IN THE NORTH WEST HIGH COURT

(MAFIKENG)

CASE NO.: CIV APP 1/13

In the matter between:

EXHAUST & RADIATOR SERVICES **APPELLANT**

and

WYNAND LAZENBY **RESPONDENT**

CIVIL APPEAL

LANDMAN J AND GUTTA J

JUDGMENT

LANDMAN J:

Introduction

[1] The appellant, Exhaust & Radiator Services (the plaintiff/applicant in the court *a quo*) appeals against the judgment delivered by the Magistrate SC Meyer, of the

Magistrate's Court for the district of Vryburg, on 12 September 2012, dismissing its application to amend its particulars of claim with costs on the scale as between attorney and client. The respondent is Wynand Lazenby who was the defendant/respondent in the court *a quo*.

The facts

[2] The appellant issued a simple summons in the Magistrate's Court of Vryburg against the respondent on 4 June 2011 for payment of R96 924.51 being the balance for goods sold and delivered by the appellant to the respondent. The summons alleged that the National Credit Act 34 of 2005 was not applicable.

[3] The respondent defended the action. The appellant delivered its declaration on 11 November 2011. The declaration, *inter alia*, alleged that the NCA was applicable. Clearly there was a conflict between the simple summons and the declaration. And so it would have been no surprise that the respondent took exception to the summons on the grounds that the summons and declaration are vague and embarrassing. The appellant was given the opportunity of removing the cause of complaint within 15 days.

[4] The appellant subsequently gave notice of its intention to amend its summons and declaration.

[5] The first proposed amendment reads as follows:

> "Geliewe kennis te neem dat die Eiser voornemens is om sy dagvaarding en deklarasie te wysig deur die vervanging van die eerste bladsy van elk daarvan met die aangehegte eerste bladsye.
>
> En neem verder kennis dat die wysiging aangebring sal word tensy skriftelike beswaar gemaak word teen die beoogde wysiging binne 10 [TIEN] dae na betekening daarvan."

[6] The respondent served a notice on November 2011 objecting to the proposed amendment. The result was that the application came to be argued before Magistrate Matthews. On 27 February 2012 the learned Magistrate refused the application for amendment with costs.

[7] Magistrate Matthews noted the grounds of objection to the amendment which was that:

> "1. dat die deklarasie vaag en verwarrend is;
> 2. dat dit nie voldoen aan vereistes soos gestel deur reëls 5 en 6;
> 3. dat die deklarasie materieel en wesenlik van die enkelvoudige dagvaarding verskil; en
> 4. dat 'n nuwe skuldoorsaak ingevoeg word wat nie in die oorspronklike dagvaarding vervat is nie."

[8] The court rejected the objection relating to rule 5 and 6. The court went on to say that where a plaintiff relies on a credit agreement as the cause of action, a plaintiff is obliged to commence the action by way of a combined summons. The court pointed out the discrepancy between the simple summons and the declaration. The court observed that the declaration introduced a new cause of action. The amendment was refused because:

> "Dit is duidelik dat eiser se dagvaarding van die begin gebrekkig was. Ek is van oordeel dat hierdie gebrek nie deur 'n wysiging herstel kan word nie. Sou die wysiging toegestaan word, sal dit net ander gronde vir eksepsie laat ontstaan. Ek gee eiser wel gelyk dat die dagvaarding nie eksepsieerbaar is net bloot omdat daar nie aan reëls 5 en 6 voldoen is nie en dat respondent 'n aansoek in terme van reël 60 A moes gebring het om hierdie tekortkoming aan te spreek."

[9] This judgment is not on appeal. I merely observe that had the action been introduced in the High Court, the court may have been content to allow the simple summons to stand, with an amendment, to be followed by a declaration. See **Krugel v Minister of Police** 1981 (1) SA 765 (T), where the plaintiff used a simple summons when a combined summons should have been used.

[10] As a result of the judgment (the first judgment) the appellant filed another notice, on 15 March 2012 of its intention to amend its pleadings; this time by substituting the simple summons with a combined summons. The particulars of claim which accompanies the combined summons is in the same terms as the declaration. Clearly the appellant was attempting to address the issue raised by Magistrate Matthews.

[11] The respondent objected to the proposed amendment on the following grounds:

> "GELIEWE KENNIS TE NEEM dat Verweerder beswaar aanteken teen die voorgestelde wysiging vir dieselfde redes wat voorheen hierin teen beswaar gemaak is en ook saamgelees met die kennisgewing van eksepsie wat geliasseer en beteken is op die 16de November 2011.
>
> Verweerder maak ook beswaar teen die voorgenome wysiging en pleit dat die aansoek om wysiging reeds *res judicata* is deurdat die Agbare Hof reeds op 27 Februarie 2012 uitspraak hierin gelewer het en die wysiging wat voorheen hierin geliasseer is van die hand gewys het met koste en kan die Eiser nie 'n verdere wysiging bring nie, maar appèlprosedure volg."

[12] The second application for amendment came before Magistrate Meyer who dismissed the application with costs on the scale as between attorney and client.

The second judgment (which is appealed against)

[13] The judgment reads:

> "Die Applikant bring weereens 'n Aansoek om wysiging sodat die Saamgestelde Dagvaarding (bl. 97–103) nou deel van die proses kan vorm. Daar word dus weg gedoen met die Enkelvoudige Dagvaarding en deklarasie wat aanvanklik deel van die proses was en dit word vervang met 'n saamgestelde Dagvaarding. Dit wil lyk asof die Applikant deur hierdie aansoek om wysiging poog om die aangehegte Saamgestelde Dagvaarding deel van die proses te maak.
>
> Die Applikant voer aan dat die aansoek om wysiging reeds daar is om gevolg te gee aan die vorige Landdros se bevinding gemaak op 27/02/2012. As die hof die stukke (bl. 97–103) beskou, dan wil dit voorkom dat die aansoek om wysiging wat nou voor die Hof is, eintlik'n versoek is om dit wat verkeerd was in die vorige aansoek waarop die vorige Landdros reeds uitspraak gegee het nou te vervang. Die probleem is egter dat die aansoek om wysiging se

inhoud ‘n Saamgestelde Dagvaarding is waarvan die inhoud beweer dat die Nasionale Kredietwet van toepassing is. Dit bring te weeg dat die inhoud van dit waarop gedagvaar word toetaal ander vereistes het.”

Grounds of appeal

“1. Die Edelagbare Landdros behoort te bevind het dat die Respondent nie benadeel sou word in sy verdediging van die aksie nie sou die wysiging toegelaat word.
2. Die Edelagbare Landdros behoort nie te bevind het nie dat sou die wysiging toegestaan word die saamgestelde dagvaarding nie aan die bepalings van die Nasionale Kredietwet 34 van 200?s, sou voldoen het nie.
3. Die Edelagbare Landdros het verkeerdelik bevind dat Edelagbare Landdros Matthews reeds sou aangedui het dat sou, enige, verdere aansoeke gebring word vir wysiging dit, net sal lei tot verdere eksepsies. Edelagbare Landdros Matthews het nie bevind dat wysiging na 'n saamgestelde dagvaarding tot verdere eksepsies sou lei nie en het ook nie verwys na "enige" verdere aansoeke nie, Die Edelagbare Landdros behoort te bevind het dat sy nie gebonde is aan die obiter dicta van Edelagbare Landdros Matthews nie.
4. Die Edelagbare Landdros behoort die meriete van die aansoek te oorweeg het.
5. Die Edelagbare Landdros behoort te bevind het dat die aansoek om wysiging op "nuwe of ander gronde" berus.
6. Die Edelagbare Landdros behoort te bevind het dat Respondent se opponering van die aansoek kwelsugtig was.
7. Die Edelagbare Landdros moes ‘n bevel verleen het soos volg:

   ‘Dat die aansoek om wysiging toegestaan word met koste'

8. Die Edelagbare Landdros het fouteer deur ’n bestraffende kostebevel teen die Appellant te verleen.”

Evaluation

[14] Before addressing the issues in question it is important to outline the manner in which the Rules of the Magistrate’s Court regulate litigation concerning the National Credit Act 34 of 2005. The Rules Regulating the Conduct of the Proceedings of the Magistrates' Courts of South Africa were amended by proclamation R740 in GG 38447 of 23 August 2010 with effect from 15 October 2010. The following sub-rules, which have been amended, are relevant:

"Rule 5

(2)(a) In every case where the claim is not for a debt or liquidated demand the summons shall be a combined summons similar to Form 2B of Annexure 1, to which summons shall be annexed a statement of the material facts relied upon by the plaintiff in support of plaintiff's claim, and which statement shall, amongst others, comply with rule 6.

(2)(b) where the claim is for a debt or liquidated demand the summons may be a simple summons similar to Form 2 of Annexure 1.

(5)(d) requires every summons to include, *inter alia*, "a notice in which the defendant's attention is directed to the provisions of sections 57, 58, 65A and 650 of the Act in cases where the action is based on a debt referred to in section 55 of the Act.

(7) Where the plaintiff issues a simple summons in respect of a claim regulated by legislation the summons may contain a bare allegation of compliance with the legislation, but the declaration, if any, must allege full particulars of such compliance: Provided that where the original cause of action is a credit agreement under the National Credit Act, 2005, the plaintiff seeking to obtain judgment in terms of section 58 of the Act shall in the summons deal with each one of the relevant provisions of sections 129 and 130 of the National Credit Act, 2005, and allege that each one has been complied with.

(11) provides that if a party fails to comply with any of the provisions of this rule, such summons shall be deemed to be an irregular step and the opposite party shall be entitled to act in accordance with rule 60A.

Rule 6

"(11) A party who relies on an agreement governed by legislation shall state the nature and extent of the party's compliance with the relevant provisions of such legislation.

(13) If a party fails to comply with any of the provisions of this rule, such pleading shall be deemed to be an irregular step and the opposite party shall be entitled to act in accordance with rule 60A."

[15] Griesel J in **Standard Bank of South Africa Ltd v Dawood** 2012 (6) SA 151 (WCC) surveyed the High Court practice concerning, *inter alia*, the need to use a simple or combined summons to give effect to the litigation in terms of the National Credit Act 34 of 2005. His remarks would also apply to litigation in a Magistrate's Court. Para 14, 15, 16 and 17 read:

"[14] In my view this principle also applies to the interpretation of rule 17(2). I accordingly agree with Gamble J that it is not impermissible or irregular to use a combined summons in matters of this kind. It may well be preferable in certain instances to make use of a combined summons - as has already been done in many cases in this Division. This would, generally, make for neater and more elegant pleading and would at the same time make the plaintiff's case more easily readable and comprehensible, not only to the defendant, but also to the court. Having said that, however, for the reasons that follow, I am not prepared to require as an absolute rule of practice - that a combined summons invariably be used in matters of this kind.

[15] First, such a rule of practice would fly in the face of the clear wording of rule 17(2)(b) and, as such, would impermissibly usurp the function of the Rules Board for Courts of Law. If the procedure laid down in rule 17 is to be changed, the interests of the administration of justice would be better served by a thorough consideration of the matter by the Rules Board in a uniform and holistic manner, resulting in a uniform rule binding in all divisions, instead of the piecemeal process of judicial tinkering that is presently taking place all over the country, which has already resulted in the undesirable situation where divergent views and practices abound, creating uncertainty for litigants and practitioners alike.

[16] Secondly, the mere fact that a summons may have to contain a number of paragraphs and may have several relevant documents annexed thereto does not mean that the use of a simple summons would be inappropriate. By way of example, reference could be made to the lengthy and detailed allegations made in two of the simple summonses quoted in *Wilkinson's* case, *supra,* where Berman J and Selikowitz J - in their day two of the most accomplished exponents of motion court practice in this Division - did not bat an eyelid at the form of the somewhat prolix summonses before them. In any event, as pointed out by the *amicus* in her argument, it is not the summons that is required to be concise; it is the plaintiff's cause of action that must be set out 'in concise terms'.

[17] Thirdly, I am not convinced that the use of a simple summons is an obstacle to compliance by a plaintiff with the duties resting on it in matters of this kind regarding necessary allegations to be made. As demonstrated by the authors of *Erasmus,* this may be accomplished without too much difficulty and should, as a matter of practice, be followed in this Division in future."

Was the application for an amendment *res judicata*?

[16] Mr Scheepers submitted that the substance of the first and second application to amend was not the same. The first application sought an amendment of both the simple summons as well as the declaration. The second application sought to substitute the simple summons with a combined summons (summons and particulars of claim).

[17] *Res judicata* normally applies to matters which have been finally disposed of. The application of the *res judicata* principle to interlocutory matters, such as an amendment, which merely consist of allegations, may be doubtful although an abuse of the process cannot be condoned. This brings to the fore the question whether the second proposed amendment is the same or substantially similar to the first proposal?

[18] Mr Jagga, who appeared on behalf of the respondent, made several points. He submitted that the granting or the refusal of an application for the amendment of pleadings is a matter for the discretion of the Court, to be exercised judicially in the light of all the circumstances and facts. See **Shepstone & Wylie and Others v Geyser NO** 1998 (3) SA 1036 (SCA) where it was observed at 1044J–1045A that:

> "Numerous judgments of this Court are to the effect that the power to interfere on appeal with the exercise of a discretion is limited to cases in which it is found that the trial court has exercised its discretion capriciously or upon a wrong principle, or has not brought its unbiased judgment to bear on the question, or has not acted for substantial reasons."

[19] In my view the learned Magistrate Meyer, who refused the application, misdirected herself as regards the law regarding the amendment of pleadings. This taints the exercise of any discretion which she may have exercised. She approached the application from the premise that the appellant could not cure the defective process ie the failure to commence the action by means of a combined summons. But this course of action is permissible. See **Krugel v Minister** (*supra*) where it is was said at 770C–D:

> "The summons contains, albeit in short form, and although there is an incorrect reference to the Act in terms whereof he sues, the material elements of the plaintiff's cause of action. In any event, in the light of the form of order that I intend to make, the defendant will be in no worse position than if a combined summons had been issued."

[20] This approach is compatible with the stance adopted by Wessels J In **Whittaker v Roos and Another** 1911 TPD 1092 at 1102- 3 said the following:

"This court has the greatest latitude in granting amendments, and it is very necessary that it should have. The object of the Court is to do justice between the parties. It is not a game we are playing, in which, if some mistake is made, the forfeit is claimed. We are here for the purpose of seeing that we have a true account of what actually took place, and we are not going to give a decision upon what we know to be wrong facts. It is presumed that when a defendant pleads to a declaration he knows what he is doing, and that, when there is a certain allegation in the declaration, he knows that he ought to deny it, and that, if he does not do so, he is taken to admit it. But we all know, at the same time, that mistakes are made in pleadings and it would be a very grave injustice, if for a slip of the pen, or error of judgment, or the misreading of a paragraph in pleadings by counsel, litigants were to be mulcted in heavy costs. That would be a gross scandal. Therefore, the Court will not look to technicalities, but will see what the real position is between the parties."

[21] Mr Jagga submitted that there is one process, namely the one whereby the appellant commenced action against the respondent. It is not permissible to replace the existing simple summons by introducing a new process and the only way to remedy the problem is to withdraw the simple summons and commence action using a combined summons. There may have been merit in this had an application been used instead of a summons but that is not the case here.

[22] Mr Jagga also submitted that the appellant may not introduce a new cause of action through a new process, namely by way of introducing a combined summons. This submission is framed too broadly. The introduction of a new cause of action is not per se impermissible. See **Morgan and Ramsey v Cornelius** 1910 NPD 262 at 265 where Dove-Wilson J expressed similar views:

"In my opinion the court ought to allow all such amendments as may be necessary for the purpose of determining in an existing action or proceedings the real question between the parties. Personally I see no objection to a new ground of action or defence being stated by way of amendment, nor should I in all circumstances object to amendment merely because if goes the length of changing the character of the action, where that is necessary to determine the real question between the parties."

But the appellant was in any event not introducing a new cause of action.

[23] The proposed amendment must be evaluated in its context and again the question of prejudice, which cannot be cured by a cost order, is important. The prejudice has not been established nor is there any reason not to permit the amendment.

[24] The learned Magistrate states that the particulars of claim do not comply with all the requirements, for a cause of action in terms of the National Credit Act. The effect thereof clearly was that even if the amendment was allowed it would have still been excipiable due to its contents. Mr Jagga submitted that the appellant, in its particulars of claim, only averred that certain provisions of that Act were not applicable to the claim. It is silent, however, on the application of *inter alia* section 130 (cancellation of the credit agreement). This he contended, shows that the learned Magistrate was correct in stating that the amendment would still have been excipiable.

[25] It is correct that that a court will not allow an amendment of a pleading if the amendment will render the pleading excipiable. See **M v M and Another** 2011 ZAGPJHC 176. There are two issues which need consideration.

[26] The first, which was not anticipated by the appellant's legal representative, is highlighted by Mr Jagga. The proposed substitution, he submitted would be excipiable because the amendment did not seek to remove the declaration which is incompatible with a combined summons (the particulars of claim is the equivalent of a declaration but it accompanies the summons). This was an oversight on the part of the appellant's legal representative but the learned Magistrate could have decided that it was implicitly to be removed by the amendment or she could have raised it with the parties or have invited further argument. Whatever the case, this was not an obstacle which the learned Magistrate had in mind and it was not an unsurmountable obstacle.

[27] The second relates to the alleged lack of averments in the summons. Mr Scheepers submits that the respondent and Magistarte Meyer misconstrued the cause of action. The appellant sues for specific performance and therefore there is no need to plead sections of the National Credit Act 34 of 2005 which regulate the cancellation of an agreement.

[28] The proviso to rule 5(7), which has been quoted above, applies where the plaintiff seek to obtain judgment by consent in terms of section 58 of the Magistrates' Court Act 32 of 1944. In such a case the summons must refer to or deal with the relevant subsections. That is not the case here. The question here is what averments must a plaintiff make in a case such as this one and has the appellant made them in his proposed amendment? Before turning to this investigation it is necessary to observe that I agree with the following dictum by Van Eeden AJ in **SA Taxi Development Finance (Pty) Ltd v Phalafala** (1512/2013) [2013] ZAGPJHC 55 (28 March 2013) where he said at para 11:

> "The bar in ss 129(1)(b) and 130(3)(a) is not absolute, but dilatory, and must be read as being subject to s 130(4)(b). The latter section allows a court to adjourn a matter and to make an order setting out the steps the credit provider must complete before the matter may be resumed. It follows that non-compliance with the procedures required by s 129 is not necessarily fatal to the proceedings. In this regard I respectfully agree with the approach of Binns-Ward J in **ABSA Bank v Petersen**. He refused an application for rescission under circumstances where the defendant had not received the s 129(1)(a) notice, since the infringement of the defendant's rights to have received it prior to summons was immaterial in the circumstances of that matter."

Prima facie, the appellant has complied with section 129 as it makes such an allegation in paragraph 8 of the particulars of claim and attaches a document which *prima facie* complies with that section as well as a slip indicating that it was sent by registered post.

[29] The particulars of claim do not expressly allege that there has been compliance with section 130(1)(a) but it need not refer to the section by name it is sufficient if the summons avers that the steps enjoined by the subsection have been taken. This averment is made in paragraph 7 and the compliance with the further time limit can be inferred from the other averments pleaded. Paragraph 7 refers to 10 days and not business days but the implication is clear.

[30] I am satisfied that the particulars of claim are not excipiable on account of their alleged non compliance with the National Credit Act.

[31] Mr Jagga argued that the prejudice which a defendant stands to suffer if a plaintiff is allowed to introduce a new process by way of an amendment is obvious. Mr Jagga is correct that prejudice is an element which must be considered in deciding whether to grant an amendment. See **Trans-Drakensberg Bank Ltd (under judicial management) v Combined Engineering (Pty) Ltd** 1967 (3) SA 632 (D) where it was held that the primary object of allowing an amendment is ". . . . . to obtain a proper ventilation of the dispute between the parties. . . . .the vital consideration in the decision whether the amendment will cause the other party such prejudice as cannot be cured by an order for costs and, where appropriate, a postponement".

[32] Although Mr Jagga submitted that the prejudice is obvious. It is not obvious that the respondent was prejudiced. The amendment proposed by the appellant, if it is granted, will regularise the position. The prejudice suffered by the respondent concerns extra costs. But an appropriate order for costs would have cured that. The order made for attorney and client costs would have removed the prejudice.

[33] In the premises the appeal must be upheld and the amendments, express and implied, must be allowed. However, the respondent has suffered prejudice ie he has been put to extra expenses.

Order

[34] I make the following order:

1. The appeal is upheld.

2. The order of the court *a quo* is amended to read:

"Aansoek om wysiging word toegestaan wat insluit die terugtrekking van die deklarasie. Die applikant betaal die koste wat volg op die voormelde wysiging. Die applikant betaal die koste van die aansoek op 'n party en party skaal"

3. The respondent is directed to take the next appropriate step as required by the Rules within 14 days of this order.

4. The respondent is to pay the costs of this appeal.

A A LANDMAN
JUDGE OF THE HIGH COURT

I concur

N GUTTA
JUDGE OF THE HIGH COURT

APPEARANCES:

DATE OF HEARING	: 26 APRIL 2013
DATE OF JUDGMENT	: 16 MAY 2013

COUNSEL FOR APPELLANT	: ADV SCHEEPERS
COUNSEL FOR RESPONDENT	: ADV JAGGA

ATTORNEYS FOR APPELLANT	: SMIT & STANTON INC
ATTORNEYS FOR RESPONDENT	: MAREE & MAREE ATTORNEYS