOTALA

ENVER N.O

Respondent

Delivered: This

judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically

by circulation to the

Parties/their legal representatives by email and by uploading it to the electronic file of this matter on

CaseLines. The date for

hand-down is deemed to be 7 August 2023.

JUDGMENT

CARRIM AJ

Introduction

- [1] This matter concerns an application for leave to amend the applicant's (plaintiff's) Particulars of Claim. The notice of amendment was filed on 25 May 2021.[1]
- [2] The applicant filed its Amended Pages as Annexure "SV6" to its founding affidavit. The amendments sought appear in italics on the proposed Amended Pages.[2]
- [3] The respondent (defendant) filed its notice of objection to the amendments. The respondent opposes the amendments on the basis that the proposed amendment would render the particulars of claim as excipiable.
- [4] For ease of reference, the parties will be referred to as in the main action.
- [5] The main action has a long and somewhat convoluted history relating to a transaction in which the plaintiff purchased four immovable properties ("the properties") from the defendant in his capacity as liquidator of Hillmer Montbria Investment Company (Pty) Ltd, on 3 October 2006.
- [6] The total purchase price was R420 000.00. The plaintiff was to pay all arrear costs including, but not limited to, rates and taxes, water, electricity, sewage, and arrear interest.
- [7] The plaintiff paid a deposit of R42 000.00. The plaintiff was given occupation of the properties on the date of acceptance of the offer by the seller and prior to transfer. The transfer was to be effected by the seller's conveyancers. The plaintiff paid over the balance of the purchase price to the defendant's attorneys, Jowell Glyn & Marais ('the conveyancer').
- [8] The plaintiff then paid over an amount to the conveyancer in respect of the properties to enable the municipality to issue a rates clearance certificate. The clearance was not obtained. Subsequently, a further higher amount was requested from the plaintiff in respect of the properties ostensibly because the municipality had re-assessed the rates applicable to the properties. The plaintiff refused to pay the amount requested.
- [9] The dispute between the parties revolved essentially around this issue but has evolved into a main action of some complexity. To date, almost 15 years since the summons was issued, and 17 years since the plaintiff took occupation of the properties, the matter remains unresolved.[3]
- [10] In the main action, the plaintiff is demanding specific performance that the defendant transfer the properties to him alternatively payment of the purchase price and refund of the payments made in respect of municipal charges. The defendant opposes the main action on the basis that the plaintiff breached the sale of land agreement, by failing to pay the arrear

rates, taxes, water, electricity, sewerage, and arrear interest, which was a material terms of the agreement. In consequence of the plaintiff's breach of the agreement, the defendant cancelled the agreement. The defendant contends it is entitled to retain the purchase price paid because the sale agreement provides for the forfeiture of the payments made by the buyer to the seller in the event of the buyer's breach of the agreement. The defendant has also instituted a counterclaim for a declaratory order that the sale of land agreement is cancelled and evicting the plaintiff from the properties.

- [11] In March 2021, a pre-trial conference was held, in which amongst other matters, the parties agreed that due to the lapse of time, both parties desired to make amendments to their pleadings to ensure that all the issues in dispute could be fully ventilated. The plaintiff's notice of amendment was filed in May 2021 but was only set down for hearing on 2nd August 2023.

The Law on Amendments

- [12] Rule 28 of the Uniform Rules of Court regulates amendments to pleadings. In deciding whether to grant or refuse an amendment, the court exercises a discretion. A court when exercising its discretion leans towards granting an amendment to ensure that justice is done between the parties.[4]

- [13] In *Moolman v Estate Moolman* it was held that –

“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 they were when pleading which it is sought to be amend was filed.”[5]

- [14] The above position has been confirmed in the SCA decision of *Imperial Bank Ltd v Barnard and Others* NNO[6] where the court stated at paragraph 8 that -

"The primary consideration in applications of this nature seems to be whether the amendment will have caused the other party prejudice

which cannot be compensated for by an order for costs or by some or other suitable order such as a postponement."

- [15] In *Trans-Drakensberg Bank Ltd (Under Judicial Management) v Combined Engineering (Pty) Ltd and Another*[7] the court reviewed the older authorities decided in various divisions of the High Court in detail and confirmed that the primary objective of allowing an amendment was to obtain a proper ventilation of the dispute between the parties.

- [16] However, an amendment that would render the relevant pleading excipiable cannot lead to a decision of the real issues and should not be granted.[8] An amendment will not be allowed if the Particulars of Claim do not disclose a cause of action and would be an exercise in futility.

Likewise, to allow an amendment in the sure knowledge that an exception will follow makes little sense.[9]

[17] The plaintiff's proposed amendments seek to amend several paragraphs of the Particulars of Claim by way of insertion, deletion, and substitution.

[18] At the hearing, the defendant clarified that it did not object to all the proposed amendments but only to the proposed paragraphs 6.5; 6.6; 6.7; 6A, 6B; and 6C and prayers 4 and 5. In light of this I find it unnecessary to reproduce all the proposed amendments here save for those that the defendant objects to for ease of reference:

[18.1] "6.5 On or about 02 March 2007, the Plaintiff gave an instruction to the Defendant's Attorneys, JOWELL GLYN MARAIS to invest all funds paid on account of the purchase price into an interest bearing account for the benefit of the Plaintiff in terms of section 78(2A) of the Attorneys Act 53 of 1979."

[18.2] "6.6 In terms of the instruction to invest referred to in 6.5 above, the interest accruing on the said investment was to be paid to the Plaintiff as soon as possible after the date of registration of the transaction. The instruction to invest is attached hereto marked 'AA'."

[18.3] "6.7 The Plaintiff has never given any subsequent instructions to the Defendant's attorneys to close the investment account, to remove any amount paid on account of the purchase price from said investment account or to discontinue investing the amount in an interest bearing account."

[18.4] "6A. In light of what is stated in 6.5 — 6.7 above, the Plaintiff is entitled to the interest accrued upon the investment amount of R420 000 as at the date of transfer or as at the date on which the above Honourable Court makes a determination in this matter."

[18.5] "6B. Despite demand by the Plaintiff to the Defendant's attorneys to render a reconciled account of the interest accrued on the investment amount, the Defendant's attorneys have failed to provide such account."

[18.6] "6C. Based on the accrual of interest of R20 814.58 as at November 2007 (7 months after investment) calculated in a statement submitted by the Defendant's attorneys, the interest rate at which the amount was invested was a minimum of 8.5% per annum."

[18.7] "Prayers:"

[18.8] "4. That the Plaintiff is entitled to be paid the interest accrued on the amount of R420 000 at the rate of 8.5% per annum compounded or at any other rate deemed equitable by the above Honourable court."

[18.9] "5. That the interest accrued in terms of 4 above be calculated from December 2007 till date of judgment or date of registration of the properties into the name of the Plaintiff, or, any other date which the above Honourable court deems more equitable."

- [19] The defendant objects to this proposed amendment on two essential grounds. The first is that on an ordinary reading these allegations do not make out a cause of action at all. They do not set out on what basis the defendant or for that matter the conveyancer would be liable to pay the interest on the purchase price to the plaintiff as claimed. The second is that even if on a generous interpretation of these paragraphs it is assumed they disclose a cause of action, such action would be against the conveyancer and not the defendant. Yet the proposed prayers in 4 and 5 if read in context of the Particulars of Claim, seek relief against the defendant which is incongruent with the allegations made in paragraphs 6.5 – 6C. This amendment, if granted, would render the pleading excipiable. Furthermore, the conveyancer has not been joined to these proceedings.
- [20] The plaintiff's explanation for these amendments is that he seeks to include all the disputes between the parties, interest being one of them. Furthermore, the conveyancer has been appointed by the seller and the claim of interest flows or is inextricably linked to the main dispute between the parties. As to paragraphs 6A-6C, it was submitted that these were more in the nature of a recordal. As to the prayers in the proposed paragraphs 4 and 5, the plaintiff explained that he is seeking a declaratory order that he is entitled to the accrued interest on the purchase price invested with the respondent's attorney.

Evaluation

- [21] On an ordinary reading, paragraphs 6.5, 6.6 and 6.7 clearly refer to an alleged agreement between the plaintiff and the conveyancer.

Yet the relief, when read in context of the existing prayers in the Particulars of Claim at page 6[10] as underlined and shown below will be sought against the defendant:

- [21.1] "WHEREFORE the Plaintiff prays for judgment against the Defendant as follows:

[21.1.1] "4. That the Plaintiff is entitled to be paid the interest accrued on the amount of R420 000 at the rate of 8.5% per annum compounded or at any other rate deemed equitable by the above Honourable court.

[21.1.2] "5. That the interest accrued in terms of 4 above be calculated from December 2007 till date of judgment or date of registration of the properties into the name of the Plaintiff, or, any other date which the above Honourable court deems more equitable."

- [22] In *McKenzie v Farmers' Co-operative Meat Industries Ltd*[11] the Appellate Division stated that a cause of action should include -

[22.1] '... every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved."

- [23] The proposed paragraphs 6.5-6.7 and 6A-6C do not set out the facts of why the defendant would be liable to pay the plaintiff the interest as claimed. No detail has been provided anywhere else in the Particulars of Claim or the proposed amendments as to why the interest rate should be 8.5% and on what basis the interest would be compounded annually. On this basis alone the amendments are excipiable because they do not set out a cause of action against the defendant.
- [24] Even if I were to assume in favour of the plaintiff (for argument's sake) that the alleged details of the interest would have been agreed between the plaintiff and the conveyancer (albeit these facts not being fully set out here) the plaintiff still faces the hurdle that the allegations make out a case against the conveyancer and not the defendant.
- [25] The conveyancer of course would have a direct and substantial interest in the matter but has not been joined to these proceedings. If the amendment were allowed in its current formulation, it could possibly also give rise to an exception based on misjoinder, which could result in further delays in this matter, which as discussed earlier, has already been dragging on for 15 years.
- [26] Granting the amendments as formulated would be an exercise in futility and would not assist in a full ventilation of the issues between the parties. The plaintiff of course is not precluded from seeking an alternatively formulated amendment regarding the issue of interest.
- [27] During argument, Ms Lipschitz for the defendant clarified that the defendant did not object to the issue of interest being included in the pleadings. However, the current formulation has not set out a cause of action against the defendant. She further confirmed that the defendant does not object to the remaining proposed amendments in the Notice of Intention to Amend dated 25 May 2021.
- [28] In the circumstances, the following order is made:
- [28.1] The application for leave to amend is dismissed in respect of paragraphs 4, 5, 6, 7, 8, 9, 29 and 30 in the applicant's (plaintiff's) Notice of Intention to Amend of 25 May 2021. [12]
- [28.2] The application for leave to amend in paragraphs 1, 2, 3, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27 and 28 of the applicant's (plaintiff's) Notice of Intention to Amend of 25 May 2021 is granted.
- [28.3] In respect of clause 28.2 above –
- [28.3.1] The Plaintiff is hereby granted leave to amend its Particulars of Claim.
- [28.3.2] The Plaintiff is to effect the amendment within ten (10) days from the date of this order by service of the amended pages.

[28.3.3] The defendant is allowed to effect the consequential amendments to its plea within fifteen (15) days from the date of the amended pages.

[28.4] The plaintiff is ordered to pay the defendant's costs of this application.

Y CARRIM

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION

JOHANNESBURG

APPEARANCES

COUNSEL FOR APPLICANT:

Ms A Starosta

INSTRUCTED BY:

Alina Starosta Attorneys

COUNSEL FOR RESPONDENTS:

Adv T Lipshitz

Rothbart Inc

DATE OF THE HEARING: 2 August 2023

DATE OF JUDGMENT: 7 August 2023

[1] Section 02-21 of CaseLines.

[2] Section 05-37 of CaseLines.

[3] The parties have apparently attempted on 6 occasions over this period to settle the matter.

[4] Harms Civil Procedure in the Superior Courts B-189.

[5] 1927 CPD 27 at 29.

[6] 2013

(5) SA 612.

[7] 1967

(3) SA 632 (N).

- [8] Cross v Ferreira 1950 (3) 443 (C). See also Nxumalo v First Link Insurance Brokers (Pty) Ltd 2003 (2) SA 620 (T); Alpha (Pty) Ltd v Carltonville Ready Mix Concrete CC 2003 (6) SA 289 (W); Krischke v Road Accident Fund 2004 (4) SA 358 (W); YB v SB 2016 (1) SA 47 (WCC); Strydom v Derby-Lewis 1990 (3) SA 96 (T).
- [9] De Klerk v Du Plessis 1995
(2) SA 40 (T).
- [10] Section 01-8 of CaseLines.
- [11] 1922 AD 16 at 23.
- [12] 02-21

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