IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, MTHATHA)

CASE NO: 896/2020

In the matter between:

ABSA BANK LTD Applicant

and

MAXWELL HOWARD MALIHAMBE CENGIMBO Respondent

JUDGMENT

RUSI J

[1] The plaintiff instituted an action against the defendant for the payment of R214 374.09 being an amount of his alleged debt in terms of a mortgage loan agreement. In the same action, the plaintiff sought an order declaring the property described as ERF 8067 Umtata Township Extension 29, King Sabata Dalindyebo Municipality, District of Umtata, Province of the Eastern Cape (the property), and hypothecated in terms of the mortgage loan agreement, specially executable as envisaged in Uniform Rule 46A (the Rule 46A payer).

[2] On 08 November 2022, and after the defendant filed his plea dated 10 December 2020, the plaintiff delivered its notice of intention to amend its particulars of claim. The defendant objected to the proposed amendment by his notice of objection dated 21 November 2022. It is that objection that impelled the present application by the plaintiff for leave to amend its particulars of claim. The application was made on 15 December 2022, and it is opposed by the defendant.

[3] The parties shall henceforth be referred to as they are in the action proceedings. For proper context and ease of comprehension I first set out in summary, the material facts that the parties pleaded in their respective pleadings.

The pleadings

[4] The plaintiff alleged, in its particulars of claim, inter alia, that the defendant breached the mortgage loan agreement and fell in arrears of R59 709.91. As at 30 January 2020, the full amount of the defendant's indebtedness to the plaintiff was R214 374.09. The plaintiff further alleged that the defendant was placed under debt review and he breached a debt restructuring order that was made by the Gqeberha Magistrates' Court on 10 June 2015. In terms of the said debt restructuring order, he was obliged to make monthly payments of R1 543.38 together with interest at the rate of 6% per annum in respect of his mortgage loan agreement with the plaintiff. The said payments would be made via a payment distribution agent.

[5] The plaintiff annexed to its particulars of claim the mortgage loan agreement together with its terms and conditions. It also annexed a payment schedule which sets out the amounts paid by and/or on behalf of the defendant in terms of the debt restructuring order. Significant for the present purposes is that *ex facie* the payment schedule, the plaintiff has charged the defendant interest on the alleged debts at 9.5% per annum.

[6] In resisting the plaintiff's claim, the defendant raised four special pleas, viz:-

(a) The non-joinder of his spouse Mrs Maureen Ntomboxolo Cengimbo on the basis that she is the co-owner of the hypothecated property and 'has an interest in the outcome of litigation in the matter;'

(b) The non-joinder of the payment distribution agent to whom he made the payments in terms of the debt restructuring order;

(c) That the mortgage loan agreement is invalid for lack of consent by his spouse to its conclusion; and

(d) That the action was pre-maturely instituted since he still was under debt review.

[7] The defendant further denied indebtedness to the plaintiff to the extent it claims or at all. He alleged that the plaintiff charged him incorrect interest in contravention of the already mentioned debt restructuring order. In denying the alleged breach of the debt restructuring order, the defendant pleaded that he paid the monies stipulated in terms of the said order over to the payment distribution agent who stopped debiting his account.

The notice to amend

[8] The proposed amendment is a substantial one spanning eight pages. In order not to overburden this judgment, I deem it convenient to set out the essence of the proposed amendments. Principally, the plaintiff seeks to delete the prayer in terms of Uniform Rule 46A for an order declaring the hypothecated specially executable. Secondly, it proposes to add paragraphs 5.3.7 and 6 in which it avers, in essence, that:

(1) The defendant renounced the benefits and legal exceptions of '*non causae debiti*, *non numeratate pecuniae*, *errore calculi'* and revision of accounts which are referred to in clause 1 of the Mortgage Conditions, included as part of annexture to the mortgage loan agreement, and are incorporated into the mortgage bon by wy of clause 14.1 of Annexure B.

(2) By reason of section 7(1) of the Recognition of Customary Marriages Act 120 of 1998 which came into operation on 15 November 200, the propriety consequences of a customary marriage entered into before the commencement of the Act, continued to be governed by customary law. The effect of this is that the defendant's wife was not the owner of the matrimonial property, hence the defendant did not require her consent in concluding the mortgage loan agreements or in mortgaging immovable property owned by him.

(3) In the alternative, that it could not have reasonably known at the time that the mortgage loan agreement was entered into that in terms of the Judgment of the Constitutional Court in *Gumede v President of South Africa* 2009(3) SA 152 (CC), section 15(9) of the Matrimonial Property Act would be ordered to apply retrospectively. Section 15(9) of the Matrimonial Property Act provides:

'When a spouse enters into a transaction with a person contrary to the provisions of subsection (2) or (3) of this section, or an order under section 16 (2), and –

(a) that person does not know and cannot reasonably know that the transaction is being entered into contrary to those provisions or that order, it is deemed that the transaction concerned has been entered into with the consent required in terms of the said subsection (2) or (3), or while the power concerned of the spouse has not been suspended, as the case may be.

(4) Accordingly, the defendant's wife is deemed to have consented to the transaction and the mortgage loan agreement is valid and enforceable.

(5) The defendant breached his obligations towards the defendant in terms of a debt restructuring order in terms of which he was obliged to make monthly payments of R1543.38 with interest at the rate of 6% per annum in respect of his mortgage loan with

the plaintiff, which payments would be made via a payment distribution agent. He and/or the payment distribution agent failed to make such payments.

(6) The defendant is indebted to the plaintiff by the full amount of the debt arising from the loan mortgage agreement in the sum of R221 865.94 plus interest at 6% per annum from 13 October 2022.

[9] The plaintiff further makes the following prayers in a way of replacing the initial prayers:

> '2. Payment of R221 865.94.
>
> 3. Interest on the above amount at 6% per annum from 13 October 2022 to date of payment, both dates inclusive.'

The defendant's objection

[10] The defendant objected to the proposed amendment on several grounds. However, the said grounds of objection are repetitive and tend to overlap. Without derogating from their content and true context, it is convenient to summarize them as follows:

(a) The main reason for defending the action was the plaintiff's prayer for an order declaring the property specially executable. The proposed deletion of this prayer is prejudicial to him and the prejudice it will cause will not be ameliorated by an appropriate cost order in that he will lose the defences he raised in his plea to the plaintiff's claim to this relief.

(b) The proposed deletion amounts to a withdrawal of the plaintiff's claim without a tender of costs, and it is thus mala fide.

(c) The amendment renders the particulars of claim excipiable in that the remaining prayer for payment of the alleged default amount of R214 347.09, would not fall within the jurisdiction of this Court but it will be justiciable in the Magistrate's Court. This would, in turn, result in a cost award at a lower scale of the Magistrates' Court if he succeeds in defending the claim in this Court.

(d) Should the amendment be granted, it will expose him to further costs of defending a separate application for an order declaring the property specially executable.

(e) The amendment has been triggered by his special pleas and through it the plaintiff is attempting to tailor its claim in keeping with his special pleas. This evinces mala fides, and it is prejudicial to him.

(f) The introduction of the new interest chargeable on the alleged amount of indebtedness will result in the loss of his defence, namely, that the previously claimed interest was in breach of the debt restructuring order of court which stipulated interest of 6% per annum on the plaintiff's alleged debt.

(g) There is a possibility that the new amount claimed based on the adjusted interest has been incorrectly calculated, and the document in which the adjusted amount is entailed is inadmissible, it has not been authenticated. The said document was manufactured 'to cover up the flaws in the plaintiff's claim'. Its admission will cause potential prejudice to him.

(h) The plaintiff ought to have replicated to his plea instead of applying for an amendment. The amendment is the plaintiff's attempt to salvage its frivolous case, and if allowed it will result in prejudice to him.

(*i*) The amendment is so substantial that it creates a new case which will necessitate him to consult with his legal representatives afresh. The appropriate course of action for the plaintiff is a withdrawal of the action.

(*j*) The amendment is proposed long after the pleadings have closed, and the plaintiff has made the required discovery in terms of the Rules of Court.

The application for an amendment

[11] This application was brought out of time by a period of nine days. Condonation is therefore sought for non-compliance with the provisions of Unifrom Rule 28. This is a preliminary issue to which I now turn.

The condonation application

[12] The legal principles governing condonation for non-compliance with the Rules of Court were re-affirmed by the Supreme Court of Appeal in *MEC for Health Eastern Cape v AS obo SS*[1], where Keightly JA (with whom Nicholls and Weiner JJA and Dolamo and Molitsoane AJJA concurred) wrote:

'[T]he high court has an inherent right to grant condonation for a failure to comply with the rules of court where the interests of justice demand this. The discretion to do so is extensive, but it must be exercised judicially. A party seeking condonation must give a full explanation for the failure to comply with the rules and this explanation must be reasonable. The court must weigh all relevant factors including, depending on the facts of each case, the degree of non-compliance, the explanation therefor, the importance of the case, the avoidance of unnecessary delays in the administration of justice and the prospects of success. These factors are interrelated and must be weighed one against the other. For example, a slight delay and a good explanation might compensate for weak prospects of success. However, in a case of flagrant or gross non-observance of the rules, a court may refuse condonation regardless of the prospects of success.'

[13] The essence of the explanation proffered by the plaintiff is that due to a lapse in communication between its legal representatives and their local correspondent attorneys, it did not come to its attention that the proposed amendment was objected to by the defendant. As a result of this lapse, it proceeded to perfect the amendment by delivering the amended particulars of claim on 08 December 2022, which in turn elicited a notice by the defendant as envisaged in Uniform Rule 30, dated 12 December 2022, that the filing of the perfected amendment was an irregular step. The perfected amendment was accordingly withdrawn.

[1] *MEC for Health Eastern Cape v AS obo SS* (842/2023) [2025] ZASCA 02 (15 January 2025), and all the cases referred to at paragraphs 19 to 20 of the judgment.

[14] A substantial portion of the defendant's heads of argument (14 of a total of 18 pages), dealt with his opposition to the condonation application for the late filing of the application. However, no positive facts were alleged in defendant's opposing affidavit in refuting the plaintiff's case in the condonation application. It was contended on behalf of the defendant, for the first time in his heads of argument, that the explanation provided by the plaintiff is insufficient and unreasonable, and that in any event, it is founded on the uncorroborated hearsay evidence of the deponent to its supporting affidavit. It was further submitted that the plaintiff has failed to show good cause for the condonation it seeks and that the application for leave to amend has no prospects of success on the basis of the defences that the defendant raised in his plea.

[15] It bears reiterating that in application proceedings the affidavits take the place not only of the pleadings, but also of the essential evidence. Heads of argument cannot replace the facts and evidence that an affidavit constitutes. It is to the affidavits that the court will turn in order to gather the facts forming the subject of a litigant's complaint. It follows that great care must be taken to fully set out the case of a party on whose behalf an affidavit is filed in support on an application.[2]

[16] In any event, I hold the view that the contention made on behalf of the defendant that the plaintiff's supporting affidavit is founded on unsubstantiated hearsay is a technical objection for the following reasons – the deponent of the supporting affidavit states that as the legal officer of the plaintiff she is *au fait* with this matter in which the plaintiff is represented by attorneys who are responsible for. It is from those attorneys that she learned of the oversight concerning the filed notice to object. I do not conceive of the deponent of the plaintiff's supporting affidavit

[2] *Hano Trading CC v J R 209 Investments (Pty) Ltd* 2013 (1) SA 161 (SCA); *James Brown & Hammer (Pty) (Previously named Gilbert Hamer & Co Ltd) Ltd v Simmons, NO* 1963 (4) (SA) 656 at 660E-G); *Reynolds NO v Mecklenberg (Pty) Ltd* 1996 (1) SA 75 (W) at 78.

hearing of this from correspondent attorneys who would have received their mandate to act as such from the plaintiff's attorneys of record.

[17] It ought to come as no surprise, therefore, that the facts regarding what caused the nine-day delay are confirmed by the plaintiff's attorney Ms Elmari Loubser in a confirmatory affidavit. Apart from all this, the defendant does not dispute the order of events regarding the service of the notice to object to the amendment, the (incorrect) filing of a perfected amendment to the particulars of claim and the subsequent withdrawal thereof after his Rule 30 notice. Schreiner JA once stated:

'[T]echnical 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.'[3]

[18] From the explanation that the plaintiff has proffered which the defendant has not seriously disputed, it is manifest that the nine-day delay in bringing this application was not caused by the plaintiff's willful default or inaction but rather its choice of an incorrect course of action which was actuated by the alleged oversight on its part. I make the finding that the plaintiff has proffered a reasonable explanation for its delay in making this application. In any event, the period of delay is not long. The late filing of the application is therefore condoned. With this said, I turn to deal with the merits of the application.

The plaintiff's case

[19] The deponent of the plaintiff's founding affidavit states that after the delivery of the defendant's plea the plaintiff caused its legal implications to be investigated by its legal representatives, and having done so, it sought the present amendment so that the true issues between the parties may be ventilated at trial. She goes on to state

[3] *Trans-African Insurance Co Ltd v Maluleka* 1956 (2) SA 273 (A) at 278F.

that the defendant was able to plead to the issues raised in the particulars of claim sought to be amended, therefore, the objection has nothing to do with prejudice but rather his attempt to delay the final determination of issues in the matter.

[20] The plaintiff denies that the deletion of the Rule 46A prayer amounts to a mala fide withdrawal of its claim without a tender of costs and that it will render the particulars of claim excipiable for lack of jurisdiction on the part of this Court to entertain the action. In this regard, the plaintiff states that the defendant's right to oppose this relief shall not be lost when an application is subsequently made, so shall his right to insist on costs to compensate him for whatever expense he may have incurred in defending the action which included the prayer sought to be deleted.

[21] The plaintiff further states that the defendant's objection based on loss of its defence is ill-founded as this is not a valid ground for the refusal of an amendment. It further contends that the amendment it seeks will not cause any prejudice that cannot be ameliorated with an order of costs, and the defendant has a procedural right to make consequential amendments.

The defendant's case

[22] In opposing the application, the defendant echoes the grounds of objection that I have set out above. He contends that the delay in bringing this application is prejudicial to him, as the plaintiff has not explained why it only delivered its notice to amend two years after the close of pleadings.

[23] The defendant states an additional ground of opposing the application, which was not pleaded in its notice to object, namely, that the plaintiff failed to join the payment distribution agent who was responsible for distributing payment to all his credit providers in terms of the debt restructuring order. Since the plaintiff replied to these grounds of objection in its replying affidavit, and notwithstanding the trite principle that a party objecting to an amendment is bound by the four corners of its

notice to object, I will deal with this additional ground at an opportune moment in this judgment. The plaintiff also contends that by the amendment, the plaintiff seeks to impermissibly 'amend the annexure' that sets out its computation of his indebtedness.

[24] In dealing with the contention that the Rule 46A prayer is deleted so that the applicant may present a proper application separately, the defendant contends that the said prayer is the subject of a pending judgment of this Court. In this regard, the defendant makes reference to an order of this Court in which it reserved the costs of the default judgment applicant and application for an order declaring the property especially executable. This court order has not been annexed to the defendant's opposing papers.

[25] The defendant further raises as the additional basis of his opposition, the non-joinder of his spouse as the second defendant in the main action in light of the fact that spousal consent was required before the conclusion of the mortgage loan. The importance of the said joinder, so the defendant contends, lies in the fact that his spouse, to whom he is married in community of property, has 50% undivided share in the hypothecated property, and the amendments that are sought 'will render the particulars of claim excipiable for non-joinder.'

[26] In reply, and apart from persisting with the contentions it made in support of the present application, the plaintiff further contends that the defendant's objection to the amendment has no sound basis in law.

The parties' submissions

[27] These are the principal submissions that Mr *Wessels* made on the merits of the application. It is not correct that the plaintiff is mala fide in making this application in that it took cognizance of the defendant's plea regarding the incorrect interest that it had charged him.

[28] The defendant's complaint regarding the costs implications of the application is unfounded in that as the party seeking leave to amend is, the plaintiff, in terms of Rule 28, is required to carry the costs occasioned by the amendment. As for the prejudice that the defendant contends for, it is not the kind of prejudice that Rule 28 envisages in that it is based on his loss of defence or an advantage emanating from the plaintiff's initial particulars of claim.

[29] With regards to the alleged excipiability of the plaintiff's particulars of claim as a result of the proposed deletion of the Rule 46A prayer, it was submitted that the High Court does not have the discretion to decline hearing a matter that is properly brought before it on the basis that the Magistrate's court also has jurisdiction to hear it.

[30] On the score of the non-joinder of the defendant's wife and the payment distribution agent resulting in the excipiability of the particulars of claim, Mr *Wessels* submitted that the defendant will not be prejudiced by the amendment as he will still be entitled to raise such defences at trial.

[31] On behalf of the defendant, Ms *Sodo* submitted that the application is intended to delay the conclusion of the matter and thus mala fide. In the defendant's heads of argument on the merits of the application, it was submitted that the proposed amendment is intended to prejudice the parties who have not been joined as defendants in the main action.

[32] It was further submitted that the plaintiff was always aware that the agreement between it and the defendant was the subject of the debt restructuring order and it is impermissible of it to introduce the proposed amendment in the absence of the persons that ought to have been joined in the main action. The submission goes on to suggest that the amendment would cause the defendant an injustice. The proposed

amendment being a material one, so the submission continued, the court's powers in granting it are limited.

[33] When invited to address the court on whether loss of a defence is a valid ground for refusing the amendment, Ms *Sodo* indicated that she was not able to make any further submissions on this point.

The Law

[34] Rule 28 provides a prism through which pleadings and documents may be amended by a party desirous of doing so. The relevant portions of the rule provide as follows:

'(1) Any party desiring to amend a pleading or document other than a sworn statement, filed in connection with any proceedings, shall notify all other parties of his intention to amend and shall furnish particulars of the amendment.
(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.
. . .
(10) The court may, notwithstanding anything to the contrary in this rule, at any stage before judgment grant leave to amend any pleading or document on such other terms as to costs or other matters as it deems fit.'

[35] The purpose of pleadings is to set out the causes of action and defences to it, and delineate the issues between the litigants.[4] The primary object of allowing an amendment is to obtain a proper ventilation of the dispute between the parties; to determine the real issues between them so that justice may be done.[5]

[36] In *Ascendis Animal Health (Pty) Limited v Merck Sharpe Dohme Corporation and Others,* the Constitutional Court *said:*[6]

'[89] It is evident that this rule is an enabling rule and amendments should generally be allowed unless there is good cause for not allowing an amendment. This was enunciated in *Moolman* where the court held that:

'[T]he practical rule adopted seems to be that amendments will always be allowed unless the application to amend 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.'[7]

[37] The court's dictum in *Commercial Union Assurance Co Ltd v Waymark NO*[8] is instructive in applications such as the present. In that case, the following principles regarding amendments were laid down:

(a) The ultimate decision of whether to grant an amendment is an issue at the discretion of a judicial officer, which discretion must be exercised wisely after deliberating on all relevant legal and factual considerations;

(b) An amendment cannot be granted for the mere asking, some explanation must be offered therefor.

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[4] *All Alloys (Pty) Ltd v Du Preez* 2013 JDR 1648 (GSJ), para 11; *Caxton Ltd and Others v Reeva Forman (Pty) Ltd and Another* [1990] ZASCA 47; 1990 (3) SA 547 (A) at 565G-566A.
[5] *Rosenberg v Bitcom* 1935 WLD 115 at 117; *Trans-Drakensberg Bank Ltd (under Judicial Management) v Combined Engineering (Pty) Ltd* 1967 (3) SA 632 (D) at 638A; *YB v SB* 2016 (1) SA 47 (WCC) at 51C–D.
[6] *Ascendis Animal Health (Pty) Limited v Merck Sharpe Dohme Corporation and Others* (CCT 212/18) [2019] ZACC 41; 2020 (1) SA 327 (CC); 2020 (1) BCLR 1 (CC); 2019 BIP 34 (CC) (24 October 2019); *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC), para 9.
[7] *Moolman v Estate Moolman* 1927 CPD 27 at 29.
[8] 1995 (2) SA 73 (Tk) at 77F-I.

(c) The applicant must show that *prima facie* the amendment has

something deserving of consideration, a triable issue.

(d) The modern tendency lies in favour of an amendment if such facilitates the proper ventilation of the disputes between the parties.

(e) The party seeking the amendment must not be mala fide.

(f) The amendment must not cause an injustice to the other side which cannot be compensated by costs.

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

[38] In the discussion that follows I apply these legal principles to the facts of this application.

Discussion

[39] The defendant makes a bald assertion throughout his answering affidavit, as he did in his notice to object, that the amendment will prejudice him. Even though he asserts that the amendment has the effect of introducing a new cause of action, he has not set out how the case sought to be introduced by way of the proposed amendment is not substantially the same cause of action on which the plaintiff's claim was based in the original particulars of claim, and how he will be prejudiced.

[40] In any event, it has been held that an amendment which introduces a new cause of action will be allowed if no prejudice is caused to the defendant.[9] Suffice it to state that I am unable to agree with the contention that the amendment has an effect of introducing a new cause of action. The plaintiff's claim is in the main, for the payment of R R214 374.09 being an amount allegedly owing by the defendant in terms of the mortgage loan agreement, together with interest thereon at the rate of 9.10% per annum from 31 January 2020 to date of payment. I hold the view that as

[9] *MacDonald Forman & Co v Van Aswegen* 1963 (2) SA 150 (O) at 153D.

opposed to introducing a fresh cause of action the proposed amendment augments the plaintiff's particulars of claim which insufficiently or imperfectly set out its cause of action.

[41] Moreover, in *Zarug v Parvathie NO*[10] it was 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, and '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.'[11]

[42] The submission that the proposed amendment lacks bona fides by reason of the fact that it was prompted by the first defendant's second special plea, and unduly late, equally cannot stand. To borrow from the words of Wessels J,[12] 'the object of the court is to do justice between the parties. It is not a game we are playing, in which, if some mistake is made, the forfeit is claimed.'

[43] Even though the above quoted passage of the court's dictum was in relation to an amendment which was objected to on the ground of it amounting to a withdrawal of an admission, it holds true for the present case. The defendant is in essence saying that he must be allowed to hold on to an advantage that he gained as a result of the plaintiff's inclusion in the unamended particulars of claim of the Rule 46A prayer; the incorrect interest charged; and the incorrectly computed debt. He has, however, not stated that he will be hampered in presenting whatever defence he may wish to raise when the application to declare the property specially executable is made at a later stage.

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[10] 1962 (3) SA 872 (D).
[11] Ibid 876 B-C; *Macduff & Co (in liqudation) v Johannesburg Consolidated Investment Co Ltd* 1923 TPD 309.
[12] *Whittaker v Roos and Another* 1911 TPD 1092 at 1102.

[44] The defendant reserves his right to dispute, at the trial of the case, his indebtedness to the plaintiff at all or in the amount sought to be claimed, and to also object to the non-joinder of his spouse and the payment distribution agent. As regards the contention that the amendment will expose the defendant to incurring costs and thus be prejudicial to him, suffice it to state that since the plaintiff is seeking an indulgence from the court, it follows that it must carry the costs occasioned by the amendment.

[45] It bears restating that an application for an amendment may be made by the party desirous of such an amendment at any stage before judgment and has been allowed at different stages of the proceedings.[13] In this case the application was made two years after the defendant filed his plea. The plaintiff is required to furnish an explanation why it took it two years to put its particulars of claim in proper order at most after the defendant filed its plea in 2020. Even so, it is only in relation to the question of prejudice that the applicant is required to show that his application to amend is *bona fide*, and to explain any delay there might have been in this regard.[14]

[46] The present application was brought before the trial of the matter commenced, and it can readily be said that it is less disruptive. The defendant has not set out how the delay of two years in making the amendment will cause him prejudice in answering to the proposed amendments if the amendment is allowed. Nor has he shown that the plaintiff's claim would not be a viable one. As held in *Benjamin v Sobac South African Building and Construction (Pty) Limited,*[15] 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.[16]

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[13] Hebstein and Van Winsen – The Civil Practice of the Superior Courts of South Africa (Ed) page 675, and authorities referred to therein.

[14] *Trans-Drakensberg Bank Ltd (under Judicial Management)* supra 640H; *Barclays Bank International v African Diamond Exporters (Pty) Ltd (1)* 1976 (1) SA 93 (W) 96C).

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

[16] Ibid page 958; *Trans-Drakensburg Bank Ltd (Under Judicial management)* at 641.

[47] On the contrary, the amendments that the plaintiff proposes are indeed matters that arose from the defendant's special pleas, and he was well able to plead to the issues raised in the unamended particulars of claim. It cannot lie in the defendant's mouth to contend that the amendment which came about two years after his plea will prejudice him.

[48] On the issue of the excipiability of the particulars of claim as a result of the deletion of the Rule 46A prater, it bears mentioning that a reading of Rule 23 which governs exceptions suggests that there are two grounds for raising an exception, namely – that a pleading does not set out a cause of action of the averments made in it are vague and embarrassing.

[49] An exception is a legal objection to an opponent's pleading on the basis of an inherent defect in its formulation.[17] The contention that lack of jurisdiction is a ground of exception cannot be sustained. Lack of jurisdiction is a legal objection that has nothing to do with the formulation of the pleading and ought to be raised by way of a special plea.

[50] Needless to say that contrary to what the defendant contends, the High Court has jurisdiction over all persons residing or being in, and in relation to all causes arising within its area of jurisdiction and all other matters of which it may according to law take cognizance. This is in terms of section 21 of the Superior Courts Act 10 of 2013.

[51] It follows that the High Court has jurisdiction over all matters that also fall within the jurisdiction of the Magistrate's Court. In *South African Human Rights Commission v Standard Bank of South Africa Ltd and Others*[18], Madlanga J, writing for the Court, dealt with the issue of the Jurisdiction of the High Court and its

[17] Erasmus, Superior Court Practice, Volume 2 (Service 13, 2020) D1-293.

[18] *South African Human Rights Commission v Standard Bank of South Africa Ltd and Others* (CCT 291/21) [2022] ZACC 43; 2023 (3) BCLR 296 (CC); 2023 (3) SA 36 (CC) (9 December 2022).

entitlement to decline hearing matters that may be heard in the Magistrate's Court and are properly brought before it, and said:

'[27] The assumption of jurisdiction should not be confused with the manner in which a court decides to exercise its jurisdiction. There is no discretionary power to decline the assumption of jurisdiction over a matter within the jurisdiction of a court. But how a court decides to exercise the jurisdiction it enjoys is a separate issue. That issue includes considerations as to whether in exceptional circumstances jurisdiction is not exercised by reason of, for example, abuse of process or the stay of proceedings pending some other form of dispute resolution, or on grounds of comity...'

[52] The learned Judge went further and stated as follows:

'[35] The law affords the High Court the power to entertain matters in respect of which the Magistrate's Court also has jurisdiction. All that the mandatory jurisdiction principle says is that the High Court cannot run away from matters that fall within its jurisdiction. If a matter over which it has jurisdiction is brought before it, it must exercise that jurisdiction. . .'

[36] A court either has jurisdiction or it does not and that question is answered by reference, in this instance, to section 21 of the Superior Courts Act. Absent a constitutional challenge to section 21, the division of labour mandated by the Legislature between courts in respect of their jurisdiction must be honoured. For these reasons, the default position advocated by the SAHRC is not possible...)

[53] Therefore, the defendant's contention that the deletion of the Rule 46A prayer will render the plaintiff's particulars of claim excipiable for lack of jurisdiction has no merit. Similarly, his objection based on his loss of defence by the deletion of the Rule 46A prayer cannot be sustained for the simple reason that loss of a defence is not a valid ground for refusing the amendment. In *South British Co Ltd v Glisson*[19], it was held:

[19] 1963(1) SA 289(D) at 294B-C.

'[T]he fact that the amendment may cause the respondent to lose his case against the applicant is not of itself "prejudice" of the sort which will dissuade the court from granting it.'

[54] I am in respectful agreement with the sentiments of the court in *Glisson*. In any event, in the present case, the defendant must still answer to the plaintiff's remaining claim for the money judgment. This brings me to the contention that the proposed amendment would amount to a mala fide withdrawal of the plaintiff's claim without a tender of costs.

[55] In the present case, the prayer for the declaration of the property specially executable was ancillary to the plaintiff's claim for the payment of the debt owed to it by the defendant. It cannot be correct, therefore, that its deletion amounts to a withdrawal of the claim without a tender of costs. Furthermore, it is open to the respondent, when the plaintiff separately launches the relevant application to declare the property specially executable, to persist with an adverse cost order against it in the light of the fact, as correctly acknowledged by the plaintiff, that the courts encourage that the Rule 46A application be instituted in the same application for the money judgment.

[56] I take cognizance of the fact that costs occasioned by an amendment will be awarded on a party and party scale, while the defendant will have incurred costs on a scale as between attorney and own client. That being said, this Court has jurisdiction to make awards of costs on an attorney and own client scale where there are grounds for such an order. This is a matter of the court's discretion.

[57] It may very well be that this application was necessitated by the plaintiff's own blunder in the formulation of its particulars of claim. However, to allow the defendant an unjust advantage over the plaintiff would not be in the interests of justice. It is my finding that the defendant will be in no worse a position than it would have been if the plaintiff's particulars of claim in amended form were filed from the beginning.

[58] I am not satisfied that the defendant will be prejudiced by the proposed amendment, which prejudice cannot be ameliorated by an appropriate cost order. Nor am I persuaded that the present application is mala fide. On the contrary, the proposed amendment will contribute to the determination by the court of the real issues between the parties. Therefore, it ought to be allowed.

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

1. The plaintiff is granted leave to amend its particulars of claim by the deletion of the prayer in terms of Uniform Rule 46A for an order declaring the property specially executable; and by adding paragraphs 5.3.7 and 6, as set out in its notice to amend dated 08 November 2022.
2. The plaintiff shall deliver its amended particulars of claim within 10 days of this order.
3. The plaintiff shall pay the costs occasioned by the aforesaid amendment.
4. The defendant shall pay the costs of this application.

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L. RUSI
JUDGE OF THE HIGH COURT

Appearances:

For the plaintiff	:	Adv. *LN Wessels*
Instructed by	:	Sandenbergh Nel Haggard c/o Smith Tabata Attorneys, Mthatha

For the defendant : Ms *S Sodo*
Mvuzo Notyesi Incorporated, Mthatha

Date heard : 28 November 2024
Date delivered : 10 June 2025