IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

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

CASE NO: 23970/21

DATE: 19 SEPTEMBER 2022

In the matter between:-

BRIAN NEALE N.O.	First Plaintiff
GLEN TROUCHET N.O.	Second Plaintiff
WAYNE VISSER N.O.	Third Plaintiff

V

PIPEFLO (PTY) LTD	Defendant

JUDGMENT

KOOVERJIE J

[1] In this interlocutory application the plaintiffs seek leave to amend their particulars of claim. The plaintiffs filed their notice of intention to amend on 7 December 2021. The defendant objected to such amendment.

[2] The plaintiffs are the trustees of the Glen Barry Trouchet Trust ("Trust"). The defendant, Pipeflo (Pty) Ltd ("Pipeflo"), had leased premises belonging to the Trust. For the purposes of this judgment the parties will be referred to as the plaintiffs and the defendant.

A CONDONATION

[3] The first issue for determination is whether the plaintiffs' late filing of the application for leave to amend should be condoned. In exercising its judicial discretion this court is required to take into account all the relevant factors in order to consider whether good cause has been shown.

[4] It is common cause that the defendant's objection was emailed to the plaintiffs' attorney on 15 December 2021 at around 14h00. The plaintiffs explained that since their attorneys' offices had closed on the afternoon of 15 December 2021, they were not aware of the objection until their return on 10 January 2022. According to the defendant the application should have been filed by 31 December 2021. The plaintiffs argued that the delay was just over a month and the defendant would not be prejudiced if condonation is granted. [1]

[1] 004-7 of the record

[5] The plaintiffs in their replying affidavit further advanced their reasons for the delay. I have taken cognisance thereof, namely that the plaintiffs' attorneys' offices were closed for the festive season from 4pm on 15 December 2021 until 10 January 2022. The objection only came to the attention of the plaintiffs' attorney, Mr Keith Sutcliffe, during the course of 10 January 2022. A draft application was prepared and furnished to counsel to settle on 24 January 2022. On the same day such affidavit was settled and deposed to.

[6] The plaintiffs requested the court to not make a ruling based on technical objections. In this regard I was referred to ***Trans-African Insurance Company v Maluleka 1956 (2) SA 273 AD at 278F-G*** where the court stated:

"Technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and if possible, inexpensive decision of cases on their real merits."

[7] The defendant primarily opposed the condonation application on the basis that the plaintiffs failed to furnish a full explanation for the delay. By relying on various authorities they further emphasised that the court consider various factors namely that there should not be a reckless and intentional disregard of the rules of court, and further that the application must be *bona fide* and not with the intention of delaying the opposition's right to have its matter finalised. [2]

[2] Silber v Olzen Wholesalers (Pty) Ltd 1954 (2) SA 345 A at 353 – where an applicant must at least furnish an explanation of its default sufficiently to enable the court to understand how it really came about and to assess its conduct and motives.
Van Wyk v Unitas Hospital (Open Democratic Advice Centre as amicus curiae) 2008 (2) SA 472 CC at 477E-G

[8] I have noted that this application was instituted on 8 February 2022. Hence there being a delay of approximately 5 (five) weeks. I am mindful that amongst the jurisdictional factors considered includes not only the lateness but whether the opposing party has been prejudiced and whether it is in the interest of justice.

[9] In exercising my judicial discretion I am inclined to grant condonation as I am of the view that, although a full explanation was not proffered for the delay, there has been a sufficient and reasonable explanation. This factor must be weighed together with other jurisdictional factors. Even though the plaintiffs' application of the *non dies* was misconstrued, the fact of the matter is that the delay was not intentional and extensive. The defendant has not suffered prejudice due to the delay. Furthermore, it is in the interests of justice that the litigation between the parties takes its cause.

B **ABSENCE OF AUTHORITY**

[10] A further legal point raised by the defendant was that the deponent, Mr Wayne Visser, deposing the affidavit lacked the necessary authority to act on behalf of the Trust. It was pointed out that Mr Visser, who deposed to the founding affidavit on behalf of the Trust, did not present evidence that he had authority.

[11] The defendant argued that it was necessary for the Trust to be represented by all three trustees. Moreover, the deponent was required to expressly state that he was authorised to depose to the affidavit.

[12] The deponent, Mr Visser, does not allege in his affidavit that he is duly authorised by his co-trustees to issue the application on behalf of the Trust and to depose to the

affidavit on their behalf. It was also pointed out that no confirmatory affidavits were filed by the other two trustees. On this basis it was argued that the deponent did not have *locus standi;* which is fatal to this application.

[13] The attempt to remedy this defect, in reply, was irregular. In fact, it was pointed out that even in his replying affidavit, the deponent failed to make the necessary allegations.[3]

[14] I am mindful that a trust is not a legal *persona* and cannot litigate in its own name. It is the trustees who play a vital role in any litigation where a Trust is a party.

[15] Section 6(1) of the Trust Property Control Act states:

"Any person whose appointment as a trustee in terms of a trust instrument, Section 7 or a court order comes into force after the commencement of the Act, shall act in that capacity only if authorized in writing by the Master."

[16] This provision was interpreted by our courts to mean that a trustee can only institute legal proceedings in his/her capacity as a trustee once a letter of authority has been issued by the Master of the High Court. Prior thereto, a trustee may not acquire rights for or contractually incur liabilities on behalf of the Trust.[4] It is the Master's authorization of the trust deed and the issuing of the letters of authority that gives the trustees the authority to act on behalf of a Trust. In this instance, the letter of authority had been issued to all three trustees.

[3] Replying Affidavit, par 1, P007-4
[4] Watt v Sea Plant Products Bpk 1998 (4) All SA 109 (C)

[17] I have noted that in the founding papers Mr Wayne Visser, the deponent, does indeed allege that he acts in his capacity as a "trustee"[5] of the Glen Barry Trouchet Trust.

[18] The defendant's further contention was that the trustees must act jointly when entering into contracts or when instituting litigation. Reference was made to the cases of ***Niewoudt***[6] and ***Parker***[7]. At paragraph 9 in ***Parker***, the court acknowledged that in the absence of the Master's authorization the trustees are required to act jointly.

[19] In reply, the plaintiffs attached a resolution dated 21 March 2022 where it was, *inter alia*, resolved that the deponent, Mr Visser "was and is authorized" to represent the Trust in this matter, which includes deposing to the affidavits. I have noted that the resolution was signed by all three trustees.

[20] In my view, the resolution, albeit only signed on 21 March 2022, ratified the deponent's authorization. I have also noted that the resolution was signed by all three trustees. Authorization to represent the Trust can at any stage be ratified.[8]

[21] Harms J in ***Niewoudt*** accepted that trustees might expressly or impliedly authorize someone to act on their behalf and that person might be one of the trustees.

[5] Founding Affidavit 004-5
[6] Niewoudt and Another NNO v Vrystaat Mielies Edms Bpk 2004 (3) SA 486 SCA
[7] Land and Agricultrual Development Bank v Parker and Others 2004 (4) All SA 261 SCA
[8] Parker matter at par 45

[22] The fact that trustees have to act jointly does not mean that the ordinary principles of law of agency do not apply. The trustees may expressly or impliedly authorize someone to act on their behalf and that person can even be a third party.[9]

[23] In the ***Hyde Park*** matter, the court acknowledged that ratification is one of the ordinary principles of the law of agency. In principle there appears to be no good reason why a decision taken ostensibly in the name of the Trust should not be ratified by the full body of trustees. The principle that the trustees must act jointly is satisfied by the ratifying conduct of the full body of trustees.[10]

[24] In ***Hyde Park***, the court further stated that the circumstances in ***Parker*** and ***Lupacchini***[11] were distinguishable in that those cases address the position which arises where a trust deed requires that there should be no fewer than a specified number of trustees and where at the time the act was performed, fewer than that number existed. In those matters the issue was whether the Trust lacked the capacity to act. In this case the issue concerns the authority to act on behalf of the Trust. Furthermore, the court in ***Parker*** did not exclude ratification.[12]

[25] In this matter all the trustees were cited in the proceedings. The resolution signed by all the trustees, authorized the deponent to represent the Trust. Moreover, the resolution was specifically worded that the deponent "was and is authorized" to represent the Trust in these proceedings. I am, therefore, satisfied that the deponent was authorized to act on behalf of the Trust.

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[9] Niewoudt matter, par 23
[10] Hyde Construction CC v The Deuchar Family Trust, Case A460/2013 dated 11 August 2014
[11] Lupacchini NO and Another v Minister of Safety and Security 2010(6) SA 457 SCA
[12] Hyde Construction matter at par 32-25

[26] In ***Hyde Park*** the court at paragraph 42 further stated:

"The question is only one of authority and in principle, therefore, the unauthorized institution of the proceedings could be ratified."

C BACKGROUND

[27] It is the plaintiffs' case that the proposed amendment constitutes a new claim against the defendant emanating from "a new tacit lease agreement on the same terms and conditions" of the lease agreement (written) between the plaintiffs and Pipefit (Pty) Ltd ("Pipefit"). The new claim is a claim for damages against Pipeflo, the defendant. The particulars of claim is based on a tacit agreement of lease entered into between the Trust and the defendant, Pipeflo.

[28] The facts are as follows:

(i) the Trust duly entered into a written agreement with Pipefit on or about 18 September 2014;

(ii) Pipefit remained in occupation on the premises after the termination of the written lease agreement and consequently a tacit renewal of the agreement (tacit relocation) was concluded between the Trust and Pipefit on the same terms and conditions as the written lease agreement;

(iii) the defendant took occupation of the premises during the period August 2016 to July 2019;

(iv) the defendant paid monthly rental in respect of the occupation of the premises;

(v) on the plaintiff's version, a tacit renewal of the agreement (the tacit relocation) was concluded between the Trust and the defendant in terms of which the

defendant became the lessee under the agreement and the defendant's right of occupation was subject to the same terms and conditions as contained in the written agreement with Pipefit;

(vi) consequently, the Trust sought payment of arrear rental in the amount of R115,920.00 in addition to the outstanding amount owed to the City of Tshwane Municipality in the amount of R602,683.20 and R30,584.00 which the defendant was obligated to pay as well as damages for future loss of rental in the amount of R2,066,446.02.

D THE AMENDMENTS

[29] The proposed amendments were as follows:

(i) an additional clause added after paragraph 5 was 5A where it was pleaded:

"The defendant has been in physical occupation of the premises since May 2014."

It was pointed out that the defendant has not objected to this amendment;

(ii) the addition of paragraph 7.13 where it was pleaded:

"7.13 It was a tacit term, that Pipefit would be entitled (and in fact would) sublet the premises to the defendant."

By replacing the existing paragraphs 8 in its entirety, it was pleaded:

"8. *Pursuant to the conclusion of the lease agreement "between plaintiff and Pipefit" the defendant remained in occupation of the premises in terms of the right of occupation given to it by Pipefit either expressly or in writing or orally or alternatively or tacitly."*

By amending paragraph 9 with the underlined words:

"9. The defendant remained in occupation of the premises after the termination date (31 August 2016) and the defendant continued to pay the agreed monthly rental subsequent to this date."

By adding the following words to paragraph 10:

"10. As a result, a new tacit lease agreement on the same terms and conditions of the agreement between the plaintiff and Pipefit was concluded between the Trust and the defendant.";

(iii) it was further pointed out that the averments contained in paragraph 5A, 7, 13, 8, 9 and 10 will be the plaintiffs' evidence at trial;

(iv) a new subheading "CLAIM D" was added to the existing paragraph 33 with the addition of paragraphs 33A, 33B, 33C and 33D. The new claim was based on a tacit term of the agreement that the defendant was required to, upon termination of the agreement, to restore the premises to the same good order and condition as they were at the time that the defendant took occupation of the premises. The plaintiffs then set out in detail the extent and nature of the damage caused in the following paragraph;

(v) consequently, in the said paragraphs the plaintiffs pleaded that they suffered damages as a result of the breach in an amount of R3,882,663.16. The amount claimed constituted the reasonable cost of restoring the premises to the condition it was when the defendant took occupation. An amount of R3,882,663.16 was quantified as per the remedial works that had to be carried out as per the bill of quantities and attached as Annexure 'I' to the pleadings.

[30] The plaintiffs further argued that the defendant's obligation to restore the premises to the same good order and condition as it was at the time the defendant took occupation of the premises emanates from an implied term in law which finds

application to all lease agreements unless specifically excluded by agreement between the parties.[13] Hence the assertion that the proposed pleading would render the particulars of claim excipiable, is misconceived.

[31] The plaintiffs further explained that there was no attempt to rely directly upon the terms of the written agreement between the plaintiffs and Pipefit. The plaintiffs proposed claim against the defendant is premised upon the specific terms of a tacit lease agreement between the plaintiffs and the defendant. In argument it was submitted *"the plaintiffs pertinently plead the conclusion of a tacit agreement of lease between the plaintiffs and the defendant. It is this tacit agreement of lease which gives rise to the plaintiffs proposed new claim against the defendant."*

E OBJECTION TO THE AMENDMENT

[32] In objecting, the defendant's core contention is that the plaintiffs rely on a tacit lease agreement with the defendant on the same terms as the written agreement concluded with the plaintiffs and Pipefit. The defendant was, however, never a party to such agreement (written agreement). On this basis, therefore, the pleadings are incompetent and bad in law.

[33] The main contention was that the defendant cannot be liable on a contract to which it was not a party: At par 6.3 of its papers, the following was stated:

"6.3 the plaintiffs' attempts in terms of the proposed amendment, to hold the defendant liable for contractual damages on strength of an alleged breach of

[13] The plaintiffs relied on the authority of – Voet 19.2.32 Van der Linden 1:15:12; Kerr, the Law of Sale and Lease (3rd edition) at page 414-415

the written agreement to which the defendant was never a party, will render the particulars of claim excipiable for want of disclosing a cause of action, alternatively on the basis of being vague and embarrassing."

[34] It was argued that the plaintiffs further failed to set out the requisite allegations in the amendment in support of its reliance on a tacit contract.

[35] The defendant emphasized that the two contracts which were in existence at the time of occupation was the main lease contract and a sublease. Pipefit had the main lease with the plaintiffs. In the written agreement with Pipefit, the defendant, Pipeflo, was subletting from Pipefit. In terms of the sublease there was a relationship between Pipeflo, the defendant, and Pipefit, the lessee. These are separate and distinctive contracts. Hence no contractual relationship between the plaintiffs and the defendant exists. It is absurd and wrong in law to rely on a sublease agreement between the defendant and Pipefit and to claim damages on that basis.

[36] Simply put, the amendments conflate the distinct and separate legal relationships amongst the parties in terms of the main lease and the sublease.

[37] It is common cause that the written lease, which is attached as Annexure 'A' to the particulars of claim constitutes an agreement between the Trust and an entity named Pipefit (Pty) Ltd. This entity is distinct from the defendant, Pipeflo. The main agreement with Pipefit was concluded on 18 September 2014 for a period of 1 September 2014 to 31 August 2016.

[38] Consequently Pipefit had a number of contractual obligations towards the Trust, more particularly complying with the monthly rental payment and related obligations regarding the leased premises. Pipefit took occupation of the lease premises and remained in occupation after expiration of the lease agreement on 31 August 2016. Due to Pipefit remaining on the premises, a tacit renewal of the lease agreement came into being between the trust and Pipefit. In this time it is not disputed that Pipeflo was occupying the premises by virtue of the sublease entered into with Pipefit.

[39] Sometime between 31 August 2016 and July 2019 the defendant, Pipeflo, remained on the premises. It remained on the premises on its own accord as Pipefit no longer occupied the premises. On this basis it was argued that there is simply no legal or rational basis why Pipeflo would be bound to the terms and conditions set out in a written contract between Pipefit and the plaintiffs.

[40] Argument was also proffered that the arrear rentals as well as the damages claim for future loss of rental income and early termination of the agreement had no bearing on Pipeflo, the defendant. These claims emanate from the tacit agreement between Pipefit and the Trust. Pipeflo was not obligated to perform in terms of the agreement between the parties.

F **ANALYSIS**

[41] I am in agreement with the defendant that it is paramount to distinguish and respect the privity of contracts since separate obligations arise between the parties by virtue

of the particular contracts.[14] A sub-lessee cannot be obliged to perform any obligation under a head lease agreement to which it is not a party even if there exists a separate sublease agreement between the sub-lessee and the sub-lessor. The *lis* is between the plaintiffs and Pipefit.

[42] Having considered the amendments, I have noted that claim D, being the new claim, is premised on the terms and conditions of the written agreement (Annexure 'A').

[43] Our law does make provision for tacit relocation, but it does so between parties that have an existing agreement in place. Such agreement can be concluded tacitly to replace a previous agreement. Tacit renewal of a lease is also known as "tacit relocation" and is a common law concept. The principle translates to mean "silent renewal". This is an implied agreement in a lease that if the relationship between the parties is not formally terminated, the lease may be extended tacitly by the parties upon its expiry. A tacit relocation of lease comes into existence where the lessor is convinced that the lessee shall remain in occupation of the premises and the lessee is content to remain on the premises.[15]

[44] The plaintiffs apply this principle with a party it had no previous express or tacit agreement with. The defendant had a relationship with Pipefit in terms of a separate sub-lessee agreement and not with the plaintiffs.

[45] I am further not in agreement with the plaintiffs that all that is pleaded is a tacit agreement of lease between the plaintiffs and the defendant since the very terms of

[14] The privity of contract rule means that only the parties to a contract can acquire rights under it or have obligations imposed upon them under it, even if the contract was created to give that party a benefit
[15] Hwange Colliery Co Ltd v Alliance Medical High Court Zimbabwe Case HC 8991/17, March 2019

the tacit agreement are borne from the written agreement which the defendant was never a party to. In my view, the proposed new claim in terms of a purported tacit agreement, based on the terms of the written agreement, is misplaced.

[46] Amendments are considered and allowed in order for real triable issues to be pleaded. A court should not allow an amendment where the amendment would make the pleading excipiable.[16]

[47] A party relying on a tacit contract is eventually required to prove the unequivocal conduct of the parties and that they, in fact, intended to and had tacitly contracted on the terms alleged. It must be proved that there was an agreement. When determining whether a tacit contract was concluded the law considers the conduct of both parties objectively by having regard to the circumstances of the case generally.[17]

[48] The purported damages claim is premised on clause 7.2 of the written agreement with Pipefit. By virtue of this written agreement, Pipefit made certain undertakings regarding the status of the interior of the premises upon conclusion of the lease between Pipefit and the Trust. Pipeflo bore no such obligation and neither had it agreed to such terms. In my view, if the amendment is allowed, it would, in all probability, be excepted to.

[49] I find it apt to reiterate the court's remarks in ***Trope and Others v South African Reserve Bank 1992 (3) SA 211 A-E***:

[16] Alpha (Pty) Ltd v Carltonville Ready Mix Concrete CC 2003 (6) SA 289 (W) at 293 I-J
[17] NBS Bank Ltd v Cape Produce Co. (Pty) Ltd 2002 (1) SA 396 (SCA)

"An exception to a pleading on the ground that it is vague and embarrassing involves a twofold consideration. The first is whether the pleading lacks particularity to the extent that it is vague. The second is whether the vagueness causes embarrassment to such a nature that the excipient is prejudiced. As to whether there is prejudice, the ability of the excipient to produce an exception proof plea is not the only nor indeed the most important test – see the remarks of Conradie in Levitann v Newhaven Holiday Enterprises CC 1991 (2) SA 297 C at 298 G-H. If that was the only test and object of the pleadings to enable parties to come to trial prepared to meet each other's case and not to be taken by surprise may well be defeated.

Thus it may be possible to plead to the particulars of claim which can be read in any one of a number of ways by simply denying the allegations made; likewise, to a pleading which leaves one guessing as to its actual meaning. Yet there can be no doubt that such a pleading is excipiable as being vague or embarrassing – See Parow Lands (Pty) Ltd v Schneider 1952 (1) SA 150 (SWA) at 152 F-G …"

[50] At 210 G-J the court went further on to say:

"It is, of course, a basic principle that the particulars of claim should be so phrased that the defendant may reasonably and fairly be required to plead thereto. This must be seen against the background of a further requirement that the object of pleadings is to enable each side to come to trial prepared to meet the case of the other and not to be taken by surprise. Pleadings must therefore by lucid and logical and in an intelligible form; the cause of the action or defence must appear clearly from the factual allegations made (Harms Civil Procedure in the Supreme Court at 263-4) ....

… The ultimate test however must, in my view, still be whether the pleading complies with the general rule enunciated in Rule 18(4) and the principles laid down in our existing law."

[51] Rule 18(4) of the Uniform Rules of Court demands that two requirements be met. The first requirement is the material facts upon which a pleader relies for its claim must be pleaded and the second requirement is that it should consist of a clear and concise statement of sufficient particularity to enable the opposite party to reply thereto.

[52] This entails that the plaintiffs would be required to plead the material facts that demonstrate that the parties had entered into a tacit agreement.

[53] I am mindful that an attack on a pleading that is vague and embarrassing cannot be found in a mere averment of lack of particularity. An exception that a pleading is vague and embarrassing, may only be taken where the vagueness and embarrassment strikes at the root cause of the action.[18] In these circumstances, therefore, I am of the view that the amendments, as they stand, goes to the very root cause of the action.

[54] Consequently I make the following order:

1. The deponent is duly authorized to represent the Trust in these proceedings.
2. The late filing of the plaintiffs' leave to amend is condoned.
3. The plaintiffs' application for leave to amend is dismissed with costs.

[18] Absa Bank v Boksburg Transitional Local Council 1997 (2) SA 415 W at 418

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H KOOVERJIE
JUDGE OF THE HIGH COURT

Appearances:

Counsel for the plaintiffs:	Adv LM Spiller
Instructed by:	Keith Sutcliffe & Associates Inc
	c/o Andrea Rae Attorney
Counsel for the defendant:	Adv U van Niekerk
Instructed by:	Jacobson & Levy Inc
Date heard:	1 September 2022
Date of Judgment:	19 September 2022