

**REPUBLIC OF SOUTH AFRICA**



**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG LOCAL DIVISION, JOHANNESBURG**

**CASE NO: 6470/18**

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

In the matter between:

**RICKY SELBY BOOYSEN**

First Plaintiff

**AUKWEST INVESTMENTS 004**

Second Plaintiff

**KATER REPAIRS CC**

Third Plaintiff

and

**RALAIS INVESTMENTS CC**

Defendant

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**J U D G M E N T**

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**MODIBA, J:**

[1] The first and second plaintiffs seek to amend their particulars of claim in terms of Rule 28(4) of the Uniform Rules of Court<sup>1</sup> by amending prayers 1 to 4 in the particulars of claim.

[2] These plaintiffs seek to introduce the following prayers to their particulars of claim:

*“2.1 an order declaring that a partnership existed between the parties;*

*2.2 that the partnership had been dissolved;*

*2.3 that a liquidator must be appointed to realise the assets and liquidate the liabilities of the partnership; and*

*2.4 that the defendant renders an account of the affairs of the partnership.”*

[3] The defendant opposes the application on several grounds. It contends that if granted, the amendment would render the particulars of claim excipiable, either on the basis that they do not disclose a cause of action or they are vague and embarrassing.

[4] In paragraph 6 of the particulars of claim the first and second plaintiff alleged that:

*“6.1 The First Plaintiff, Second Plaintiff and Defendant operated for all intents and purposes as a partnership through the Defendant to obtain and execute a tender under tender number A-F 01/2014 by Ekurhuleni Municipality to do water and electricity meter readings (‘the Tender’);*

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<sup>1</sup> Rule 28 (4) provides:

6.2 *The profits made by the Defendant from the Tender would, at the end of the tender period, be apportioned equally between the First Plaintiff, the Second Plaintiff and the Defendant."*

[5] The particulars of claim do not set out the date of conclusion of the agreement of partnership, its terms and its duration.

[6] In paragraph 7 of the particulars of claim, the first and second plaintiffs allege the existence of what they refer to as a 'tender agreement' between the parties and its breach by the defendant in that it has not paid the first and second plaintiffs an alleged amount of profits derived from a service contract entered into between the defendant and the Ekurhuleni Municipality. This is a separate cause of action based on contract.

[7] When adjudicating the dispute between the parties, I am guided by the following legal principles, set out in the ancient *Moolman v Estate Moolman*<sup>2</sup> judgment:

7.1 it is trite that a litigant may amend his or her pleadings at any stage of the proceedings before judgment (Rule 28(10));<sup>3</sup>

7.2 a court hearing an application for an amendment has a discretion to grant it. Such discretion must be exercised judiciously;

7.3 the general approach to amendments is that they should be allowed, unless the amendment application is made in bad faith

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<sup>2</sup> 1927 CPD 27 at page 29

<sup>3</sup> Rule 28(10) provides:

and would cause an injustice which cannot be compensated with a costs order;

7.4 an amendment that would render the particulars of claim excipiable is impermissible.

[8] To the extent that the first and second plaintiffs seek to rely on a partnership, they have failed to disclose a cause of action. To the extent that they rely on an alleged contract between the parties and its breach by the defendant, if the amendment is granted, the particulars of claim would not sustain the relief sought.

[9] Therefore if granted, the proposed amendment would render the particulars of claim excipiable, either because it fails to disclose a cause of action based on partnership or it is vague and embarrassing because the cause of action based on contract does not sustain the proposed amended relief. Therefore these two grounds of objection stand to be upheld.

[10] In his heads of argument, counsel for the defendant sought to raise an additional ground of objection regarding the conflicting claims caused by the non- or misjoinder two other defendants in respect of the third plaintiff's claim for the repayment of money allegedly advanced. This is inappropriate as this ground of objection is not set out in the notice of objection as required by Rule 28 (3). In the premises, this ground of objection stands to be dismissed.

[11] In the premises, the following order is made:

1. The defendant's grounds of objection as set out in its notice of objection are upheld.

2. The first and second plaintiff's application to amend the prayers in their particulars of claim in accordance with the notice of amendment dated 27 March 2019 is dismissed.
3. The first and second plaintiffs are ordered to pay the costs of this application on an opposed basis.



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**L MOBIDA**  
**JUDGE OF THE HIGH COURT**  
**GAUTENG LOCAL DIVISION, JOHANNESBURG**

Counsel for Plaintiff:	Ms L Grobler
Instructed by:	Ayoob Kaka Attorneys
Counsel for Defendant:	Mr HH Cowley
Instructed by:	Bezuidenhout Attorneys
Date of hearing:	07 May 2019
Date of judgment:	14 May 2019