CASE NO I 3663/2009

IN THE HIGH COURT OF NAMIBIA

In the matter between

FICH OPPORTUNITY FUND SPC **PLAINTIFF**

AND

QUINTON VAN ROOYEN **DEFENDANT**

Heard on: 23 NOVEMBER 2010

Delivered: 28 JUNE 2012

JUDGMENT

UEITELE A J [1] In this matter the plaintiff is seeking leave from this court to amend its particulars of claim. The defendant objects to the intended amendment.

[2] I find it appropriate to briefly sketch the background to this application. During October 2009, the plaintiff instituted an action for damages, against the defendant. The plaintiff basis its claim for damages on the alleged breach of a partly written and partly oral agreement entered into and between the parties.

[3] In terms of the agreement, the plaintiff would purchase from a third party, who is not a party to these proceedings, 3 million ordinary shares of Trustco Group Holdings Ltd at an amount N$3-50 each. In terms of the written part of the agreement, the defendant undertook to buy the shares at the transaction price between the plaintiff and the third party plus 10% premium 90 days from 31 March 2008. Annexure "A" to the particulars of claim refers to this transaction as a buy-back transaction.

[4] The plaintiff further alleges that the agreement between the parties was amended by a further oral agreement between the parties, and the 90 day period was extended until end of September 2008.

[5] The plaintiff furthermore alleges that after the end of September 2008, the agreement was once again amended by agreement between the parties and the 90 days period was once again extended to an uncertain future date. Thus the averment is that the undertaking to buy was extended to now be either on demand, alternatively within a reasonable time, and that the defendant would be liable for further interest at 40% per year. As proof of the last purported amendment, the plaintiff relies on copies of certain e-mails, contained in annexure "B" to the plaintiff's particulars of claim.

[6] The defendant requested further particulars from the plaintiff. After the plaintiff supplied the requested particulars the defendant gave notice that it excepts to the plaintiff's particulars of claim as amplified by its further particulars. The defendant then gave further notice to strike out annexure "B" to

the plaintiff's particulars of claim. After the defendant's notice to strike, the plaintiff lodged a notice of amendment. The defendant objects to the plaintiff's intended amendments, hence the application to this Court for leave to amend the particulars of claim.

The legal principles

[7] The amendment of pleadings is governed by Rule 28 of this Court's Rules. Rule 28(1) to (4) provides as follows:

> "28. (1) Any party desiring to amend any pleading or document other than an affidavit, filed in connection with any proceeding, may give notice to all other parties to the proceeding of his or her intention so to amend.
>
> (2) Such notice shall state that unless objection in writing to the proposed amendment is made within 10 days the party giving the notice will amend the pleading or document in question accordingly.
>
> (3) If no objection in writing be so made, the party receiving such notice shall be deemed to have agreed to the amendment.
>
> (4) If objection is made within the said period, which objection shall clearly and concisely state the grounds upon which it is founded, the party wishing to pursue the amendment shall within 10 days after the receipt of such objection, apply to court on notice for leave to amend and set the matter down for hearing, and the court may make such order thereon as to it seems meet."

[8] Both Mr Tötemeyer who appeared for the plaintiff and Mr Heathcote who appeared for the defendant are agreed as to the general legal principles relating to amendments of pleadings. I will below briefly outline the approach taken by this Court as regards amendment of pleadings. Manyarara AJ said, in the case of

South Bakels (Pty) Ltd and Another v Quality Products and Another: 2008 (2) NR 419 (HC) at page 421:D-H

> "In deciding whether to grant or refuse an application for an amendment the court exercises discretion and, in so doing, leans in favour of granting it in order to ensure that justice is done between the parties by deciding the real issue between them.
>
> An amendment which would render the relevant pleading excipiable cannot lead to a decision of the real issues and should not be granted. *On the other hand, it may be more sensible in a given case to grant the amendment and let the other party file an exception. Applications for amendments should not deteriorate into mini-trials since amendment proceedings are not intended or designed to determine factual issues such as whether the claim has become prescribed* . . .{ My Emphasis}
>
> An amendment must raise a triable issue - i.e., it may be of sufficient importance to justify any procedural disadvantages caused by the amendment proceedings in the sense that the issue is viable and relevant or ***will probably be covered by the available evidence***. It will normally not be granted if there will be prejudice to the other party which cannot be cured by an order for costs or a postponement. Prejudice in this context is not limited to factors which affect the pending litigation but embraces prejudice to the rights of a party in regard to the subject-matter of the litigation. . . There will not be prejudice if the parties can be put back for the purpose of justice in the same position as they were when the pleading, which is sought to be amended, was originally filed. The onus rests upon the applicant seeking the amendment to show that the other party will not be prejudiced by the amendment." {My Emphasis}

The learned Judge went on at page 423 E-F and quoted with approval the passage by Van Dijkhorst J in ***De Klerk and Another v Du Plessis and Others*** 1995 (2) SA 40 (T) (1994 (6) BCLR 124) as follows:

> "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 excipiable, allow it, and send

the parties away to prepare for another battle on exception on the same point. I agree with views …'

The grounds on which the defendant objects to the amendments

[9] The plaintiff objects to the amendment on the premises that the proposed amendment will render the particulars claim vague and embarrassing and excipiable or cause the particulars of claim to become vague and embarrassing and in addition, the particulars of claim do not disclose a cause of action.

[10] The grounds on which the defendant objects to the intended amendments may be summarized as follows-

(a) the conclusion which the plaintiff reaches in paragraph 9 (after having inserted, through the amendment, who the duly authorized agents of the plaintiff were), namely that the e-mails (contained in annexure "B" to the particulars of claim) constituted an amendment of the earlier agreement, is not substantiated or supported by the e-mail correspondence attached by the plaintiff in support of the alleged amendment;

(b) the interest at a rate of 40% claimed by the plaintiff is contrary to the Usury Act No 73 of 1968 and legally unenforceable;

(c) the introduction of the proposed new paragraph 14 to the plaintiff's particulars of claim, renders the particulars of claim vague and embarrassing, as no amendment could have been effected by the e-mails attached to the particulars of claim. The proposed new paragraph 14 refers to an amended agreement allegedly entered into and while the plaintiff was represented by the duly authorized agents referred to in paragraph 1 of the

notice to amend. The words ”amended as aforesaid” sought to be introduced by the new paragraph 14, renders the particulars of claim vague and embarrassing;

(d) the plaintiff's claim is in effect one for specific performance disguised as damages;

(e) the plaintiff's claim fails to specify either what the period of the future date (on which damages could be calculated with finality) might be, or when/ if the future period will come to an end, and thus ignores the once and for all rule;

(f) the plaintiff failed to calculate its damages, whereas it was quite possible to calculate same at the moment of the alleged breach, alternatively at the moment of cancellation of the agreement;

(g) the plaintiff impermissibly claims interest on damages for a period prior to the date of judgment.

Evaluation of the objections

[11] I am of the view that in order to determine whether the intended amendments are excipiable or not, it is necessary look at the amendments which the plaintiff seeks to introduce. The plaintiff seeks to effect two amendments, first amendment which the plaintiff seeks leave to introduce relates to paragraph 9 of the particulars of claim: The original paragraph 9 of the particulars of claim partly reads as follows:

> “9 Thereafter a further agreement was reached between plaintiff and defendant, which further amended the terms of the agreements as set out in paragraph s 4 and 7 above (and to the extent as set out her hereafter). That agreement was concluded by way of e-mail correspondence exchanged during or about October 2008. Copies of the relevant e mails are attached hereto as

annexure 'B'. The following were, *inter alia*, express, alternatively implied in the further alternative tacit terms of the aforesaid agreement whereby the aforementioned earlier agreements were amended…"

[12] The plaintiff is seeking leave to introduce a sentence immediately after the words annexure B as quoted above. If allowed paragraph 9 will read as follows (the underlined sentence representing the proposed amendment):

"9 Thereafter a further agreement was reached between plaintiff and defendant, which further amended the terms of the agreements as set out in paragraph s 4 and 7 above (and to the extent as set out her hereafter). That agreement was concluded by way of e-mail correspondence exchanged during or about October 2008. Copies of the relevant e mails are attached hereto as annexure 'B'. <u>At all relevant times thereto the plaintiff was duly represented by one or more or all of Jenny Chamberlain, Chai Musoni or a company named SAL Advisory</u>. The following were, *inter alia*, express, alternatively implied in the further alternative tacit terms of the aforesaid agreement whereby the aforementioned earlier agreements were amended…""

[13] The defendant's objection to the amendments are that "The Plaintiff's proposed amendment will render the particulars of claim vague and embarrassing and excipiable, in that the plaintiff alleges in paragraph 9 of its particular of claim that a further agreement was reached between the parties which was concluded by way of e-mail correspondence exchanged during October 2008.

[14] I fail to see how the above quoted sentence (which the plaintiff seeks to introduce) will render the particulars of claim vague and embarrassing and excipiable. If anything the proposed amendment simply sheds clarity as to who represented the plaintiff during the alleged negotiations to extend the period within which the shares were to be purchased by the defendant.

[15] The second amendment which the plaintiff seeks to introduce relates to paragraphs 13 and 14 of its particular of claim. The original paragraphs 13 and 14 read as follows:

> "13 Defendant failed to comply with, or adhere to, the aforementioned demand. As a result, the plaintiff dully cancelled the aforementioned agreement (as amended) between the parties and conveyed its election to do so to defendant on or about 10 August 2009 and by means of delivery of annexure "D" hereto.
>
> 14 Plaintiff is currently unable to sell the aforesaid shares."

[16] The second amendment which the plaintiff is seeking leave to introduce is to shortened paragraph 13, introduce a new paragraph 14 and renumber the remaining paragraphs. If the amendments are allowed the particulars of claim will amongst others read as follows (the underlined sentences representing the proposed amendments):

> "13 Defendant failed to comply with, or adhere to, the aforementioned demand.
>
> 14 Defendant's breach of the agreement as referred to in paragraph 11 above (either by itself or in so far a as it may be required also considered against the background of what is stated in paragraphs 12 and 13 above constituted a sufficiently serious breach of a sufficient material and important term of the agreement (amended as aforesaid) so as to justify and entitle the plaintiff to cancel such agreement.
>
> 15 As a result, the plaintiff dully cancelled the aforementioned agreement (as amended) between the parties and conveyed its election to do so to defendant on or about 10 August 2009 and by means of delivery of annexure "D" hereto.
>
> 16 Plaintiff is currently unable to sell the aforesaid shares."

[17] The defendant's grounds on which he objects to the amendment is that "The plaintiff's introduction of the new processed paragraph 14 to its particulars

of claim which refers to "the agreement (amended as aforesaid)", renders its particulars of claim vague and embarrassing, in that no "amendment" was effected as alleged, plaintiff advances the following reasons as a basis of denying that any amendments were effected:

> The e-mail attached by the plaintiff as annexure "B" to its particular of claim purportedly in support of the alleged terms and condition agreed upon do not support any one of the alleged terms and condition alleged and set out in subparagraph 9.1 and 9.2 of the particulars of claim because the e-mail correspondence refers to "a loan" that need to be settled soon and the e-mail dated 26 October 2008 refer to terms that need to be agreed and the final terms which need to be negotiated",
>
> The conclusion which the plaintiff reaches in paragraph 9, namely that the e-mail constituted an amendment to the earlier agreed is thus not substantiated or supported by the e-mail correspondence attached by the plaintiff in support of the allegation in sub-paragraph 9.2 of its particulars of claim that" interest on the purchase price of 40% per annum calculated as from 1 July 2008 compounded daily until the re-purchase occurred"

[18] All these aspects raised by the defendant are not part of the proposed amendments. It is not the proposed amendment that seeks to introduce the e - mail which the defendant regards as offensive. It is also not the proposed amendments that introduce the aspects which constitutes the different grounds of objection. I am therefore not convinced that is the proposed amendments that will rendered the particulars of claim excipiable.

As to costs:

[19] Rule 28(7) of this Court's rules provide as follows:

> '(7) A party giving notice of amendment shall, unless the court otherwise orders, be liable to pay the costs thereby occasioned to any other party."

[20] Mr Tötemeyer who appeared for the plaintiff urged me to order the defendant to pay the cost of the opposition even if I find that such opposition was reasonable. Mr Tötemeyer argues that this is a matter where unsuccessful opposition in the amendment application should follow the event, but Mr. Heathcote who appeared for the defendant argued that, in the event of the application being allowed there is no reason to deviate from the provisions of Rule 28(7), that the plaintiff should be ordered to pay all wasted costs, including the costs of the unsuccessful opposition on the grounds that the opposition was not unreasonable.

[21] I agree with Mr. Heathcote that no reasons have been advanced to me for me to depart from the provision of Rule 28(7). It appears to me that the plaintiff must pay the costs up to and including the filing and service of the plaintiff's replying affidavit because that affidavit was necessary to supplement the plaintiff's supporting affidavit as well as the costs wasted as a consequence of the amendment: The defendants must pay the costs of the argument because they have failed in their contentions.

[22] In the result I make the following order.

22.1 The plaintiff be and is hereby granted leave to amend the particulars of claim in accordance with the notice given by it on 22 June 2010;

22.2 The plaintiff is to pay the costs of the application up to and including the filing and service of its replying affidavits and also the costs in the action wasted as a consequence of the amendment;

22.3 The defendant is to pay the costs (which costs include the cost of one instructing and one instructed counsel) of the argument of this application.

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UEITELE, AJ

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ON BEHALF OF THE PLAINTIFF:	MR R TÖTEMEYER
INSTRUCTED BY:	HD BOSSAU & CO
ON BEHALF OF THE DEFENDANT	MR R HEATHCOTE
	ASSISTED BY H SCHNEIDER
INSTRUCTED BY:	VAN DER MERWE –GREEFF INC