REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: 29323/2012

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

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SIGNATURE

08/09/17
.....
DATE

In the matter between:

ABEL MANO	**FIRST APPLICANT**
LERATO PROSPERITY MANO	**SECOND APPLICANT**

And

TIVHILAHELI RUTSANE	**FIRST RESPONDENT**
BLOSE PROPERTIES CC	**SECOND RESPONDENT**

JUDGMENT

Windell J:

INTRODUCTION

[1] This is an application in terms of Rule 28 of the Uniform Rules of Court to amend the applicants' simple summons and declaration. For ease of reference the parties will be referred to as plaintiffs and defendants.

[2] The defendants oppose the amendment on the basis that the amendment will render the declaration excipiable.

BACKGROUND

[3] On or about 24 April 2012 the plaintiffs entered into a written purchase and sale agreement with the first defendant in respect of a property situated at Erf 2241, Rasmeni Street, Protea North, Soweto ("the property"). The first defendant was the owner and seller of the property in question, and the second defendant was the estate agency, represented by Sipho Blose. The purchase price was for an amount of R1 480 000. The plaintiffs alleged that on or about 12 June 2012 the agreement was amended, to reflect a revised purchase price of R800 000. The defendants dispute this. The plaintiffs allege that they duly complied with all the material terms and conditions of the amended offer, and accordingly the only issue outstanding was the registration of the property in their names. It is alleged that on or about 26 June 2012 the first defendant informed the plaintiffs, through her agent the second defendant, that they were to pay a further R680 000 and that the property would not be transferred before the additional amount was not paid. It is further alleged that the first defendant subsequently phoned the plaintiff and verbally cancelled the agreement. The plaintiffs allege that the words and the conduct of the defendants constituted a repudiation of the agreement.

[4] The plaintiffs elected to reject the repudiation and hold the first defendant to the contract. They launched application proceedings on 27 July 2012 for an order directing the first respondent to sign all documents necessary to transfer the property into the names of the plaintiffs and an order directing them to refrain from advertising the property as one available for sale. The defendants opposed the application and on 22 March 2013 the application was referred to trial with an order that the notice of motion shall stand as a simple summons and the plaintiff was ordered to deliver a declaration within 20 days.

[5] It is common cause that, notwithstanding the pending litigation, the property was sold to Ms Cibe during April 2015 and was transferred into her name.

[6] The plaintiffs submit that it is no longer practicable to hold the first defendant to the agreement and the plaintiffs now elect to accept the repudiation and claim damages (the so called 'repentance principle'). It has therefore become necessary to amend their particulars of claim to reflect their election. The defendants oppose the amendment and submit that the plaintiffs are bound by their election and that the repentance principle is not applicable to the facts in this matter.

THE AMENDMENT

[7] The current attorneys of record received instructions on 17 February 2016, almost four years after the initial application. It is submitted that on perusing the summons and declaration it became clear that the relief sought in the simple summons did not adequately or sufficiently articulate the relief the plaintiffs were entitled to based on their original cause of action. It was then decided to amend the simple summons and

the declaration. In the process of gathering the information necessary to affect the desired amendments, it came to the attention of the attorneys that the first defendant had, despite the pending litigation, sold the subject matter of the litigation. The sale of the property resulted in the plaintiffs having to reconsider the entire cause of action in the matter, which resulted in the current application for amendment. The defendants objected to the amendment and contend that it would render the plaintiff's declaration vague and embarrassing and bad in law as it does not disclose a cause of action.

[8] Rule 28 of the Uniform Rules of Court regulates the procedure to be followed when a party seeks to amend a pleading. The application of the rule involves the exercise of discretion by the court to which an application to amend has been made. That discretion must obviously be exercised judicially.[1] 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.[2] In *Anderson v Batley,* [3] Plasket J remarked:

> *"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*

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[1] *Caxton Ltd and others v Reeva Forman (Pty) Ltd and Another* 1990 93) SA 547 (A) at 569G.

[2] *Moolman v Estate Moolman and Another* 1927 CPD 27 at 29

[3] 2010 JDR 0291 (ECG)

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 in 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.'

[9] In *Rosenberg v Bitcom,* [4] Greenberg J referred to the fact that, although the granting of an amendment amounts to an indulgence, 'the modern tendency of the Courts lies in favour of an amendment whenever such an amendment facilitates the proper ventilation of the dispute between the parties.'

THE OBJECTION

Vague and embarrassing

[10] The first objection is that the amendment of paragraph 8 of the declaration would render the plaintiffs' declaration vague and embarrassing. In the proposed paragraph 8 and paragraph 8A the plaintiffs allege the following:

"[8] On or about 12 June 2012, and at or near Johannesburg, the first and second plaintiff and the first defendant all signed (and initialed) the amended page of the offer to purchase the property, which reflected the revised purchase price of R 800 000.....

[4] 1936 WLD 115 at 117

[8A] The amended offer to purchase made it plain that:

[8A1] The first defendant through initialing and signing the amended agreement, alternatively, by the initialing and signing of the amended agreement by the second defendant (her duly appointed agent) confirmed her intention to sell the property to the first and second plaintiffs for an amount of R800 000.

[8A2] The first and second plaintiff made their intention clear by similarly, and at the insistence of the second defendant, confirming their intention to purchase the property by appending their initials and/or signature to the amended agreement for an amount of R 800 000."

[11] The basis of the contention is that the allegation in paragraph [8] and paragraph [8A] is contradictory as it is alleged in paragraph [8] that it is the first defendant who signed and initialed the agreement, whilst in paragraph [8A] it is alleged that the first defendant, alternatively, the second defendant signed the agreement. It is therefore inconsistent and renders the plaintiffs' declaration vague and embarrassing.

[12] A statement will be vague if it is either meaningless or capable of more than one meaning. The reader must be unable to distill from the statement a clear, single meaning. The pleading must be read as a whole and one paragraph should not be read in isolation in deciding whether a pleading is vague and embarrassing. The vagueness must strike at the root of the matter to cause such prejudice that the defendant cannot be expected to plead. The onus is on the excipient to show both vagueness amounting to embarrassment and embarrassment amounting to prejudice.

[13] It is clear from paragraph 8A that the plaintiff does not know who signed the amended agreement. It is for that reason that it is pleaded in the alternative. The plaintiff contended during argument that one should read paragraph 8 to also include the second defendant in the alternative.

[14] Paragraphs 8 and 8A are contradictory. In paragraph 8 it is alleged that first defendant signed the agreement and in paragraph 8A it is alleged that the first defendant, alternatively the second defendant, signed the agreement. It is indeed vague and embarrassing. I am however unable to find that the defendants will suffer any prejudice to plead to it in light of the fact that the defendants had already indicated in their opposing affidavit and their present plea that neither party signed the amended agreement. The defendants are able to plead to the allegations since the defendants' version of events does not depend upon the plaintiffs' version.[5] It follows that they are aware of what is being pleaded and there is no prejudice as the defendants are clearly able to answer to it. The amendment is allowed.

No cause of action

[15] In the present instance, the plaintiffs, after learning that the first respondent had sold the property, despite the existence of the present litigation, elected to revise their election and cancel the agreement. The proposed amendment seeks to reflect the change of election.

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[5] *Levitan v Newhaven Holiday Enterprises CC* 1991 4 All SA 226 (C) at

[16] The objection to this amendment relates to the plaintiffs change of election. The basis of the contention is that the plaintiffs in the first instance elected to reject the alleged repudiation of the agreement by the first defendant, and thereby waived their right to accept such alleged repudiation. In law the plaintiffs are bound by that election and the amendment, so it is submitted, is therefore bad in law and does not disclose a cause of action.

[17] The plaintiffs submit that it is no longer practicable for them to persist in their claim for specific performance as it is common cause that the property had been sold onward to a third party. The issue, for present purposes, relates to the question whether it is permissible for a party to change his mind regarding his election.

[18] It is trite that where a party to an agreement breaches the agreement by repudiating its obligations, the innocent party has an election to either reject the repudiation and enforce the performance thereof or accept the repudiation and cancel the agreement. The general rule is that if an innocent party elects to reject the repudiation and keep the agreement alive by seeking specific performance it is bound by its election - the choice of one remedy necessarily involves the abandonment of the other inconsistent remedy. He cannot both approbate and reprobate.[6] The question is what happens if the defaulting party persists and refuses to perform in terms of the contract?

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[6] *Bekazaku Properties (Pty) Ltd v Pam Golding Properties (Pty) Ltd* 1996 (2) SA 537 (C) at 542E-F:

[19] In *Culverwell v Brown*,[7] the plaintiff's original claim was for specific performance based on an anticipatory breach. After the plea had been filed, the plaintiff amended its particulars of claim wherein a new cause of action was set out wherein the plaintiff accepted the repudiation of the contract and claimed damages. Nicholas AJA (in the dissenting judgment) relied on the matter of *Cohen v Orlowski,* [8] and recognized that an innocent party would be entitled to change its election in the following instance:

> *"....where the injured party refuses to accept the repudiation and thereby allows the defaulting party to repent of his repudiation and gives him an opportunity to carry out his portion of the bargain, and the defaulting party nevertheless persists in his repudiation, the injured party is entitled to change his mind and notify the other party that he would no longer treat the agreement as existing, but that he would now regard it as rescinded and sue for damages. "*

[20] *Sandown Travel (Pty) Ltd v Cricket South Africa*[9] involved a repudiation of an agreement. Wepener J considered the principles underlying the doctrine of election and held that the 'repentance principle' is part of our law and a plaintiff is entitled to rely on such principle in order to exercise its rights. The learned judge held that the innocent party had been entitled to change its earlier decision when the time for performance had arrived, and the defaulting party had failed to repent of the repudiation (anticipatory breach). On the basis of this principle, the plaintiff is entitled to succeed with its claim against the defendant, based on the acceptance of the repudiation at the time when performance was due by the defendant.

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[7] [1990] 1 All SA 253 (A)

[8] 1930 SWA 125 at 133

[9] 2013 (2) SA 502 (GSJ)

[21] Counsel for the defendants submitted that the repentance principle only finds application where the guilty party persists in his/her repudiation at the time **when performance in terms of the contract arise** (my emphasis). In terms of the repentance principle the innocent party may, at the time of the performance elect to cancel the agreement.[10] As the plaintiff's did not allege when the performance was due they cannot rely on the repentance principle. Although the alleged amended agreement does not stipulate when transfer of the property should be effected by the first defendant it is submitted that the obligation to register the property into the name of the plaintiff would have been due after a reasonable period after June 2012.

[22] What first appeared to be a novel point of law during the hearing of this application has now been answered and finally laid to rest in the matter of *Primat Construction v Nelson Mandela Bay Metropolitan Municipality.*[11] In *Primat* the appeal turned on whether a party to a contract, who has elected not to accept a repudiation of the contract by the other party, may, in the face of the persistent and unequivocal intention of the other not to be bound, change its stance and cancel and sue for damages for breach of contract. The court held that the requirement of a new and independent act of repudiation before the innocent party could change its election and exercise its right to cancel and claim damages is not one mentioned in any of the earlier authorities. The court held that it would in any event make no sense because it would allow the defaulting party who steadfastly refuses to comply with the contract to keep the contract alive until it commits another act of repudiation. Lewis JA remarked as follows:

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[10] Sandown Travel *supra* at [44] and [48]

[11] (1075/2016) [2017] ZASCA 73 (1 June 2017)

"The Municipality argues, on the other hand, that to allow a change of election would negate the fundamental principle that on breach, an aggrieved party must make an election and is then bound by it. The argument fails to take into account the fact that the doctrine of election is not inviolable: the double-barrelled procedure, sanctioned as early as Ras v Simpson[12]*, allows the aggrieved party to claim in the same action specific performance, and in the event of non-compliance, cancellation and damages. The repentance principle does just that. The aggrieved party gives the defaulting party the opportunity to repent of the breach, and to perform. If the defaulting party continues to refuse or fail to perform, the aggrieved party should then be entitled to change its election, and cancel and claim damages".*

In my view, *Primat* clearly widened the right of the innocent party to change its election to all cases of repudiation and not only to instances involving anticipatory breach.

CONCLUSION

[23] It is alleged that the defendants persisted in its repudiation and despite pending litigation sold the property which is the subject of the litigation. It is clear from the alleged facts that the first defendant refuses to repent of his alleged breach, despite the opportunities given to him to do so. In the circumstances the plaintiffs are entitled to change its election.

[24] In the result the following order is made:

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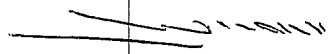
[12] 1904 TS 254

1. The amendment is granted with costs.



L WINDELL

JUDGE OF THE HIGH COURT

Counsel for the Applicants	Advocate R.M. Courtenay
Instructed by:	DRW Attorneys
Counsel for the Respondent	Advocate A. Kruger
Instructed by:	Scholtz Attorneys
Date of Hearing:	30 May 2017
Date of Judgment:	8 September 2017