JM

IN THE HIGH COURT OF SOUTH AFRICA
(REPUBLIC OF SOUTH AFRICA)
PRETORIA

CASE NO: 56811/10

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED

4 JULY 2014
DATE

SIGNATURE

In the matter between:

AFRICA X-RAY INDUSTRIAL AND MEDICAL (PTY) LTD	**APPLICANT**
And	
NORMAN KLEIN	**1ST RESPONDENT**
JUANITO DAMONS	**2ND RESPONDENT**
MOHERANE WILLIAM MATHIBEDI	**3RD RESPONDENT**
NONA ABRAM MATLALA	**4TH RESPONDENT**

JUDGMENT

MSIMEKI J:

INTRODUCTION

[1] The applicant in this application seeks an order as follows:

"1. Granting leave to the applicant to amend its particulars of claim in accordance with the notice of intention to amend annexed hereto marked **"A"**.

2. Ordering the applicant to pay the wasted costs occasioned by the amendment, save in the event of any of the respondents opposing the application in which event ordering the respondents opposing the application to pay the costs of the application.

3. Granting the applicant further and/ or alternative relief".

BRIEF FACTS

[2] On 16 February 2006 a company called Cardio Genesis Systems (Pty) Ltd ("Cardio Genesis") was provisionally liquidated. It was finally liquidated on 10 May 2006. The applicant, a secured creditor, proved and submitted a secured claim against Cardio Genesis in an amount of R5 531.112.00. Subsequent to the final liquidation of Cardio Genesis, the respondents were duty appointed joint liquidators of Cardio Genesis. During October 2010, the applicant launched an action against the respondents in their personal capacities seeking payment of the sum of R7 391 789.48 interest thereon and costs. The action arose as a result of the fact that the respondents, under case no. 2006/5579, and in terms of Section 386 of Act 61 of 1973, had been allowed by the court to carry on the business of Cardio Genesis insofar as it might be necessary for the beneficial winding up thereof. The court permitted that on the strength of the fact that Blue Catalyst Matching Fund Trust ("Blue Catalyst") had agreed to advance working capital and conduct the business of Cardio Genesis in the interim and to indemnify the liquidators (the respondents) against losses which might be incurred by Cardio Genesis arising from the carrying on of its business. A written indemnity was furnished by Blue Catalyst. Cardio Genesis sustained a loss of R7 391.48 during the interim period. Its computation appears from Annexure "B" to the particulars of claim. On 4 December 2012 the applicant served a notice of intention to amend its particulars of claim (the first notice amendment). On 14 January 2013 the first respondent served a notice of objection to paragraph 2 of the first notice of amendment. The applicant served another notice of amendment on 28 January 2013 (the second notice of amendment) without proceeding with an application for leave to amend in terms of Rule 28(4) of the Uniform Rules of Court. The second notice of amendment not objected to, the particulars of claim, on 13 February 2013, were amended. The first notice of amendment sought to amend the particulars of claim by adding three subparagraphs to paragraph 14 as subparagraphs 14.3, 14.4 and 14.5. The second

notice of amendment also sought to introduce into the particulars of claim three new paragraphs as paragraphs 14.3, 14.4 and 14.5. However, averments in paragraphs 14.3, 14.4 and 14.5 of the first set of notice to amend contain averments which are not similar. The period in Rule 28(4), in respect of the first notice of amendment by agreement, was extended on 18 February 2013. The opposition to the intended amendment has resulted in this application.

THE ISSUES

[3] 1. These are:

Whether the use of the word "implementing" in paragraph 14.3 of the intended amendment where the applicant says:

"Defendants were negligent in "implementing" the agreement" is unclear i.e. whether same is used as a synonym of "concluding" or whether it is intended to refer to the execution of the Indemnity Agreement. (my emphasis)

2. Whether the envisaged (intended amendment i.e. paragraph 14.4 (14.7) which states that the defendants' negligence was such that they could not establish the amount of the loss suffered is not at variance with the fact that the trading loss could be established by the defendants as calculated in and based on annexure "B" to the particulars of claim.

3. Whether the numbering of the paragraphs occasioned by the second amendment having been allowed and effected prior to the present amendment that the applicant seeks i.e. where the notice was served before the second amendment was effected, is detrimental to the application for leave to amend.

[4] The first respondent who gave notice of his intention to oppose the application in terms of Rule 28(4) abandoned, correctly in my view, the first ground of objection.

[5] I shall first deal with the third ground of objection. Advocate **B H Swart SC ("Mr Swart"),** on behalf of the first respondent, contended that it was no longer possible for the applicant to proceed with an application for leave to amend in terms of the first notice of amendment. The applicant, according to him, first had to serve a fresh notice of intention to amend, indicating therein which paragraphs of the particulars

of claim he wanted to amend or amplify. **Natalie Marshall ("Marshall"),** the first respondent's attorney, in her answering affidavit, averred that the numbering of the particulars of claim added to the vagueness and to the embarrassment that would result if the proposed amendment was allowed. **Mr K J Braatvedt,** the applicants' attorney, in his replying affidavit sought an informal amendment of the first notice to amend to allow the numbering of the particulars of claim to be from 14.1 to 14.8. That meant that the numbering 14.6, 14.7 and 14.8 would be substituted for 14.3, 14.4 and 14.5 wherever same appeared in the notice of intention to amend. It was contended, on behalf of the applicant, that this objection was not contained in the notice of objection. It was, indeed, raised for the first time in the answering affidavit in the present application.

[6] Indeed, with the problem of the numbering, the first respondent could not be expected to guess what the applicants' intention was in respect of the amendment. The matter, however, does not and there. One has to determine the seriousness of the problem. **Advocate Leathern SC ("Mr Leathern")**, on behalf of the applicant, submitted that the problem needed just two letters between the attorneys concerned to solve. It was his view that to suggest that the entire process of applying for an amendment has to be recommenced was being obstructive. It must be remembered that the first respondent could not be expected to plead when the problem of numbering remained. The first respondent was therefore entitled to oppose the intended amendment. The problem, however, was not complicated to solve. The problem, in my view, is not of such a serious nature that the application, on that basis, should be dismissed.

THE SECOND OBJECTION

[7] To properly deal with this objection one has to consider:

1. Annexure "B" to the particulars of claim

2. paragraph 9 of the particulars of claim

3. paragraphs 14.2 and 14.4 of the intended amendment. Mr Swart contended that relying on annexure "B" in those paragraphs is contradictory and therefore vague and embarrassing. Mr Leathern disagreed.

4. The first and second notices to amend the particulars of claim.

[8] Paragraph 9 of the particulars of claim reads:

> "During the interim period, Cardio Genesis sustained a loss of R7 391 789.48 the computation of which appears in the schedule annexed hereto marked "B".

Paragraph 14.2 reads:

> "14.2 Had the Defendants enforced the indemnity agreement against Blue Catalyst they would be entitled to receive and would in fact have received on behalf of Cardio Genesis the amount claimed as calculated in Annexure "B" hereto and such amount would have been awarded to the Plaintiff in part settlement of its secured claim as set out hereinbefore."

Annexure "A" the notice of intention to amend, reads:

> "1. By deleting the date 29 March 2006 where it appears in paragraph 3 of the particulars of claim and replacing same with "16 February 2006".
>
> 2. By inserting as paragraph 14.3 the following:-
>
> "14.3
>
> Alternatively to paragraph 14.2, the defendants, represented by the first defendant, were negligent in implementing the agreement with Blue Cat in that :-
>
> 14.3.1 they did not take the necessary steps to preserve the value of the assets;
>
> 14.3.2 they did not keep or obtain proper records of the trading, sale of the assets and allocation of payment received;
>
> 14.3.3 they placed such assets at the disposal of Blue Cat without taking sufficient or reasonable steps:-

14.3.3.1 to ensure precisely which assets were placed in possession of Blue Cat;

14.3.3.2 to ensure that the proceeds of such assets were used only for the payment of the plaintiff's claim;

14.3.3.3 to ensure that such assets were not disposed of at below their market value;

14.3.3.4 to ensure that such assets were not replaced with assets of lesser value"

3. By inserting as paragraph 14.4 the following:-

"14.4"

As a result of such negligence the defendants were unable to:-

14.4.1 establish the amount of the loss suffered;

14.4.2 enforce the indemnity agreement against Blue Cat;

14.4.3 ensure that such assets were sold at their proper value and the proceeds thereof be applied to satisfy the plaintiff's secured claim".

4. By inserting as paragraph 14.5 the following :-

"14.5

As a result of the failure set out in 14.3 and 14.4 above, the plaintiff suffered a loss of R7 391. 789.48 in accordance with annexure "B" to the particulars of claim"

It is unnecessary to quote the second notice of intention to amend as same was not opposed. In any event, it is part of the court record.

The amendment was duly effected. (See annexure "NK2" which is the Notice of Amendment dated 12 February 201.)

THE LAW

[9] The objection to the proposed amendment is premised on the fact that the amendment will render the particulars of claim excipiable in that they will become vague and embarrassing.

Before resolving the problem regard must be had to the applicable legal principles. It has been said that an exception to a plea should not be allowed unless, if upheld, it would obviate the leading of "unnecessary" evidence. An exception should not be taken to part of a plea unless it is self-contained, amounts to a separate defence and can therefore be struck out without affecting the remainder of the plea. **(See Barclays National Bank Ltd v Thompson 1989(1) SA 547 (A) at F-H and Dharumpal Transport (Pty) Ltd v Dharumpal 1956 (1) SA 700 (A) 706)**

[10] **In Venter and Others NNO v Barritt 2008 (4) SA 639 Potgieter AJ** dealt with exceptions where particulars of claim are said to be vague and embarrassing. According to him, a statement is vague when it is either meaningless or capable of more than one meaning. This, according to him, is where the reader is "unable to extract from the statement a clear single meaning" (at 644B).

Particulars of claim can hardly be said to be vague and embarrassing if the defendant is fairly able to plead thereto. Where a declaration reasonably discloses the nature, extent and grounds of the cause of action, courts are loath to strike out paragraphs as vague and embarrassing if the information furnished is reasonably sufficient and does not disclose to the court that the paragraphs cannot be pleaded to by the defendant. **(See paragraphs 13 and 14 of Venter v Wolfsberg Arch Investments 2 2008 (4) SA 639 CPD Venter Barrit (supra) and Lokhat and Others v Minister of the Interior 1960 (3) SA 765 (D) at 777D**

In paragraph 15 Potgieter AJ said:

> "[15] The basic requirement is that the defendant must have a clear enough exposition of the plaintiff's case to enable it to take instructions from the client and file an adequate response to the claim in the form of a plea. The plea may consist of a denial seriatim of all the averments in the particulars of claim (a 'bare denial') as long as there is no ambiguity in such denial".

The court, in paragraph 17, proceeded and said:

> "[17] The onus remains on the excipient to show both vagueness amounting to embarrassment and embarrassment amounting to prejudice. The court must decide on the particular facts of each case whether the excipient will be prejudiced if compelled to plead to the particulars of claim in the form of which he or she objects".

[11] An exception, to succeed, must demonstrate that the whole cause of action is vague and embarrassing. **Mr De Beer**, in the applicant's heads of argument, holds the view that an exception on the ground that it is vague and embarrassing should not be taken and prosecuted where an amendment, like in the present application, is sought as an alternative to the main cause of action (**See Venter and Others NNO v Barrit** (supra)

[12] Exceptions are not for settling questions of interpretation which may be cleared up by evidence when the matter is heard **(See Sun Packaging (Pty) Ltd v Vreulink 1996 (4) SA 179 (SCA))**

[13] **McCreath J, in Trope v South African Reserve Bank and Another 1992 (3) SA 208 (T) at 211E** said:

> "It follows that averments in the pleading which are contradictory and which are not pleaded in the alternative are patently vague and embarrassing; one can be left guessing as to the actual meaning (if any) conveyed by the pleading". (my emphasis)

[14] In exceptions based on vagueness and embarrassment the upshot is that the particulars of claim must lack particularity in a manner that discloses vagueness which leads to embarrassment and which ultimately culminates in substantial prejudice to the pleader.

[15] The test in the final analysis is whether the excipient is prejudice. The onus is then on him or her to demonstrate the vagueness, the embarrassment and the prejudice. The onus must be proved on the pleadings alone. **(See Deane v Deane) 1955 (3) SA 86 (N) at 87F and Lockhat v Minister of Interior at 777B (supra))**

[16] It has been submitted, on behalf of the applicant, that the first respondent failed to demonstrate "either in the face of the proposed amendment and/ or the (particulars of claim) that vagueness amounting to embarrassment would result from the amendment and that the embarrassment amounting to prejudice would follow or result therefrom. This, in my view, appears to be the case.

[17] It is the contention, on behalf of the applicant, that annexure "B" to the particulars of claim has been calculated in a manner which does not conflict with the intended alternative cause of action which the applicant seeks to introduce. The annexure which relates to the computation of damages suffered by the applicant, according to applicant's counsel, is not self-contained. The contention and submissions are full of substance. It is submitted, on behalf of the applicant, that a different basis for dealing with the non-payment alone, and in the alternative, is what the applicant intends to add and not a new cause of action. The amount of damages suffered and claimed due to the indemnity agreement not being implemented or enforced, according to the submission, remains the same. This is correct. Indeed, the portion sought to be introduced is intended to operate in the alternative to paragraph 14.2.

[18] It has also been submitted on behalf of the applicant that the main cause of action and the alternative, as intended, are not mutually destructive. Neither are they competing with one another as they are not pleaded to exist separate from each other.

[19] Paragraph 14.2, it is contended, on behalf of the applicant, is premised on the allegation that the defendants would have been able to establish the loss and accordingly, enforce the indemnity agreement against Blue Catalyst Trust while the proposed amendment is premised on the construction that (but for the negligence of the defendants) the defendants would have been able to establish the loss in the manner as calculated and as confirmed in annexure "B".

[20] It is noteworthy that the first respondent, in the plea filed by him, denies the contents of paragraph 9 of the particulars of claim. The denial simply means that paragraph 9 contains an allegation by the plaintiff regarding the loss as the first defendant denies it. Annexure "B" indeed, uses the amount of purchases, the amount of sales and the expenses incurred which are all amounts extracted from the liquidation and the distribution account. At the same time, the submission

proceeds, annexure "B" contains allegations in items 4, 5, 5, 6, 7 and 8 which relate to stock which was not considered, should not have been considered or should not or should have been included in the opening stock which figures are not obtained from the liquidation and distribution account.

[21] It was further submitted, on behalf of the applicant, that that it is apparent from paragraphs 9 and 14.2 of the existing particulars of claim that annexure "B" has been calculated and premised on an assumption that the defendants were able to establish the amount of the loss suffered and accordingly, able to enforce the indemnity agreement against Blue Catalyst Trust, is based on no evidence or allegations whatsoever. This appears to be the case. The allegation, it was contended on behalf of the applicant, loses sight of the fact that what the applicant alleges the damages were and the ability of the liquidators to calculate the damages are two different issues.

[22] Lastly, the liquidators themselves, at page 75 of the court record (Bundle: index-Pleadings) which is the Liquidation and distribution account state:

> "2. The loss incurred during the interim trading period is subject to <u>further investigation</u> which may result in litigation in the event that a settlement between the parties is not reached. Therefore the loss computed above is subject to dispute and may not be recoverable". (my emphasis)

It is for this reason that it was further submitted, on behalf of the applicant, that the applicant "now pleads why it is disputed and liquidators cannot prove the true claim". The final submission is that the objection to the proposed amendment "is without any basis in logic or in law".

[23] A proper consideration of the legal principles relating to exceptions on the basis of them being vague and embarrassing and the application of the principles to the facts of the current matter, demonstrate that:

1. The numbering that the first respondent complains about is not such that the court cannot find its way clear to agree that the amendment be allowed.

2. Even if the averments in the pleadings are contradictory, they will not be patently vague and embarrassing so long as they are pleaded in the alternative.

3. No evidence has been tendered to demonstrate that annexure "B" to the particulars of claim has been calculated in a manner which is in conflict with the intended alternative cause of action which the applicant seeks to introduce.

4. There is, indeed, nothing contentious (or unclear) regarding the purpose of annexure "B" in respect of the cause of action pleaded.

5. The primary object of allowing an amendment is to obtain a proper ventilation and determination of the issues between the parties in order for justice to be done. **(See Barclays Bank International v African Diamond Exporters (Pty) Ltd 1976 (1) SA 93 (W) at 96A-C and Kirsch Industries Ltd v Vosloo & Leneki 1982 (3) SA 479 (W) at 484 G)**

6. The first respondent failed to prove that the intended amendment would cause vagueness which would cause embarrassment and which in turn would amount to substantial prejudice to the first respondent.

7. There is nothing, in the way of the court, in this matter, to stop it from acceding to the request of the applicant.

[24] It must be remembered that amendments are not easily refused where prejudice, (if any), can be cured by an order for costs or a postponement.

[25] The facts of the current matter and the legal principles enunciated in the cases referred to above, demonstrate that the applicant's application for leave to amend the particulars of claim as intended should succeed.

[26] Mr K J Braatvedt, the deponent in the applications' replying affidavit, – Applicant's Application for leave to amend in terms of Rule 28(4) and in particular paragraph 7.10 thereof sought an amendment that "the numbering 14.6, 14.7 and 14.8 be substituted for 14.3, 14.4 and 14.5 wherever same appear in the notice of intention

to amend." In the interest of justice the amendment should be granted and is hereby granted.

COSTS

[28] The court has a discretion to exercise when it comes to the question of costs. The applicant in its notice of application for leave to amend in terms of Rule 28 (4) and in particular prayer 2 said:

> "2. Ordering the applicant to pay the wasted costs occasioned by the amendment, save in the event of any of the respondents opposing the application in which event ordering the respondents opposing the application to pay the costs of the application."

[29] The first respondent opposes the application and demonstrated that there, indeed, was a problem with the numbering of the particulars of claim intended in the first notice. The amendment, pursuant to the unopposed amendment, also had problems with numbering. The first respondent, notwithstanding the numbering problem, would have to plead. The first respondent, therefore, and on that basis had every reason to oppose the amendment. The applicant, as Mr Swart correctly pointed out, sought an informal amendment of the first notice of intention to amend without proffering an explanation for the confusion caused by it and without tendering the first respondent's costs of opposition. Mr Swart's submission has merit. The first respondent is entitled to such costs.

[30] **The order that is accordingly made is as follows:**

1. **Leave is granted to the applicant to amend its particulars of claim in accordance with the notice of intention to amend (as amended) annexed to the Notice of application for leave to amend in terms of Rule 28 (4) marked "A"**

2. **The applicant is ordered to pay the wasted costs occasioned by the amendment.**

M.W MSIMEKI
JUDGE OF THE HIGH COURT
NORTH GAUTENG, PRETORIA

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DATE OF HEARING:
DATE OF JUDGMENT: