REPUBLIC OF SOUTH AFRICA

**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG DIVISION, PRETORIA**

**CASE NO. 82452/2019**

(1) REPORTABLE: YES/ NO

(2) OF INTEREST TO OTHER JUDGES: YES/ NO

19 8 2021

DATE

SIGNATURE

In the matter between:

**FIRSTRAND BANK LIMITED**

(Formerly known as **FIRST NATIONAL BANK**

**OF SOUTHERN AFRICA LIMITED)** Applicant/Plaintiff

and

**LOUIS JOHANNES COETZEE** 1st Respondent/Defendant

(ID NO: [ … ] )

**GERBRECHTA MARIA ADRIANA COETZEE** 2nd Respondent/Defendant

(ID NO. […])

**JUDGMENT**

**NOCHUMSOHN (AJ)**

1. This is an Application for leave to amend in terms of Rule 28(4).

2. The Applicant is the Plaintiff and the First and Second Respondents in this application, are respectively the Defendants in the main action.

3. The Applicant seeks leave to amend is Particulars of Claim in accordance with its Notice of Intention to Amend dated 17 February 2021, served upon the Respondents on 17 February2021.

4. The background to this matter can be summarised as follows:

4.1. In paragraph 4 of the Particulars of Claim, the Applicant/Plaintiff alleged that on 20 December 2007 a Loan Agreement for monies lent and advanced was entered into, a copy of which was annexed thereto;

4.2. The Applicant/Plaintiff did not allege the identity of the party who represented it, in the conclusion of the Loan Agreement;

4.3. *Ex facie* the Loan Agreement, which was annexed to the Particulars of Claim marked as annexure "A", two signatures appear above the line with the First Defendant's name typed beneath such signatures. Above the two witness lines, two signatures appear and the document purports to be signed at Pretoria on 20 December 2007. Below the signatures, the following words appear:

*"The Bank shall be bound by the terms and conditions of this Agreement on receipt by the Bank of this Agreement duly initialled and signed by the customer."*

4.4. On 14 December 2020 the Respondents/Defendants filed an exception to the Particulars of Claim for want of compliance with Rule 18(6) of the Uniform Rules of Court inasmuch as paragraph 4 thereof failed to disclose the name of the party who represented the Applicant/Plaintiff in the signing of the Loan Agreement;

4.5. On 3 February 2021, the Honourable Sardiwalla J upheld an exception noted by the Respondents to the Particulars of Claim and ordered them to amend the Particulars within ten days from the date of granting of such Order.

4.6. Pursuant to the Order of the Honourable Sardiwalla J, and on 17 February 2021, the Applicant/Plaintiff delivered a Notice of Intention to Amend the Particulars of Claim, in which notice it conveyed an intention to amend paragraph **4** by inserting the words: ***"duly represented by an authorised employee"*** after the word ***"Plaintiff".***

4.7. The Respondents/Defendants have objected to such amendment on the basis that the intended amendment does not remedy the defect complained of.

5. The sole issue for determination is whether or not the intended amendment, if permitted, would serve to cure the defect, leaving the Respondents/Defendants in a position that they are able to plead.

6. Mr Jacobz for the Applicant / Plaintiff, drew my attention to an identical case, where the identical issue fell to be determined by the Honourable Henriques J. This case is ***Charioteer Investor 2 CC t/a Ballid Protection Services CC v Electrical Power Systems CC, unreported KZNHC case number 9244/2014 on 31 August 2016,*** paragraphs 29 to 34 of which read as follows:

*"[29] It is the defendant's complaint that the plaintiff did not comply with rule 18(6) as it did not mention the names or the capacities of the persons that duly represented the parties in concluding the agreement. It is for this reason that the defendant alleges that the particulars of claim lacks sufficient clarity to enable it to plead and that it is prejudiced thereby.*

*[30] If one reads the provisions of rule 18(6), the sub-rule does not say that* a *pleader must provide the name and capacity of the parties who concluded the contract. All that is required to be pleaded is whether or not the contract is written or oral, when, where and* ***by whom*** *it was concluded.*

*[31] In my view, the plaintiff has pleaded each of the facts required to sustain a cause of action based on an agreement - facts not evidence must be pleaded. One must draw a distinction between the facta probanda (the facts that have to be proved) and the facta probantia (the evidence needed to prove those facts).*

*[32] If one has regard to the pleadings as a whole, the plaintiff sues the defendant, a close corporation, for security services rendered pursuant to an oral agreement. It has pleaded the express, alternatively implied, alternatively tacit terms of the agreement and has also, in addition attached to the particulars of claim, individual invoices evidencing the amount claimed, the date the services were rendered, the nature of these services rendered, as well as the specific site at which such services were rendered. Essentially, paragraph 3 refers to the fact that the parties were duly represented. The contracting parties to the agreement are identified and being juristic persons, it is alleged they were duly represented when the agreement was concluded in or about July 2013 but no later than 23 July 2014 at Howick, KwaZulu-Natal.*

*[33] The defendant bears the onus to prove that the lack of clarity amounts to vagueness and embarrassment and consequently prejudice. In my view, the defendant has failed to make out a case that the omission of the names and capacity of the persons, who represented the parties when the agreement was concluded, amounts to vagueness and embarrassment and that it is prejudiced.*

*[34] The exception does not, in my view, go to the root of the cause of action and consequently, does not dispose of the matter in whole or in part. The omission of the names and capacity of the representatives does not render the particulars of claim meaningless or capable of more than one meaning, and in addition, discloses* a *cause of action to which the defendant is able to plead without embarrassment."*

7. From the above quotation, it is clear that the Honourable Henriques J dealt with the identical legal position as prevails *in casu.* There seems to be little or no reason not to import the KZNHC's jurisprudence into that of our own.

8. In objecting to the amendment, Mr Scholz for the Respondents/Defendants placed reliance upon ***Mercedes-Benz Financial Services (Pty) Ltd v Mahowa1.*** In presiding over an opposed application for summary judgment therein, the Honourable Maakane AJ considered the non-compliance with Rule 18(6), in the context that in those proceedings the Plaintiff had not alleged where the contract was concluded or by whom same was concluded. Maakane AJ mentioned in paragraph 24 and 25 of such Judgment that the Plaintiff's counsel argued that such non-compliance was not material in nature and that the court had a discretion to condone such non-compliance. Counsel for the Plaintiff in that case, had quoted a paragraph from summary judgment *(Summary Judgment: A Practical Guide)* which the Honourable Maakane AJ repeated in his Judgment as follows:

---

[1] (18716/ 2017) (2017] ZAGPPHC

*"The High Court is vested with inherent jurisdiction to condone any procedurally irregularity as non-compliance with its rules. No fixed rules can fetter that discretion. The rules of Court stout general guidelines within which that discretion is to be exercised. As a result, the Court may condone any irregularity or neglect which does not materially prejudice the other party."*

9. In response to this submission, the Honourable Maakane AJ pointed out at paragraph 27 of the Judgment that the Defendant raised Rule 18(12) of the Uniform Rules of Court under which, if a party fails to comply with any provision of the Rule, the pleadings shall be deemed to be an irregular step and the opposite party shall be entitled to act in accordance with Rule 30.

10. Whilst the Honourable Maakane AJ seems to have accepted the argument that summary judgment could not be granted in those proceedings, in circumstances where the Particulars of Claim were excipiable, and constituted an irregular step, it is to be borne in mind that in those proceedings there was no Notice of Intention to Amend.

11. In the case in *casu,* the court is faced with a Notice of Intention to Amend. It would have been more appropriate to have raised the *Mahowa* judgement in argument to the exception application, which preceded the present application. Mr Scholz conceded in argument that he had relied upon this judgement in obtaining the order from the Honourable Sardiwalla J, in upholding the exception. The point is that Maakane AJ was not called upon to consider the particulars of claim in that case, at a time after the delivery of a notice of intention to amend.

The only question now is whether or not the amendment sought to be brought about by way of the Notice of Intention to Amend, serves to cure the defect.

12. *Ex facie* Annexure "A" to the Summons, the Loan Agreement was not signed on behalf of the Applicant/Plaintiff, who from the foot thereof *'would be bound by the terms and conditions of the Agreement on receipt by the Bank of the Agreement duly initialled and signed by the customer.'*

13. It thus becomes a matter of evidence as to when and by whom the Agreement was received by the Bank. Such chain of evidence, to be adduced on trial, would presumably establish the point at which the Applicant/Plaintiff became bound by the Agreement.

14. *Ex facie* the Agreement, there is no signature for and on behalf of the Applicant/Plaintiff, but the allegation to be introduced in the intended amendment to the effect that the Applicant/Plaintiff was represented by its duly authorised representative, in concluding the agreement, is sufficient to enable the Defendants to plead. The identical position prevailed in ***Charioteer*** *supra.*

15. Thus, there has been sufficient compliance with Rule 18(6), certainly for purposes of enabling a Plea and in my view the intended amendment brings about sufficient particularity to enable the Defendants to plead. In the result the necessary chain of evidence would be adduced before a trial court, and if at that stage, the Plaintiff is unable to identify its representative, who did so bind it to the Agreement, such inability would be a factor to be determined by the trial court, against all of the other evidence to be adduced at such trial and considered in context.

The failure to identify the duly authorised representative, at this stage, is insufficient a failure to stop the Applicant/Plaintiff in its tracks in proceeding to trial.

16. All that the Plaintiff needs to prove, on trial is that its duly authorised representative did represent it in binding it to the terms of the Agreement. The Plaintiff may be able to discharge such burden of proof, on trial. To uphold the objection to the amendment would accordingly be adverse to the interests of justice, in circumstances where the Respondent/Defendants are well able to plead to the Particulars of Claim, as amended.

17. Accordingly, I make the following Order:

17.1. The Applicant is granted leave to amend the Particulars of Claim, in accordance with the Notice of Intention to Amend dated 17 February 2021;

17.2. Such amendment is to be effected within ten days from date of service of this Order;

17.3. The Respondents/Defendants are ordered to pay the costs of this Application on the scale as between party and party.

**NOCHUMSOHN, G**
**ACTING JUDGE OF THE HIGH COURT**

| | |
|---|---|
| On behalf of Applicant: | Advocate PSAJ Jacobz |
| Instructed by: | Hack Stupel & Ross Attorneys |
| On behalf of the Respondents: | Advocate HEW Scholz |
| Instructed by: | Taute Bouwer & Cilliers Inc |
| Date of Hearing: | 19 August 2021 |
| Date of Judgment: | 19 August 2021 |
| Delivered via email: | 19 August 2021 |