

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 76079/2019

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| (1) | REPORTABLE: Yes <input type="checkbox"/> / No <input checked="" type="checkbox"/> |
| (2) | OF INTEREST TO OTHER JUDGES: Yes <input type="checkbox"/> / No <input checked="" type="checkbox"/> |
| (3) | REVISED: Yes <input type="checkbox"/> / No <input checked="" type="checkbox"/> |

Date: 28 September 2023

WI

In the matter between:

STANDARD BANK OF SOUTH AFRICA LIMITED

PLAINTIFF / APPLICANT

and

MATHEUS THEODORUS ENGELBRECHT

FIRST DEFENDANT/ RESPONDENT

ELMARIE ENGELBRECHT

SECOND DEFENDANT / RESPONDENT

PIETER JACOBUS ENGELBRECHT

THIRD DEFENDANT / RESPONDENT

JUDGMENT

DU PLESSIS AJ

[1] This is an application for leave to amend the particulars of claim dated 11 October 2019.

[2] The Applicant is the Standard Bank of South Africa Limited and the Plaintiff in the main proceedings. The Respondents signed sureties for the debts incurred by a

Trust, which surety the bank now wishes to call up. They are the Defendants in the main proceedings. The parties will be referred to as they are in the main proceedings.

Background

- [3] The Plaintiff bank instituted action against the Defendants on 15 October 2019. In its particulars of claim, the bank alleged that on 12 Augustus 2008, at Pretoria, the bank concluded a home loan agreement with Precor Construction Trust (‘the Trust’) as principal debtor and that the Defendants bound themselves as sureties for the debts owed to the bank by the Trust.
- [4] One of the issues to be decided is whether the National Credit Act (“the NCA”)¹ is applicable and has been complied with. The Defendants set out various arguments as to whether this is so, although not relevant to this dispute. For background and insofar as it relates to the argument about the exception, the following can be stated: the Defendants contend that the Plaintiff did not comply with the NCA in that it did not conduct an assessment as contemplated in ss 80(1)(a) and 81(2) of the NCA. For this reason, the Defendants filed a counterclaim to have the agreement set aside as there is no valid credit agreement. The Plaintiffs filed a replication that it is exempted from the NCA as it is a large agreement concluded with a “juristic person”.
- [5] However, in February 2023, the Plaintiff served a notice of intention to amend its particulars of claim in terms of Rule 28(4). They seek to substitute the date of the conclusion of the agreement of 12 August 2008 with a new date of 12 August 2005 (they cite a clerical error as a reason for the wrong date), and together with that, insert the allegation that on that date the Usury Act² governed the agreement, and later the transitional provisions of the NCA. This excludes Chapter 4, Part D of the NCA, dealing with reckless credit.

¹ 34 of 2005.

² 73 of 1968.

[6] The Defendants objected in terms of Rule 28(3). Their objection is based on four grounds:

- i. The amendment of the date is not *bona fide* as the bulk of the evidence indicates that the agreement was concluded in 2008 and not 2005;
- ii. The amendment will not achieve a proper and true ventilation of the relevant issues;
- iii. The introduction of a date of 2005 in place of the date 2008 will render the particulars vague, embarrassing and excipiable in that the particulars of claim would not correspond with the replication of the Plaintiff in the counterapplication;³ and
- iv. The Plaintiff is attempting to put the agreement beyond the reach of the National Credit Act.

[7] The Defendants contend that the agreement was concluded in 2008 and not 2005. The Plaintiff disagrees. According to the Plaintiff, there are factual disputes relating to the date of the conclusion of the agreement. Such issues cannot be ventilated in an application for an amendment, as it was not designed to resolve factual disputes.

[8] The Defendants, however, persist, saying there are no factual disputes, only legal ones. Furthermore, the gist of the matter is whether the NCA applies to the agreement, which, in turn, depends on the date the agreement was concluded. They refer the court to various documents attached to the application for amendment and the facts as set out in the opposing affidavit, asking the court to make a factual finding as to when the agreement was concluded.

[9] The Plaintiff finds it irregular and impermissible for the Defendants to request the court to evaluate the bulk of the evidence. This is what the trial is for, especially since there is an apparent dispute of fact. They further argue that the Defendants

³ *Hipkin v Nigel Engineering Works (Pty) Ltd* 1941 TPD 155.

have failed to set out why the amendment is *mala fide* and why it would not be in the interest of justice to allow the amendment in their notice of objection.

[10] As for the argument that the amendment will render the Plaintiff's particulars of claim vague and embarrassing, the Plaintiff states that this is made without substantiation. This is because an exception that the pleading is vague and embarrassing goes to the whole cause of action,⁴ and the Defendants' complaints do not relate to the whole of the Plaintiff's cause of action. Furthermore, an amendment will not be allowed unless the excipient will be seriously prejudiced if the allegations were not expunged.

[11] Plaintiffs continue stating that exceptions based on vagueness and embarrassment require that the reader must not be able to distil from the statement a clear, single meaning. If there is such vagueness, then the court must regard the embarrassment that can be proven to be caused to the excipient. Then it must be decided if the embarrassment is so serious as to cause prejudice to the excipient if they are compelled to plead to the pleading objected against. If the excipient is to be prejudiced if the exception is not upheld, then it should be upheld. Keeping this in mind, the exception is not against the whole cause of action, and it is not clear what prejudice the Defendants will suffer, the Plaintiff argues. They also argue that the amendment should be allowed in cases where the exception is arguable.⁵

[12] As for the argument that the purpose of the amendment is to put the agreement beyond the reach of the NCA, the Plaintiff argues that this has no bearing on the amendment, as the court is not tasked to pronounce on the applicability of the NCA.

⁴ *Jowell v Bramwell-Jones* 1998 1 SA 836 (W) at 899G.

⁵ Citing *Crawford-Brunt v Kavnat* 1967 (4) SA 308 (C) at 310G.

The law

- [13] The purposes of allowing amendments to particulars is to ensure that there will be a proper ventilation of the dispute between the parties, by determining the real issues between them. This way, justice may be done.⁶
- [14] In general, an amendment will not be allowed if the application to amend is made *mala fide* or if the amendment will cause the other party prejudice that a cost order cannot cure.⁷
- [15] The court has a wide discretion whether to allow an amendment or not,⁸ and in exercising this discretion judicially, it is guided by consideration of prejudice or injustice to the opponent.⁹ It is for the party seeking the amendment to show no prejudice. Prejudice is not when an amendment may cause the other party to lose his case against the party seeking the amendment.¹⁰
- [16] An amendment to a plea should not be allowed if the plea would then be excipiable. Whether a pleading would be excipiable is a matter of law which should be decided by the court hearing the application for amendment.¹¹ However, the court should only refuse the amendment if it is clear that it would be excipiable, not when it may be excipiable. In terms of *Crawford-Brunt v Kavnat*¹² it seems correct that if the amendment is arguable, the correct approach is that it should be allowed.

⁶ *Rosenberg v Bitcom* 1935 WLD 115 at 117.

⁷ *Absa Bank Ltd v Public Protector and Several Other Matters* [2018] 2 All SA 1 (GP) at para 119. *Moolman v Estate Moolman* 1927 CPD 27 at 29.

⁸ *Embling v Two Oceans Aquarium CC* 2000 (3) SA 691 (C) 694G–H

⁹ *Devonia Shipping Ltd v MV Luis (Yeoman Shipping Co Ltd intervening)* 1994 (2) SA 363 (C) at 369G.

¹⁰ *South British Insurance Co Ltd v Glisson* 1963 (1) SA 289 (D) at 294B; *Amod v SA Mutual Fire & General Insurance Co Ltd* 1971 (2) SA 611 (N) at 615A.

¹¹ *De Klerk v Du Plessis* 1995(2) SA 40, TPD at 43 para 1.

¹² 1967 (4) SA 308 (C) at 310G.

Conclusion

- [17] If the purpose of an amendment is to place the correct facts before the court for proper ventilation, then whether the NCA is applicable or not to the dispute, is not for this court to decide or to consider. It is likewise not for the court to determine any of the issues between the parties. The issues that were raised by the Defendants they can raise in their plea, should they so wish. Whether or not there is a factual dispute about the date of the conclusion of the contract, is for the trial court to decide.
- [18] Furthermore, nothing in the affidavits indicates that the Plaintiff is *mala fide*, or that the amendment would prejudice the Defendants. Considerations of costs and delays can be cured with a cost order.
- [19] As for the rest of the pleadings and the counterclaim possibly not corresponding with the pleadings, Rule 28(8) provides that any party affected by an amendment may, within 15 days after the amendment has been effected, make any consequential adjustment to the documents filed by them.
- [20] Considering the facts set out above, together with the law as discussed, the application to amend should be granted.

Order

I, therefore, make the following order:

1. The Applicant is granted leave to amend its particulars of claim dated 11 October 2019;
2. The Plaintiff is ordered to pay the defendants wasted costs occasioned as a result of this application.

WJ DU PLESSIS

Acting Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. It will be sent to the parties/their legal representatives by email.

Counsel for the Applicant:	Mr D Ntsweni
Instructed by:	Strauss Daly Attorneys
Counsel for the respondent:	Mr DM Leathern
Instructed by:	Els Attorneys
Date of the hearing:	05 September 2023
Date of judgment:	28 September 2023