

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 41715/2015

(1) <u>REPORTABLE:</u>
(2) <u>OF INTEREST TO OTHER JUDGES:</u>
(3) <u>REVISED.</u>
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DATE
SIGNATURE

In the matter between:

MASHEGOANA GODFREY KGOBISI

Applicant/Plaintiff

and

ABSA BANK LIMITED

1ST Respondent/Defendant

CECIL PATRICK SHAIN LAMENT

2ND Respondent/Defendant

JUDGMENT

MAKUME J:

INTRODUCTION

- [1] This is an application for leave to amend the Plaintiff's Particulars of Claim in terms of Rule 28(4) of the Uniform rules of Court.
- [2] On the 12th July 2021 the Plaintiff filed a notice of intention to amend his particulars of claim. On the 19th July 2021 the Defendant filed its notice of objection to the proposed amendments in terms of Rule 28(3) of the Uniform Rules. In the notice of objection the Defendant has set out grounds on which the objection is founded.
- [3] It is trite law that the primary object of allowing an amendment is to obtain a proper ventilation of the dispute between the parties, to determine the real issue between them so that justice may be done and be seen to have been done. (See: **Cross v Ferreira 1950 (3) SA 443 (C)**; **Viljoen v Baijnath 1974 (2) SA 52 (N)**; **Kirsch Industries vs Vosloo and Lindeque 1982 (3) SA 479**).
- [4] It is also common cause that save in exceptional circumstances an amendment ought not to be allowed where its introduction into the pleading would render such pleading excipiable (See: **Cross v Ferreira 1950 (3) SA 443 (C)**; **Krischke v Road Accident Fund 2004 (4) SA 358 (W)**; **YBVSb 2016(1) SA 47 (WCC) AT 51 E-F**).

BACKGROUND FACTS

- [5] During or about the year 2005 the Plaintiff placed a bet on the National Lottery and won an amount of approximately R20 million (Twenty

Million Rand). He approached his bank the first Defendant who assigned to him a financial advisor being the second Defendant to assist him with investments.

[6] He thereafter made several transactions, withdrawal and purchased properties and motor vehicles. The proceeds of his investments were being paid into his savings account held with the first Respondent.

[7] During the year 2011 it came to his notice that no proceeds of investments were being paid into his savings account. He made enquiries and was told that he had sold and ceded his investments and received all the money.

[8] In paragraph 16 of his particulars of claim dated 19th November 2015 the Plaintiff says that he laid a charge of fraud against the second Defendant after he was informed that the Second Defendant had unlawfully transferred an amount of R1 265 700.00 (One Million Two Hundred and Sixty-Five Thousand Seven hundred Rand) from his account into second Defendant bank account.

[9] He then issued summons against both Defendants and pleaded that the first Defendant was liable because the second Defendant was acting within his cause and scope of his employment with the first Defendant when he unlawfully transferred Plaintiff's money into his account.

- [11] The first Defendant entered appearance to defend and filed a special plea of prescription, a special plea of misjoinder it being pleaded that the second Defendant was not in the employment of the first Defendant but that he was an employee of ABSA Insurance and Financial advices (Pty) Ltd. In its main plea the first Defendant reiterated that it is not the employer of the second Defendant and that it had no control over the funds of the Plaintiff.
- [12] On the 21 November 2012 ABSA Insurance Financial Advisors informed the Plaintiff in a letter that there was no money due to him as he had sold or ceded his investment with Liberty and Sanlam and had received the proceedings of both investments. He was told categorically that there was no more money due to him from the two investments. Despite this he proceeded to issue summons against the Defendants.
- [13] The second Defendant also filed his plea and denied liability in actual fact he repeated that the Plaintiff had sold and or ceded his investments to third party and received the proceeds of the investments.
- [14] On the 12th July 2021 the Plaintiff filed a lengthy notice of intention to amend his particulars of claim. In an equally comprehensive notice

filed on the 19th July 2021 the first Defendant objects to all six paragraphs that the Plaintiff sought to amend.

[15] It is common cause that in its current form the Plaintiff's claim is to the effect that Lament as an employee of ABSA together with ABSA mismanaged the Plaintiff's funds.

[16] Despite the first and second Defendant having pleaded specifically that at the time of the transaction and thereafter the second Defendant was not in the employment of ABSA the Plaintiff proposed amendment now seeks to make out a case against the first Defendant on a basis other than vicarious liability of an employer for the action of its employee Mr Lament.

[17] A further reading of the proposed amendment demonstrate an unclear cause of action which in my view is vague and embarrassing and accordingly excipiable.

[18] What is also clear is that the proposed amendment does not contain a clear and concise statement of the material facts upon which the Plaintiff seeks to rely on as is required in terms of Rule 18(4). The amendments are all over the place. The notice of amendment seeks to introduce broad and sweepy changes to the original claim.

[19] The first objection relates to lack of clarity whether the proposed amendment seeks to advance a claim against the first Defendant in contract or in delict if it is in contract then the Plaintiff has failed to plead where, when and by whom was the contract concluded and

whether such contract was oral or in writing as is required by Rule 18 (6).

[20] On the other hand if the claim is intended to be in delict the Plaintiff has failed to plead that first Defendant owed him a particular duty and that same was negligently breached.

[21] It must be remembered that the first Defendant's amended plea which is supported by the second Defendant is that there is no employer – employee relations between the first and second Defendants.

[22] The Plaintiff 's amendment seeks to change that element of the Plaintiff's pleaded case in as far as it concerns the missing money. He now seeks to plead a convoluted cause of action. In my view the plea would become vague and embarrassing and excipiable.

[23] This claim was instituted in the year 2015 and yet the notice to amend was filed only in the year 2021 some six-year later. In addition to proving that the application is *bona fide* and that the other party will not suffer prejudice the Applicant must then also prove that he did not delay in making the application after becoming aware of the evidential material upon which reliance is now placed. Secondly Applicant must provide a reasonable and satisfactory reason why the amendment was not sought at an earlier stage (See: **Bulktrans (Pty) Ltd v Power Plus**

**Performance [2003] JOL 11708 EC; Trans-Drakensberg Bank Ltd
(Under Judicial Management 1967 (3) SA 632 (D)).**

[24] The amendment does not seek to clarify or improve the particulars of claim rather it seeks to create new pleading six years later. Nothing in the proposed amendment deals with the issue of misjoinder raised as a special plea. The cause the Plaintiff seeks to prove is simply that the second Defendant whilst employed by the first Defendant and acting within the cause and scope as such mismanaged his fact. The Plaintiff will not pass the first hurdle of proving that relationship and that will be the end of the matter. He has also indicated that criminal charges were investigated against Mr Lament the second Defendant. He has not told this court as to what eventually happened to that.

[25] In **Ciba-Ceigy 2002 (2) SA 447 SCA** the court held that an Applicant in an amendment must show *prima facie* that he has something deserving of consideration or triable issue. I have highlighted the short history of this matter especially the consistent denial by the first Defendant that there exists an employer-employee relationship between it and the second Defendant. The fact that second Defendant is not opposing the proposed amendment does not benefit or enhance the Applicant's case.

[26] Having regard to all the facts herein including the fact that the proposed amendment would render the particulars of claim excipiable I

have exercised my discretion against allowing the amendments as a whole and in the result I make the following order:

ORDER

- a) The application to amend the Plaintiff's Particulars Claim is dismissed.
- b) The Applicant/Plaintiff is ordered to pay the Respondent/first Defendant taxed party and party costs which shall include costs of counsel.

DATED at JOHANNESBURG this the 17 day of MAY 2022.

**M A MAKUME
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG**

DATE OF HEARING : 05 MAY 2022
DATE OF JUDGMENT : 17 MAY 2022
FOR APPLICANT : ADV GIBSON
INSTRUCTED BY : CILLIERS LATTANZI ATTORNEYS
FOR RESPONDENT : IN PERSON MS K MTHETWA

