

IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)

CASE NO. 27048/03

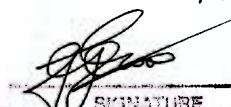
in the matter between:

27/7/2010

ANNE ELIZABETH MARY PRATT

Applicant

and

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE	<input checked="" type="checkbox"/> YES/NO
(2) OF INTEREST TO OTHER JUDGES	<input checked="" type="checkbox"/> YES/NO
(3) REVISED	<input checked="" type="checkbox"/>
DATE 27/07/10	 SIGNATURE

FIRSTRAND BANK LIMITED

First Respondent

M CUBED HOLDINGS LIMITED

Second Respondent

WATERMANS CHARTERED ACCOUNTANTS

Third Respondent

JUDGMENT

GOODEY AJ:

[1] INTRODUCTION:

1.1 This is an application in which the Plaintiff applies for an order

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In the matter between:

ANNE ELIZABETH MARY PRATT

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and

FIRSTRAND BANK LIMITED

First Respondent

M CUBED HOLDINGS LIMITED

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JUDGMENT

GOODEY AJ:

[1] INTRODUCTION:

granting her leave to amend her pleas to the First Defendant's claim in reconvention and conditional claim in reconvention.

1.2 There was no appearance on behalf of the Second Defendant nor on behalf of the Third Party.

1.3 For easy reference and to follow the reference to the parties as it was made by counsel, the Plaintiff will be referred to as the "Applicant" or "Plaintiff" and the First Defendant as "Firststrand" or "First Defendant".

[2] **HISTORY:**

2.1 This matter has a long history which is basically not in dispute.

2.2 It has been dealt with extensively by Mr Louw SC on behalf of Firststrand.

2.3 From Firststrand's heads of argument, the following should be mentioned in this regard:

- 2.3.1 On 25 September 2003 the plaintiff instituted action against *inter alia* the first defendant for an order declaring that an agreement of loan entered into between herself and the first defendant be declared null and void due to the fact that they were concluded in the absence of any permission or exemption granted by treasury and accordingly in contravention of Regulations 3(1)(e) and 10(1)(c) of the Exchange Control Regulations promulgated in terms of Section 9 of the Currency and Exchange Act 9 of 1933.
- 2.3.2 On or about 16 November 2004 the first defendant pleaded to the plaintiff's particulars of claim and, in addition thereto, raised a counterclaim for the repayment of the loan advanced by it to the plaintiff.
- 2.3.3 The plaintiff pleaded to the first defendant's counterclaim and denied any liability to repay the loan advanced to her by the first defendant on the

grounds that such loan was void as it contravened Regulations 3(1)(e) and 10(1)(c).

- 2.3.4 On 31 January 2007 the plaintiff and first defendant proceeded to trial on certain separated issues before His Lordship Mr Acting Justice Mokgoatheng (as he then was).
- 2.3.5 On 5 April 2007 His Lordship Mr Acting Justice Mokgoatheng handed down a judgment in favour of the first defendant on all of the separated issues and ordered that the plaintiff's summons be dismissed and that the plaintiff pay the first defendant's costs, including the costs of two counsel.
- 2.3.6 The plaintiff appealed to the Supreme Court of Appeal and such appeal was heard on 2 September 2008.
- 2.3.7 On 12 September 2008 the Supreme Court of Appeal dismissed the plaintiff's appeal with costs, including the costs of two counsel.

2.3.8 The effect of the Supreme Court of Appeal's judgment is that the order of the court *a quo* by His Lordship Mr Acting Justice Mokgoatheng remained intact, namely that the plaintiff's summons or particulars of claim were dismissed.

2.3.9 In light thereof, the first defendant gave notice to proceed to trial on its counterclaim. In this regard the first defendant adopted, we submit correctly so, the view that the only issue in relation to its counterclaim was that of quantum as the very defence raised by the plaintiff had foursquarely been addressed by the Supreme Court of Appeal and had been dismissed.

2.3.10 On 11 November 2008 the plaintiff's attorneys indicated that it was counsel's view that the plea to the counterclaim required an amendment and that counsel had been briefed in this regard. This was reiterated, on oath, by the plaintiff's attorney on 9 December 2008 in an affidavit filed in answer to a

consolidation application. A year later, on 18 December 2009, the defendant's attorney wrote a letter to the plaintiff reminding her of these facts and recording that no amendment had been forthcoming and in writing the plaintiff "to immediately attend to effecting any further amendments that you wish to make as soon as possible in light of the eminent trial date". This letter appears in the notices bundle at 304A to 304 B.

2.3.11 On 7 April 2010 (a mere one and a half months before the trial was to resume, but nineteen months after the Supreme Court of Appeal had dismissed the plaintiff's appeal) the plaintiff gave notice of her intention to amend her plea to the first defendant's counterclaim.

2.3.12 On 21 April 2010 the first defendant objected to the plaintiff's notice of intention to amend her plea to the first defendant's counterclaim.

2.3.13 On 5 May 2010 the plaintiff made application for leave to amend her plea to the first defendant's counterclaim.

2.3.14 The trial in which the first defendant had hoped to obtain an order for the repayment by the plaintiff of the loan advanced to her was scheduled to commence on 21 May 2010.

[3] **THE COURT'S APPROACH TO GRANTING OF AN AMENDMENT:**

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3.1 *...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, unless in other words, unless the parties cannot be put back for the purposes of justice in the same position as they were when the pleadings which is sought to be amended were filed."*

See: Erasmus (Superior Court Practice) at B1 – 179

See: *Erasmus on the same page "The power of the Courts to allow material amendments is, accordingly, limited only by considerations of prejudice or injustice to the opponent."*

Also see: *Devonia Shipping Ltd v MV Luis 1994(2) SA 363C at 369G*

5.2

The fact that an amendment may cause the other party to lose his case against the party seeking the amendment is not, of itself, "*prejudice*" of the sort which will dissuade the court from granting it. "Prejudice" in this context "*embraces prejudice to the rights of a party in regard to the subject matter of the litigation, provided there is a causal connection which is not too remote between the amendment of the pleadings and the prejudice to the other party's rights.*"

See: *South British Insurance Co Ltd v Ellisson 1963 (1) SA 289 (D) at 296A-C*
GMF Kontrakteurs (Edms) Bpk v Pretoria City Council 1978 (2) SA 219 (T) at 222H – 223A

3.3 There is no objection in principle to a new cause of action or defence being added by way of amendment, even though it has the effect of changing the character of the action and necessitating the reopening of the case for fresh evidence to be led, where that is necessary to determine the real issue between the parties.

See: Myers v Abramson 1951(3) SA 438 (C) at 449 H-450A;

Trans-Drakensberg Bank Limited v Combined Engineering (Pty) Limited 1967(3) SA 632 (D) at 463 A-C

3.4 The amendment must be *bona fide* and, if it is, it will be granted.

See: Trans-Drakensberg Bank Limited v Combined Engineering (Pty) Limited 1967(3) SA 632 (D) at 464 C;

Morgan and Ramsay v Cornelius and Hollis [1910] 31 NLR 262 at 264;

Greyling v Nieuwoudt 1951(1) SA 88 (O)

3.5 In the absence of prejudice to the other party, leave to amend may be granted "at any stage, however careless the mistake or omission may have been and however late may be the application for amendment."

See: Krogman v Van Reenen 1926 (OPD) 191 at 193;

SA Steel Equipment Co (Pty) Limited v Lurelk (Pty) Limited 1951(4) SA 167 (T) at 175 D;

Trans-Drakensberg Bank Limited v Combined Engineering (Pty) Limited 1967(3) SA 632 (D) at 468 F

Mabaso v Minister of Police 1980(4) SA 319 (W) at 323 D

3.6 The question of *res judicata* ought ordinarily not to be raised by way of an objection, but by way of a special plea, since evidence must be led as to the previous action.

See: Fell v Goodwill (1884) 5 NLR 265;

Lamb v The Colonial Secretary and the Rand Mining Estates Limited 1902 TS 319;

Lowrey v Steedman 1914 AD 532 at 539;

Blaikie-Johnstone v P Hollingsworth (Pty) Limited 1974(3) SA 392 (D) at 395 D

3.7 It may well be in a clear-cut case that an amendment will be refused on the basis of *res judicata*. Where, however, the question of *res judicata* is doubtful or arguable, it is submitted that the amendment should be allowed and that it should be left to the defendant to raise the issue of *res judicata* by way of special plea.

See, by analogy, the observations in regard to prescription in:

See: Rand Staple Machine Leasing (Pty) Limited v ICI SA Limited 1977(3) SA 199 (W) at 202 E-H.;

Cordier v Cordier 1984(4) SA 524 (C) at 535 G-H;

Erasmus Superior Court Practice p184 footnote

[4] THE FIRST DEFENDANT'S OBJECTION:

4.1 The first defendant's objection to the plaintiff's proposed amendment to her plea is based principally on the grounds that the proposed amendment is bad in law and/or excipiable in as much as it seeks to introduce matters that have already been addressed by the Court a quo and by the Supreme Court of Appeal and in respect of which the court is thus either *functus officio* or the issues now *res judicata*.

4.2 It was further argued by Mr Louw SC (on behalf of Firstrand) that since the SCA found the agreement to be valid, it is not now open to the Plaintiff to raise voidness or illegality.

[5] THE PLAINTIFF'S ARGUMENT:

5.1 Mr Friedmann SC on behalf of the Plaintiff argued that:

- The matter is not *res judicata* in that it was not decided by the SCA and further that there was no prejudice and lastly that I should adopt the approach to the amendments (to which I am bound) as set out above.

5.2

It was also argued that, at the trial of the matter, the Applicant's previous legal representatives had been of the view that no evidence would be led and that the matter would be argued simply on the separated issues as formulated. One day before the trial commenced, Firstrand's legal representatives advised the Applicant's previous legal representatives that they intended calling Mr Andreas Ribbens ("Ribbens"), Firstrand's official in charge of Exchange Control. The Applicant's previous legal representatives were of the view that the evidence of a person other than a representative of the South African Reserve Bank was irrelevant and inadmissible. The South African Reserve Bank, at a consultation held that day, expressed the attitude that the South African Reserve Bank did not wish to get involved in the action and would not make a representative available to give evidence at the trial. The

Applicant's previous Counsel had objected at the outset to the evidence of Mr Ribbens on this basis. In the light of the fact that it was not possible to secure the attendance of a representative of the South African Reserve Bank to give evidence at the trial, at the recommencement of the trial, on the next day, the Applicant's Counsel advised the Court that he did not intend to lead any evidence and did not intend to cross-examine Mr Ribbens. In the absence of any witness to gainsay the evidence of Mr Ribbens, he was effectively not in a position to conduct a meaningful cross-examination.

CONCLUSION:

- 6.1 After careful consideration and especially the approach which I should adopt as stated above, I am of opinion that the amendment should be allowed. I am also of opinion that it is not appropriate at this time to try and decide the merits of the case at all.
- 6.2 Consequently I make the following order:

6.2.1 The Plaintiff is granted leave to amend her plea to the First Defendant's claim in reconvention and conditional claim in reconvention as per the notice of amendment;

6.2.2 Costs will be costs in the cause.



GOODEY AJ