

28/7/15

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

29 June 2015

DATE

[Signature]

SIGNATURE

APPLICANT

1ST RESPONDENT

2ND RESPONDENT

3RD RESPONDENT

JUDGMENT

HIEMSTRA AJ

[1] This is an opposed application for the amendment of a declaration.

BACKGROUND

[2] In setting out the background of this matter, I borrow liberally from the Heads of Argument on behalf of the applicant, prepared by Ms H.R. Fourie. It is the following:

[3] On 19 September 2013 the applicant issued an application for the eviction of the respondents from commercial premises situated at 456 Mitchell Street, Pretoria-West (the premises), of which the applicant is the owner and the respondents are in occupation. The application was opposed. On 5 May 2014 this court ordered that the application be referred for trial, that the Notice of Motion stands as a simple summons and that applicant file its declaration within 20 days.

[4] I shall henceforth refer to the parties as the plaintiff and the defendants.

[5] In compliance with the order, the plaintiff delivered a declaration. The declaration sets out that on 7 February 2012 the plaintiff concluded a partly written and partly oral agreement of lease with first defendant in respect of the premises. The plaintiff was at the time not yet the registered owner of the premises, but registration in its name was pending. The defendants were already in occupation of the premises. On 27 August 2012, the property was registered in the name of the plaintiff. The second and third defendants are subtenants of the first defendant.

[6] The declaration continues to set out the terms of the agreement of lease. The terms included that the lease would endure on a month-to-month basis from 1 March 2012, pending the conclusion of a formal written lease agreement within a reasonable time, alternatively on registration of the property in the name of the plaintiff. The

formal agreement would regulate the further lease of the premises and would provide for the payment by the first defendant of an amount of R1 million to the plaintiff.

[7] The plaintiff duly prepared a draft lease agreement and presented it to the first defendant for consideration and signature. The first defendant failed to sign the draft or to propose amendments

[8] On 21 November 2012 the plaintiff gave notice to the defendants of cancellation of the lease agreement and demanded that the defendants vacate the premises by no later than 28 November 2012. On 4 July, alternatively on 9 July 2013 the plaintiff gave further notice to the defendants to vacate the premises no later than 10 August 2013.

[9] The declaration states that therefore the defendants' right to occupy the premises terminated on 28 November 2012, alternatively on 10 August 2013, alternatively on 23 September 2013. Despite demand, the defendants have refused or failed to vacate the premises.

[10] The defendants gave notice of their intention to except against the declaration on the grounds that it was vague and embarrassing and/or missed averments that were required to sustain the action.

THE APPLICATION TO AMEND

[11] The plaintiff now seeks to amend its declaration. The application seeks to delete paragraphs 3, 4, 5, 6, 7, 8, 9 and 10 of the declaration and substituting them with

new paragraphs 3, 4 and 5 of the Notice of Intention to Amend. The paragraphs that are sought to be deleted are the ones that set out the lease agreement and its ultimate cancellation by the plaintiff.

[12] The new paragraphs 3, 4 and 5 are as follows:

- "3. The plaintiff is the owner of the immovable property situated at Portion 1 of Erf 1875, Pretoria Township, Registration Division JR, Province of Gauteng, better known as 456 Mitchell Street, Pretoria-West, Pretoria ('the immovable property').*
- 4. The defendants are in occupation of the immovable property.*
- 5. On 19 September 2013, the plaintiff issued an application under case number 60867/2013 for the eviction of the defendants from the immovable property. The application was opposed and on 5 May 2014 this Honourable Court ordered that the application be referred for trial, the notice of motion stand as a simple summons and that the applicant file its declaration within 20 days."*

THE OBJECTION

[13] The defendants object to the proposed amendment. The grounds on which the objection is founded are as follows:

- "3. The Plaintiff's intended amendment discloses a cause of action that substantially differs from the cause of action that the Plaintiff/Applicant relied upon in its Notice of Motion and annexures thereto.*
- 5. If the Plaintiff's proposed objection was to be effected, the Plaintiff's Declaration will be excepiable (sic) on the grounds set out hereinbefore."*

[14] The defendants enrolled its exception to the original declaration for argument on the same day as the application to amend. Should I disallow the proposed amendment, this would have been a convenient course of action. Should I, however, allow the amendment, the exception will have no practical purpose.

THE GRANTING OF AMENDMENTS

[15] The granting or refusal of an application for amendment of a pleading is a matter for the discretion of the court, to be exercised judicially in the light of all the facts and circumstances before it. The Supreme Court of Appeal said in *Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd*¹:

"...[T]he 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."

[16] It is implied in the above *dictum* that an amendment may be refused if the pleading, if amended, will be excipiable. To allow an amendment that will render the pleading excipiable will cause an injustice or result in further unnecessary costs of an exception.

THE AVERMENTS REQUIRED TO SUSTAIN AN ACTION FOR EVICTION

[17] It was held in *Chetty v Naidoo*² that *"The owner, in instituting a rei vindicatio, need, therefore, do no more than allege and prove that he is the owner and that the*

¹ 2002 (2) SA 447 (SCA) at 462

² 1974 (3) SA 13 (A) at 20C

defendant is holding the res – the onus being on the defendant to allege and establish any right to continue to hold against the owner. ... But if he goes beyond alleging merely his ownership and the defendant being in possession ... other considerations come into play."

[18] The submission on behalf of the defendants is that the declaration, if amended would be excipiable. That is course not be correct. The declaration, if amended, contains all the averments to sustain an action for eviction as set out in *Chetty*³

[19] The case of the defendants is rather that the declaration, if amended, would introduce a different cause of action. I do not agree. The allegation that there had been a lease which had been terminated was not the cause of action pleaded in the declaration. The cause of action was, and still is, the fact that the plaintiff claims that it is the owner of the property and that the defendants are in occupation thereof. It is not part of the cause of action that the defendants at some stage had a right of possession, which right had been terminated. These allegations were not necessary to sustain a cause of action and might as well have been omitted. It was held in *Graham v Ridley*⁴ that an allegation by a plaintiff who sues for ejectment, that he had granted a lease to the defendant, which lease had been terminated, is merely a convenient way of anticipating the defendant's plea that the latter is in possession by virtue of a lease. Such a plea would call for a replication that the lease is terminated.

³ *supra*

⁴ 1931 TPD 476


[20] It was held in *Karim v Baccus*⁵ that allegations that the plaintiff had parted with his possession but had regained it, altered the cause of action. This was rejected and overruled by the Appeal Court in *Chetty*.

CONCLUSION

[21] I therefore find that the declaration, if amended will not be excipiable. I further find that the amendment does not introduce a different cause of action.

In the result, I make the following order:

1. The applicant is granted leave to amend its declaration as set out in the applicant's Notice of Intention to Amend its Declaration dated 27 June 2014;
2. The respondents are ordered to pay the costs of this application.


 J. HIEMSTRA
 ACTING JUDGE OF THE HIGH COURT

Date heard:
 Date of judgment:
 Counsel for the applicant:
 Attorney for the applicant:

2 June 2015
 29 June 2015
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⁵ 1946 NPD 721

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