

Editorial note: Certain information has been redacted from this judgment in compliance with the law.

REPUBLIC OF SOUTH AFRICA



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

- (1) REPORTABLE: NO
- (2) OF INTEREST TO OTHER JUDGES: NO
- (3) REVISED

3 November 2023

DATE

SIGNATURE

CASE NUMBER:

2022/17136

In the matter between

LIZINEX (PTY) LIMITED

Respondent/Plaintiff

and

FPC SOLUTIONS (PTY) LIMITED
(Registration No. 2016/135654/07)

First Applicant/First Defendant

FRANCOIS PACHONICK
(ID No. [...])

Second Applicant/ Second Defendant

PHILLIPUS LODEWYK LE ROUX
(ID No. [...])

Third Applicant/Third Defendant

JUDGMENT

DOSIO J:***Introduction***

[1] This is an application for leave to amend the defendants' plea. The application is opposed by the plaintiff.

[2] The plaintiff's objection is based on the following, namely:

- (a) that the defendants are withdrawing certain admissions;
- (b) that the proposed amendments would lead to excipiability;
- (c) that the application is unsupported by an affidavit.

Background

[3] On 5 October 2021 and 11 October 2021 respectively, a written offer to lease was entered between the plaintiff, duly represented by an authorised representative and the first defendant, duly represented by the second defendant. This was in respect to the premises known as shop 113 Fin Forum Centre ('the leased premises'). The lease period of two years would commence on 1 November 2021 and terminate on 31 October 2023.

[4] The second and third defendants bound themselves jointly and severally as sureties, in favour of the plaintiff for the obligations of the first defendant.

[5] Due to an alleged breach by the first defendant of the agreement of lease, the plaintiff cancelled the lease agreement and instituted proceedings, claiming judgment, for arrear rental and damages (positive interesse) against the defendants, premised on the contract of lease.

[6] The first defendant vacated the premises, long before the issue of summons. The defendants delivered a plea on 14 July 2022 and the plaintiff applied for summary judgment on 28 July 2022, on arrear rental only.

[7] An explanation is afforded in the affidavit resisting summary judgment that after the defendant's counsel had insight to the particulars and claim, the defendant's counsel realised the defendant's plea needed to be amended. The defendants served a notice of intention to amend the plea on 20 September 2022. The plaintiff served a notice of objection, against the amendment on 28 September 2022. The defendants served the application for leave to amend

on 7 October 2022, which elicited a notice to oppose the application, dated 10 October 2022. The plaintiff also served a notice in terms of Rule 6(5)(d)(iii), objecting to the proposed amendment, on 14 October 2022.

[8] The plaintiff served its application for summary judgment on the attorney of the defendants on 28 July 2022, prior to the notice to amend being served by the defendants on the plaintiff.

[9] The proposed amendment included the deletion of the first special plea on jurisdiction and substituting it with a special plea that the plaintiff lacks *locus standi*. The defendant's amended plea suggests that a mortgage bond was registered over the building where the leased premises are situated and that nowhere in the particulars of claim does the plaintiff allege or plead that a mortgage bond was registered over the building in favour of Standard Bank. The defendants contend that due to an absence in the particulars of claim stating that the plaintiff ceded to Standard Bank its right and title to rentals and other amounts payable under the lease agreement, that the aforesaid cession is one in *securitatem debiti* and no recession is pleaded thereto by the plaintiff. As a result, the defendants plead that the plaintiff lacks the requisite legal standing to institute the action and that the plaintiff's claim should be dismissed.

[10] The additional amendments sought by the defendants are the insertion of paragraphs 7.4, 7.5, 7.6, 7.7, 7.8, 7.9, 7.10, 7.11 and 7.12 to the defendant's plea, which refers to the defence of lack of *commodus usus* and the reasons substantiating same.

[11] The proposed insertion of paragraphs 8.3 and 8.4 to the defendant's plea, refers to the fact that because there was a dispute between the parties, that such dispute falls within the purview of the arbitration clause in the lease agreement, which is part of the original third special plea raised by the defendants.

[12] An amendment was also sought to insert paragraphs 9.3, 9.4, 9.5, 9.6, 9.7, 9.8, 9.9, 9.10, 9.11, and 9.12 to the defendants' plea, which refers to the deposit paid by the first defendant and a claim for a reduction of the claimed amount by the plaintiff, together with the fact that the plaintiff secured other tenants in the premises previously occupied by the first defendant.

[13] The insertion of paragraphs 17.3, 17.4, 17.5 and 17.6 refers to the plaintiff's disentitlement to claim double rental from the new tenants whilst claiming positive interesse from the defendants.

The submissions of the defendant

[14] The defendants contend that:

- (a) there is no withdrawal of admissions but merely the insertion of a defence that the plaintiff has no *locus standi*;
- (b) there is no need for an affidavit; and
- (c) the amendment will not lead to excipiability;
- (d) the objection is frivolous and vexatious.

The submissions of the plaintiff

[15] The plaintiff contends that the defendants made certain admissions in relation to the plaintiff and admitted its *locus standi* and are now denying this. The plaintiff contends that the defendants in their plea admitted the name and description of the plaintiff and that it was the owner of the premises, accordingly admitting that the plaintiff had *locus standi* to issue summons.

[16] The plaintiff contends that it has already applied for summary judgment which is pending and that such withdrawal of an admission will prejudice the plaintiff as it has not had the opportunity to deal with this proposed withdrawal of admission in its affidavit. Furthermore, the defendant has given no explanation why it withdrew this admission.

[17] The plaintiff submits that the proposed amendment will render the pleadings excipiable in that:

- (a) the defendants are not pleading sufficient facts in relation to the alleged cession in *securitatem debiti* and as a result fail to disclose a defence;
- (b) the defendants deny being provided with *commodus usus*, whilst simultaneously denying that a lease agreement exists;
- (c) the defendants allege that arbitration should have been followed, notwithstanding the denial of the existence of a lease; and
- (c) the defendants are claiming a reduction in respect to the deposit paid, whilst simultaneously denying that the lease exists.

[18] In the premises, the plaintiff contends that the defendants are making mutually destructive averments.

The law

[19] A Court hearing an application for an amendment has a discretion whether to grant it or not. Such discretion must be exercised judicially.¹

[20] The party requesting the amendment has the onus to establish that the other party will not be prejudiced by it.

[21] The test on whether an amendment should be allowed, was formulated in the matter of *Moolman v Estate Moolman & ANO*² ('*Moolman*') where the Court stated that: 'The practical rule adopted seems to be that amendments will always be allowed unless the application for amendment is mala fide or unless such amendment would cause an injustice to the other side which cannot be compensated by costs, or in other words unless the parties cannot be put back for the purposes of justice in the same position as they were when the pleading which it is sought to amend was filed.'³ [my emphasis]

[22] In the case of *Zarug v Parvathie NO*⁴ ('*Zarug*') the Court held that: '...the Court will allow an amendment, even though it may be a drastic one, if it raises no new question that the other party should not be prepared to meet.'⁵ The Court held further that: 'No matter how negligent or careless the mistake or omission may have been and no matter how late the application for amendment may be made, the application can be granted if the necessity for the amendment has arisen through some reasonable cause, even though it be a *bona fide* mistake.'⁶ [my emphasis]

[23] In the matter of *Trans-Drakensberg Bank Limited (under judicial management) v Combined Engineering (Pty) Limited*⁷ ('*Trans-Drakensberg Bank*') the Court held that the primary object of allowing an amendment is to obtain the proper ventilation of a dispute between the parties.⁸

¹ (see *Robinson v Randfontein Estates Gold Mining Company Ltd* 1921 AD 168 at 243.).

² *Moolman v Estate Moolman & ANO* 1927 CPD 27.

³ *Ibid* page 29.

⁴ *Zarug v Parvathie NO* 1962 (3) SA 872 (D).

⁵ *Ibid* 876 A-B.

⁶ *Ibid* 876 B-C.

⁷ *Trans-Drakensberg Bank Limited (under judicial management) v Combined Engineering (Pty) Limited* 1967 (3) SA 632 D.

⁸ *Ibid* page 637 A – 641 C.

[24] As stated in the matter of *Trans-Drakensberg Bank*⁹ a party who wishes to change or add to his original pleading must show that it has something deserving of consideration and a triable issue. He cannot be allowed to harass his opponent by an amendment which has no foundation or which would introduce a pleading which would make the pleadings excipiable¹⁰

[25] In the matter of *Benjamin v Sobac South African Building and Construction (Pty) Limited*¹¹ ('Benjamin') it was stated that if a claim as set out by a party is not a viable claim, it would be doing an injustice to the respondent to grant the amendment.¹²

The grounds of objection raised by the plaintiff

1. Whether there is a withdrawal of an admission

[26] In the matter of *President Versekeringsmaatskappy v Moodley*¹³ the Court held that the amendment of a pleading involving the withdrawal of an admission stands in a somewhat different footing because it involves a change of stance and is more likely to prejudice the other party.¹⁴

[27] The defendants admitted in paragraph 1.1 of the defendants' plea that the plaintiff is the owner of the premises. Paragraph 1.1 of the plea is not being amended by the proposed amendment at all, and remains extant. The proposed amendment substitutes the initial first special plea of territorial jurisdiction, and not paragraph 1.1 of the plea. No admission is withdrawn. An admission of ownership, which is still extant, does not equate to an admission on *locus standi*. The *locus standi in casu*, pertains to whether the plaintiff has the requisite standing to pursue its contractual claim for arrear rental and damages in the form of positive interesse.

[28] The plaintiff's claim is based on contract, not ownership. As stated in the matter of *Boompret Investments (Pty) Ltd and Another v Paardekraal Concession Store (Pty) Ltd*¹⁵

⁹ Ibid page 64.1.

¹⁰ Ibid page 641.

¹¹ *Benjamin v Sobac South African Building and Construction (Pty) Limited* 1989 (4) SA 940 (C).

¹² Ibid page 958.

¹³ *President Versekeringsmaatskappy v Moodley* 1964 (4) SA 109 (T).

¹⁴ Ibid 110 H – 111 A.

¹⁵ *Boompret Investments (Pty) Ltd and Another v Paardekraal Concession Store (Pty) Ltd* 1990 (1) SA 347 (A).

ownership is irrelevant to a claim flowing from a lease, such as a claim for arrear rental or ejectment. The Appellate Division, as it then was, held that:

'It is, of course, true that in general a lessee is bound by the terms of the lease even if the lessor has no title to the property. It is also clear that when sued for ejectment at the termination of the lease it does not avail the lessee to show that the lessor has no right to occupy the property.'¹⁶

[29] The plaintiff should have included a paragraph in its particulars of claim stating that it had ceded its rights to the bank. The bond is registered against the property and has not been cancelled. The mortgage bond and cession remains extant, for as long as there is any liability, whether future or contingent. The plaintiff must plead its case establishing *locus standi*. Absent same being pleaded, the particulars of claim are excipiable and the plaintiff can in any event not sustain summary judgment.

[30] As a result, the objection raised by the plaintiff that the admission is withdrawn has no basis and is dismissed.

2. Whether the proposed amendment will lead to excipiability

[31] It is a cardinal rule and common practice that every pleading must comply with Uniform Rule 18, more specifically, pleadings must contain clear and concise material facts upon which the pleader relies on his claim to enable the other party to plead thereto.

[22] In *Trope v South African Reserve Bank*¹⁷ the Court held that an exception to a pleading on the ground that it is vague and embarrassing involves two considerations, firstly, whether it is vague and secondly, whether it causes embarrassment of such a nature that the excipient is prejudiced.

[23] The proposed amendment pertaining to the first special plea in respect to *locus standi* is not excipiable and even if it was, it does not disentitle leave to amend.

[24] In the matter of *Living Hands (Pty) Ltd v Ditz*¹⁸ the Court held that: '...(f) Pleadings must be read as a whole and an exception cannot be taken to a paragraph or a part of a pleading that is not self-contained.

¹⁶ Ibid page 351.

¹⁷ *Trope v South African Reserve Bank* 1992(3) SA (208) (T).

¹⁸ *Living Hands (Pty) Ltd v Ditz* 2013 (2) SA 368 (GSJ).

(g) Minor blemishes and unradical embarrassments caused by a pleading can and should be cured by further particulars.¹⁹

[25] In the matter of *Randa v Radopile Projects CC*²⁰ ('Randa') the Court referred to the matter of *Rosenberg v Bitcom*²¹ and the Court held that:

'It is also interesting to note that the concept of the 'modern tendency' of the courts granting an amendment where such amendment facilitates the proper ventilation of the disputes between the parties emanates from the judgment of Greenberg J in *Rosenberg v Bitcom* 1935 WLD 115 at 117 in fin where he stated:

'Although it has been stated that the granting of the amendment is an indulgence to the party asking for it it seems to me that at any rate 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.²²

[my emphasis]

[26] In the matter of *Compass Insurance Company Ltd v Cobus Smit Projekbestuur CC and Another*²³ the Court held that even if the pleading may be rendered excipiable, same should be allowed as long as a relevant or triable issue is raised, being one which can be proved by evidence foreshadowed in the application for leave to amend.

[27] In the matter of *Levitan v Newhaven Holiday Enterprises CC*²⁴ the Court held that the pleading must cause serious prejudice to the excipient, to warrant an exception to be upheld.²⁵ The plaintiff at paragraph 7.3 stated that it did provide *commodus uses* to the first defendant. The defendants deny the contents of paragraph 7.3, therefore, this Court can find no prejudice by the defendants broadening on this lack of *commodus uses* in the proposed insertion of paragraphs 7.4 to 7.12.

[28] As a result, the proposed insertion of 7.4 to 7.12 does not introduce *commodus uses*, it merely clarifies it in more detail. This Court finds that the issue of *commodus uses* is a triable issue and even if clarified in this proposed amendment, it is best left for the trial Court to determine.

¹⁹ Ibid at 374G.

²⁰ *Randa v Radopile Projects CC* 2012 (6) SA 126 (GSJ).

²¹ *Rosenberg v Bitcom* WLD 115.

²² Ibid para 33.

²³ *Compass Insurance Company Ltd v Cobus Smit Projekbestuur CC and Another* 2019 (1) SA 413 (WCC).

²⁴ *Levitan v Newhaven Holiday Enterprises CC* 1991 (2) SA 297 (C).

²⁵ Ibid 298A.

[29] As regards the introduction of the issue pertaining to the arbitration, this aspect had already been raised in the defendants' third special plea. The insertion of paragraphs 8.3 and 8.4 does not introduce a new fact, as it was there all along.

[30] Pleading an alternative, based on the plaintiff's own allegations regarding the conclusion of a lease, should same be proved, does not constitute mutually destructive defences. Even if this Court is wrong, the issue as to whether the proposed amendments introduces a mutually destructive version in respect to the *commodus usus*, the arbitration and the reduction of the claim, should best be determined by the trial court. The plaintiff can request further particulars in this regard as well.

3. Whether the proposed amendment will cause prejudice to the plaintiff

[31] The plaintiff has raised the concern that it has already filed its application for summary judgment and that such an amendment to the defendant's plea would prejudice the plaintiff. This Court disagrees. The fact that an amendment may cause the plaintiff to fail at summary judgment stage is not 'prejudice', as the claim remains extant and will be determined at trial. Summary judgment is an extraordinary remedy and the refusal of same does not finally determine the plaintiff's claim.

[32] The defendants cannot be precluded from amending pleadings, purely because a summary judgment application is pending. To refuse an amendment based on a substantive defence, due to the impending summary judgment, would go against s9 and s34 of our Constitution. The defendants have a right to amend pleadings, so that the true issues are determined.

[33] The prejudice the plaintiff complains about will equally be experienced by the defendants in that:

- (a) the plaintiff will be vested with a final judgment, when not entitled to same;
- (b) the defendants will have to seek leave to appeal that judgment, on a version not apparent due to the un-amended plea;
- (c) the defendants would need to seek leave to appeal and would rely on a defence, not before the Court, when summary judgment was granted. This will certainly result in a refusal of the leave to appeal against a summary judgment, which should never have been granted had the proposed amendment been effected;

(d) even if the defendants succeeded in obtaining leave to appeal, then they would need to seek leave to introduce its amendment, at the appeal stage.

[34] The affidavit resisting summary judgment must accord with the plea or the proposed amendment, as requested in the matter *in casu*. If the amendment is refused, the evidence in the affidavit resisting summary judgment will be disregarded. This all seems unnecessary because if such leave is granted by the Appeal Court to introduce the amendment then it will inevitably be referred back to the Court *a quo*, to assess the summary judgment again. This would make it extremely costly for both parties.

[35] The defendants have a right to be heard, and a right to a fair hearing, which cannot be trumped by the plaintiff's alleged prejudice arising from a desire for expedition of the summary judgment.

[36] From the matter of *Moolman*²⁶ it is clear that absent *mala fides* on the part of the defendants, or an injustice being occasioned by same, the amendment should be allowed.

[37] Even though the attorneys who drafted the defendants' plea were careless, an explanation was afforded by the counsel for the defendants in the affidavit resisting summary judgment as to why there was a need to amend the defendants' plea. In light of the matter of *Zarug*²⁷ the explanation afforded in the affidavit resisting summary judgment is reflective of a *bona fide* mistake. This Court does not find that the explanation is *mala fide*. In addition, there is no allegation that the proposed amendment is *mala fide*, or will occasion an injustice.

[38] In line with the matter of *Trans-Drakensberg Bank*²⁸ the defendants do have a defence which is deserving of consideration and a triable issue. The defence is valid and in line with the decision of *Benjamin*,²⁹ this Court grants the amendment, as the amendment will allow for a proper ventilation of the disputes between the parties.³⁰

[39] Accordingly, the prejudice argument raised in opposition to the amendment lacks traction and is dismissed.

²⁶ *Moolman* (note 2 above).

²⁷ *Zarug* (note 4 above).

²⁸ *Trans-Drakensberg Bank* (note 7 above).

²⁹ *Benjamin* (note 11 above).

³⁰ See *Randa* (note 20 above).

4. The failure to seek leave to amend supported by an affidavit.

[40] In the matter of *Swartz v van Der Walt t/a Sentraten*³¹ and *De Kock v Middelhoven*,³² the Courts held that an application for leave to amend need not be supported by an affidavit, save in the event of the withdrawal of an admission, which does not apply in the matter *in casu*.

[41] Accordingly, this objection is also dismissed.

Costs

[42] The defendant seeks a punitive cost order against the plaintiff for objecting to the application for an amendment. Costs are within the discretion of the Court.

[43] Both parties are to blame for the way in which this matter has been placed before this Court. The defendants are liable for filing a plea which now needs an amendment and the plaintiffs are objecting to this unnecessarily. As a result, each party will be liable for their own costs.

Order

[44] The application is granted.
Each party to pay their own costs.

D DOSIO
JUDGE OF THE HIGH COURT
JOHANNESBURG

This judgment was handed down electronically by circulation to the parties' representatives via e-mail, by being uploaded to CaseLines and by release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 3 November 2023

³¹ *Swartz v van Der Walt t/a Sentraten* 1998 (1) SA 53 (W).

³² *De Kock v Middelhoven* 2018 (3) SA 180 (GP).

Date Heard: 3 October 2023

Judgment handed down: 3 November 2023

Appearances:

On behalf of the Applicant: Adv. C van der Merwe

Instructed by: AJ SCHOLTZ ATTORNEYS

On behalf of the Respondent: Adv J.G Dobie

Instructed by: ROOSEBOOM ATTORNEYS