Reportable:	**NO**
Circulate to Judges:	**NO**
Circulate to Magistrates:	**NO**
Circulate to Regional Magistrates:	**NO**

IN THE HIGH COURT OF SOUTH AFRICA

NORTHWEST DIVISION, MAHIKENG

CASE NO: 2044/2017

In the matter between:-

SIMON SIMI MORWANE Applicant

and

WALTER LOWRENS KINNEAR First Respondent

SITONA MINING AND CONSULTANTS

(PTY) LTD Second Respondent

THAKADU HOLDINGS (PTY) LTD Third Respondent

CORAM: MFENYANA J

Delivered: This judgment was handed down electronically by circulation to the parties' representatives *via* email. The date and time for hand-down is deemed to be **05 January 2024**.

Summary: Amendment – Rule 28(4) of the Uniform Rules – whether the proposed amendment will introduce a new cause of action, and will cause an injustice which cannot be compensated by an order for costs.

ORDER

(1) The application for amendment is refused.

(2) The applicant shall pay the costs of the application.

JUDGMENT

Mfenyana J

[1] In this application the applicant, Simon Simi Morwane (Morwane), who is the plaintiff in the main action, seeks an order for the amendment of the particulars of claim. The application is made pursuant to the provisions of Rule 28(4) of the Uniform Rules of Court.

[2] The essence of the application is that the applicant seeks to delete the entire particulars of claim and replace them with new particulars of claim.

[3] The application is opposed by the respondents.

[4] It is apposite to set out the factual background giving rise to the application, to the extent relevant to provide context and illustrate the effect of the proposed amendment.

[5] On 27 August 2013 the parties concluded a written agreement for the sale of the applicant's shareholder's interest in the second and third respondent (the companies, to the first respondent (Kinnear) for an amount of R2 200 000 (two million two hundred thousand rand). In the agreement it is recorded that the applicant was issued with 26 shares in the second respondent (Sitona Mining), and 260 shares in the third respondent (Thakadu).

[6] The existing particulars of claim, which the applicant seeks to substitute, set out the basis for the applicant's claim and consequently, the present application, as the applicant's lack of

information and understanding of the business affairs of the companies, which led to him selling the shares for less than they were worth at the time the agreement was concluded. This situation was, according to the applicant created by the fact that as the majority shareholder, the first respondent controlled the affairs of the businesses and the applicant was kept in the dark.

[7] It is further stipulated in the particulars of claim that the applicant was a BEE partner in the two companies, with a minority shareholding of 26%, “in exchange for his black face”, from May 2005 until the shares were depleted in October 2014. The applicant avers that at the time, the shares were however worth far more than the R2 200 000 they were sold for. The applicant thus claims 26% of the companies, fairly valued as at October 2014 and inclusive of dividends declared, the amount of his loan account, as well as 26% of all amounts transferred to other companies owned by the first respondent and his wife. These amounts, according to the applicant, total ‘over R24 million’.

[8] In the proposed particulars of claim, the applicant contends that the agreement was preceded by negotiations which commenced in October 2014 as Kinnear wanted to purchase the applicant’s 26%

shareholding. It was agreed that the applicant would sell the shares to Kinnear and his wife at the fair market value, less the amount owed by the applicant to the companies at that stage.

[9] It is the applicant's contention that during the negotiations, the first respondent made false representations to him that the value of the applicant's shares was R2 200 000.00, which induced the applicant into concluding the agreement. He further contends that at the time of concluding the agreement, the value of the plaintiff's 26% shareholding less the amount owed by the applicant to the companies, was R42 070 365.60. He claims damages in the amount of R39 870 365.58 which represents the actual value of the shares less the amount of R2 200 000 already paid to him in terms of the sale agreement.

[10] The respondents have objected to the proposed amendment on various grounds. First, the respondents aver that the intended amendment seeks to introduce a new cause of action based on fraudulent misrepresentation. Linked to this objection, the respondents contend that as the applicant alleges that the misrepresentation was made during October 2014, any claim predicated on that misrepresentation has become prescribed.

[11] Second, the respondents allege that the proposed amendment would render the particulars of claim excipiable for being vague and embarrassing, alternatively that they would constitute an irregular step for non- compliance with Rule 18(10) which requires damages to be pleaded in a manner that would enable the respondents to reasonably assess the quantum thereof. In this regard, the respondents aver that in the proposed particulars of claim the applicant does not distinguish the amount and the value of shares owed in respect of each of the respondent companies, such that the respondents cannot reasonably assess the quantum, or how the applicant arrived at the amount claimed. In this regard, the applicant claims a globular amount of R42 070 356.60 (less R2 200 000.00).

[12] The third objection, while also related to excipiability is that the intended amendment would render the particulars of claim vague and embarrassing as there is a disparity between the date which the applicant avers the agreement to have been concluded on, *vis-a- vis* what is stated in the agreement itself. According to the applicant, the agreement was concluded in October 2014 whereas the agreement itself indicates that the sale agreement was

concluded on 27 August 2013. Thus the respondents aver that the date on which the agreement was concluded would have an impact on the valuation of the shares. They therefore argue that reference by the applicant to October 2014 as opposed to August 2013 is prejudicial to the respondents. They further contend that this discrepancy in the date of the conclusion of the agreement, has an effect on the date of the misrepresentation alleged by the applicant.

[13] The fourth and final ground of objection is that the applicant's reliance on the misrepresentation which allegedly occurred during negotiations in October 2014 could not have induced the applicant to conclude the agreement, as the agreement was concluded in August 2013, prior to the alleged negotiations. This, the respondents aver, also renders the proposed particulars of claim, excipiable for failing to disclose a cause of action and for being vague and embarrassing.

[14] Rule 28 governs the amendment of pleadings in general. In relevant parts the Rule provides:

"28. Amendment of pleadings and documents

(1) If an objection which complies with subrule (3) is delivered within the period referred to in subrule (2), the party wishing to amend may, within 10 days, lodge an application for leave to amend.

(2) The notice referred to in subrule (1) shall state that unless written objection to the proposed amendment is delivered within 10 days of delivery of the notice, the amendment will be effected.

(3) An objection to a proposed amendment shall clearly and concisely state the grounds upon which the objection is founded.

(4) If an objection which complies with subrule (3) is delivered within the period referred to in subrule (2), the party wishing to amend may, within 10 days, lodge an application for leave to amend.

[15] It is trite that the court will always lean in favour of granting an amendment, provided it is not made mala fide, or would not cause prejudice to the other party, which cannot be compensated by a costs order.[1] The onus to show that the other party will not be prejudiced by the amendment rests on the applicant.

[16] In *Affordable Medicines Trust & Others v Minister of Health & Others*[2] the Constitutional Court observed in relation to the rule:

[1]In this regard, see: *Moolman v Estate Moolman and Another* 1927 CPD 27 at 29.
[2] 2006 (3) SA 247 CC, paragraph 9.

> *"The practical rule … is that amendments will always be allowed unless the amendment is mala fide (made in bad faith) or unless the amendment will cause an injustice to the other side which cannot be cured by an appropriate order for costs, or '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'. … The question in each case, therefore, is what do the interests of justice demand."*

[17] A court faced with an application for an amendment should consider certain principles which govern the granting of an amendment. These were outlined in *Commercial Union Assurance Co Ltd v Waymark NO*[3]*.* In summary, these are that:

(a) *a court faced with an application for amendment has a discretion whether to grant to refuse an amendment.*

(b) *an amendment cannot be granted for the mere asking, there must be an explanation for it.*

(c) *the applicant must show that prima facie the amendment has something deserving of consideration; that it raises a triable issue.*

[3] 1995 (2) SA 73 TkGD at 77F- I.

(d) it seeks to facilitate a proper ventilation of the dispute between the parties.

(e) the applicant must not be mala fide.

(f) the amendment must not cause an injustice to the other party which cannot be compensated by an order for costs.

(g) the amendment should not simply be refused to punish the applicant for neglect.

(h) a mere loss of time is in itself not a reason for refusing the amendment.

(i) if the amendment is not sought timeously, some reason must be given for the delay.

[18] In exercising its discretion, which must be exercised judicially, these principles are taken in the context of the circumstances of each case.

[19] The respondents contend that the amendment seeks to introduce a new cause of action. The test as to whether a proposed amendment would introduce a new cause of action or not, was set out by Eksteen JA in *Sentrachem Ltd vs Prinsloo*[4] as follows:

> *"Die eintlike toets is om te bepaal of die eiser nog steeds dieselfde, of wesentlik dieselfde skuld prober afdwing.*

[4] 1997 (2) SA 1 (A) at 151–166.

> *Die skuld of vorderingsreg moet minstens uit die oorspronklike dagvaarding kenbaar wees, sodat 'n daaropvolgende wysiging eintlik sou neerkom op die opklaring van 'n gebrekkige of onvolkome pleitstuk waarin die vorderingsreg, waarop daar deurgaans gesteun is, uiteen gesit word. So 'n wysiging sal uiteraard nie 'n ander vorderingsreg naas die oorspronklike kan inbring nie, of 'n vorderingsreg wat in die oorspronklike dagvaarding prematuur of voorbarig was, te red nie, of om 'n nuwe party tot die geding te voeg nie."*

[20] Applying this test to the circumstances of the present case, it cannot be said that the applicant's right of action as set out in the 'original summons' accords with the cause of action set out in the proposed amendment. Save for the common cause facts relating to the relationship between the parties, and the agreement between the parties, the underlying facts leading up to the claim in the proposed amendment are fairly distinct from the original summons. The proposed amendment does not amount to a mere clarification of an incomplete or defective pleading.

[21] I do not agree with the applicant that the cause of action has not changed, and that it has always been misrepresentation. It is trite

that the introduction of a new cause of action will ordinarily be permitted if it does not introduce new facts and does not seek to revive a liability that has expired. Equally trite, is that a plaintiff is not precluded from augmenting its claim for damages if the new claim merely represents a fresh quantification of the original claim.[5] This is not the case with the proposed amendment. The issue of misrepresentation was not raised in the original particulars of claim. Neither were the specific requirements for reliance on a claim of misrepresentation.

[22] As regards the various objections that the proposed amendment would render the particulars of claim excipiable, the law is settled that an amendment which would render a pleading excipiable will not be granted, and if a case has been made by the objector for an exception, the court ought to deal with the application as if it were an exception. Thus it does not make sense for a court to grant an amendment if it is clear that the defendant would immediately note an exception.[6] By his own admission, the applicant makes common cause in this submission. He however denies that the particulars of claim are excipiable.

---

[5] See Jones & Buckle *The Civil Practice of the Magistrates' Courts in South Africa* – Volume 1: The Act 10 ed (2012) p691.
[6] In this regard, see also: *Manyatshe v South African Post Office Ltd* [2008] 4 All SA 458 (T).

[23] In demonstrating this issue, I can do no better than iterate what the Appellate Division (as it was then known) stated in *Trope and Others v South African Reserve Bank*[7]*.* Grosskopf JA summed up the position with regard to exceptions as follows:

> *"An exception to a pleading on the ground that it is vague and embarrassing involves a two-fold consideration. The first is whether the pleading lacks particularity to the extent that it is vague. The second is whether the vagueness causes embarrassment of 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, or indeed the most important, test. If that were the only test the object of pleadings to enable parties to come to trial, prepare to meet other's case and not be taken by surprise may well be defeated. Thus it may be possible to plead to particulars of claim which can be read in any one of a number of ways by simply denying the allegations made,*

[7] (641/91) [1993] ZASCA 54; 1993 (3) SA 264 (AD); [1993] 2 All SA 278 (A) (31 March 1993).

likewise to a pleading which leaves one guessing as to the actual meaning. Yet, there can be no doubt that such a pleading is excipiable as being vague and embarrassing".

[24] What this denotes in the circumstances of the present case, is that the respondents would not be able to plead to the proposed particulars of claim, without themselves risking an excipiable plea. The proposed amendment leaves one guessing as to what the basis for the applicant's claim is, and when that claim arose. That is not the only issue. The respondents' ability to go to trial, ready to meet the applicant's case may well be denied them if the amendment were to be granted.

[25] During the hearing of the matter, the applicant attempted to explain away the discrepancy with the dates, by submitting that the reference to October 2014 was simply a typing error as the correct date should be October 2014. This does not assist the applicant for a number of reasons, one of them being that the agreement was concluded in August 2013 and not in October of that year. The second reason is that this is not supported by any of the allegations on the papers. The third is that throughout the

proposed particulars of claim, the applicant refers to October 2014, first as the date on which the agreement was concluded, and also as the date on which the pre- negotiations were concluded when the misrepresentations were allegedly made, and lastly as the date on which the shares were depleted. It is thus unclear whether the applicant disavows his reliance on each of these instances.

[26] Even it could be assumed as the applicant seems to suggest, that reference should be to October 2013, and not October 2014, it would not save the proposed particulars of claim as the agreement was concluded on 27 August 2013. They remain excipiable. The authorities are unequivocal in this regard that if an amendment would render a pleading excipiable, that amendment should not be allowed.

[27] It is simply prejudicial to a respondent to be expected to do guesswork, and in that process make themselves guilty of producing an excipiable pleading, to approach court not knowing what case it has to meet, and thus not being able to adequately prepare for trial. Such prejudice cannot be compensated by an order for costs. Consequently the application falls to be dismissed on this ground as well.

[28] As far as the objection that the applicant's claim has become prescribed goes, this issue is ineluctably linked to the cause of action sought to be introduced in the proposed amendment. The respondents aver that the agreement was concluded in August 2013. This much is apparent from the agreement itself. The applicant has retorted that despite the respondents' objection, no special plea of prescription has been raised by the respondents. It is indeed the case that nothing prohibits the respondents from raising the issue of prescription in their plea by way of a special plea.

[29] I do not consider it necessary to deal with the averments relating to the history of the matter, save to note that according to the respondents, the applicant delivered the first notice of intention to amend on 24 November 2017, which was not acted upon until 18 November 2021 when the applicant delivered a further notice of intention to amend which is the subject of the current proceedings. The import of this is that the law is trite that if the applicant is unable to provide a good reason, or if a court is satisfied that the late amendment is due to the negligence of the applicant or his legal representative, that should be the end of the matter and the

court should refuse the amendment (on that basis), even if the application to amend is not *mala fide*[8]*.* It is after all, one of the foundational principles as stated in *Commercial Union*[9] that if an amendment is not sought timeously, a reason must be given for the delay.

[30] While the starting point in deciding whether to permit or refuse an amendment is the proper ventilation of the real issues between the parties, I posit that this must as a matter of course, take place within the confines of available supporting evidence. Thus, 'an amendment may not be allowed to place on record an issue for which there is no supporting evidence'.[10] A court, in an application for an amendment is not concerned with the merits of the matter but of the amendment itself.

[31] In my view, permitting an amendment of the nature envisaged by the applicant would be an exercise in futility. On this basis, the amendment cannot be permitted.

---

[8]Bekker T, *The late amendment of pleadings -Time for a new approach?* University of Pretoria, 2017.
[9]Ibid, note 3; see also: *Randa v Radopile Projects CC* 2012 (6) SA 128 (GSJ).
[10]*Strydom v Derby-Lewis* 1990 (3) SA 96 (T).

[32] In the circumstances, I am of the view that the applicant has not discharged the onus of showing that the respondents will not suffer prejudice which cannot be compensated by a costs order.

[33] With regard to costs, Rule 28(9) sets out that a party seeking an amendment shall be liable for the costs occasioned by such amendment, unless the court directs otherwise. An application for an amendment, being an indulgence, this principle applies irrespective of whether the application is successful or not. In the circumstances of this case I can find no reason to direct otherwise than set out in this this trite principle.

Order

[34] In the result, I make the following order:

(1) The application for amendment is refused.

(2) The applicant shall pay the costs of the application.

_____

S MFENYANA

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

NORTHWEST DIVISION, MAHIKENG

Appearances:

On behalf of the applicant	:	D de Kock
Instructed by	:	Langenhoven Pistorius
		Modihapula Attorneys
c/o	:	Smit Stanton Attorneys
Email	:	litigation1@smitstanton.co.za
		litigation2@smitstanton.co.za
On behalf of the Respondents	:	W N Keeny
Instructed by	:	Van Velden Duffey Attorneys
c/o	:	Van Rooyen Thlapi Wessels Inc.
Email	:	wesleyk@vvd.co.za
Reserved	:	24 March 2023
Handed down	:	05 January 2024