



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

CASE No: 9260/2013

In the matter between:

**THE COMMISSIONER FOR THE
SOUTH AFRICAN REVENUE SERVICES**

PLAINTIFF

and

GARY PATRICK PORRIT N.O.

FIRST DEFENDANT

SUSAN HILLARY BENNET N.O.

SECOND DEFENDANT

SYNERGY MANAGEMENT (PTY) LTD

THIRD DEFENDANT

LAMAX (PTY) LTD (IN LIQUIDATION)

FOURTH DEFENDANT

JOHN DOUGLAS MICHAU

FIFTH DEFENDANT

MARK WILLIAM LYN

SIXTH DEFENDANT

THE MASTER OF THE HIGH COURT

SEVENTH DEFENDANT

ORDER

In the premises the following order is made:

1. The plaintiff's amendment is granted.
2. Costs are reserved for determination by the trial court.

JUDGMENT

Mathenjwa AJ

[1] This is an opposed application to amend the particulars of claim of the plaintiff in terms of Uniform rule 28(4). On 19 July 2021, the plaintiff served a notice to amend prayer 3 of its particulars of claim in terms of the provisions of rule 28. On 2 August 2021 the first, second and third defendants served a notice of objection to the proposed amendment. The proposed amendment sought to substitute prayer 3 in the particulars of claim with the following prayer:

'3. That the fifth and sixth defendants be ordered to reflect the third defendant in the winding-up of the fourth defendant as a creditor in respect of the amount referred to in paragraph 13'.

The original prayer 3 reads:

'3. That fifth and sixth defendants are ordered to pay any dividend to SARS that is payable to third defendant in the winding-up of fourth defendant.'

[2] The first, second and third defendants objection to the amendment is based on the grounds that the amendment seeks to abandon the plaintiff's claim for payment and intends to now substitute same with a claim that is tantamount to declaratory relief in that:

(a) Plaintiff initially claimed payment of a dividend due to the third defendant in the winding up of the fourth defendant to be made by fifth and sixth defendants to it.

(b) The proposed amendment seeks to now direct the fifth and sixth defendants to reflect the third defendant as a 'creditor' in the winding-up of the fourth defendant.

Firstly, the plaintiff has previously written off its claim as admitted in its replication; the proposed amendment will therefore render the relief sought becoming academic and having no practical effect as the plaintiff will not be paid any monies as consequence of the claim; the amendment will thus render the plaintiff's particulars of claim expiable. Secondly, the plaintiff by writing off its claim had thus 'elected' via the doctrine of election to no longer enforce its claim against the relevant defendants. Therefore, by operation of the legal doctrine of election the plaintiff is disentitled to seek any relief

based on such claim. Thirdly, the proposed amendment will render the particulars of claim becoming vague and embarrassing and will fail to sustain a cause of action.

[3] The plaintiff in its founding affidavit explains the reason for the amendment sought being that prayer 3 of the particulars of claim, in its current form, does not concern the dispute embodied in the particulars of claim. The particulars of claim concerns the validity of the cession. If the cession is invalid, it will follow that the third defendant should be reflected as creditor in respect of the amount claimed.

[4] For a proper understanding of the context within which the amendment is sought, it is appropriate to briefly explain the factual matrix to the cause of action. The fourth defendant is a company in liquidation and the first and second defendants are co- trustees of the Surety Development Trust, IT 7537/93 (the Trust). The third defendant is a company which is allegedly indebted to the plaintiff (SARS) in respect of outstanding income tax. The fifth and sixth defendants are appointed liquidators of the fourth defendant. At a meeting of creditors of the fourth defendant, third defendant lodged a claim which was accepted by the fifth and sixth defendants. In an amended second liquidation, distribution and contribution account the fifth and sixth defendants recorded that payment of a dividend to the third defendant was envisaged. The Trust alleged in a letter, objecting to the amended second liquidation distribution and contribution account that third defendant's claim against fourth defendant was ceded to it in terms of a deed of cession and pledge. The plaintiff contends that the deed of cession and pledge and the cession agreement were fraudulently created in order to avoid payment to the plaintiff of the dividend owing to the third defendant in the winding-up of the fourth defendant, and that third defendant's claim against fourth defendant was not ceded to the Trust. In paragraph 17.4.2 in the particulars of claim the plaintiff avers that it is entitled to an order directing the fifth and sixth defendants to reflect the third defendant in the winding-up of the fourth defendant as the creditor in respect of the amount claimed.

[5] Uniform rule 28(3) provides that: 'An objection to a proposed amendment shall clearly and concisely state the grounds upon which the objection is founded'. Both counsels for the plaintiff and defendants referred this court to case law in support of their own and against each other's propositions. Defendants' counsel referred this

court to a case summary in *Consolidated Ltd t/a Consol Glass v Twee Jonge Gezellen (Pty) Ltd*,¹ where it was held that:

'A proposed amendment to a pleading may be refused on the basis that it does not raise a triable issue. A triable issue is one which, if it can be proved by the evidence foreshadowed in the application for the amendment, will be viable or relevant, or which, as a matter of probability, will be proved by the evidence so foreshadowed.'

Counsel for the plaintiff referred this court to *Moolman v Estate Moolman*,² where it was held that:

'the 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'.

[6] The court has a discretion to allow an amendment which introduces a new cause of action only if no prejudice is occasioned thereby.³ In *Tomassini v Dos Remandos*,⁴ it was held that if the 'amendments are of such a kind that the scope of inquiry is not unduly enlarged' and the main issue remains the same, such amendments should be allowed. The court would exercise its discretion and allow amendments of orders prayed for, if the addition of a new prayer is not based upon allegations different from those on which the original relief was claimed.⁵ In exercising a judicial discretion whether or not to grant the amendment, first and foremost I am guided by provisions of rule 28(3) to consider the grounds upon which the opposition is premised in the notice for objection. In their heads of argument the defendants raise additional grounds of objection to the amendment that there has been unreasonable delay for eight years on the plaintiff in seeking the amendment and that the application for amendment was one day out of time. Therefore, it is defective because there is no application for condonation for such delay. These additional grounds are not contained in the notice of objection nor in the respondents answering affidavit to the application.

¹ *Consol Ltd t/a Consol Glass v Twee Jonge Gezellen (Pty) Ltd and another* (2) 2005 (6) SA 23 (C) at 23H, see the headnote.

² *Moolman v Estate Moolman* 1927 CPD 27 at 29.

³ See *MacDonald, Forman and Co. v Van Aswegen* 1963 (2) SA 150 (O) at 153D.

⁴ *Tomassini v Dos Remandos and another* 1961 (1) SA226 (W) 228D-E.

⁵ See *Bestenbier v Goodwood Municipality* 1955 (2) SA 692 (C) 697H-698E.

In the result this judgment is confined to the grounds of objection raised by the respondents in their notice of objection and answering affidavits.

[7] The main grounds for objecting to the amendment is that the plaintiff has admitted in its replication that it has written off the debt, therefore, it follows that the claim is unenforceable and the proposed amendment renders the particulars of claim expiable. I am unable to agree with the respondents' contention. In 'Ad Paragraphs' 4, 6, and 7 of the plaintiff's replication of first and second defendants' plea and to paragraph 3 of the replication to the third defendant's plea, the plaintiff disputes that the tax debt owing was permanently written off, but contends that it was temporarily written off. The plaintiff's counsel referred this court to Part 2 of the Regulations prescribing the circumstances under which the commissioner may write off any amount of debt.⁶ Regulation 4(2) reads 'A decision by the Commissioner to temporarily write off an amount of tax debt does not absolve the debtor from the liability of that tax debt'. Accordingly it is not correct that the writing off of the tax debt is admitted. That issue is still alive between the parties for adjudication by the trial court. It is further apparent from the pleadings that the proposed amendment does not introduce a new cause of action. The prayer sought to be introduced is grounded in the particulars of claim where the plaintiff averred that it is entitled to an order ordering the fifth and sixth defendants to reflect the third defendant in the winding-up of the fourth defendant as the creditor in respect of the amount claimed. In this regard the amendment is required to reflect an appropriate relief for an issue that is already canvassed in the pleadings. There is no reason to conclude that the proposed amendment is mala fide, or will cause prejudice to the defendants since the parties remain the same and the cause of action remains the same, such amendment would not unduly enlarge the scope of the inquiry.

[8] With regards to costs the plaintiff's counsel contends that the defendants should bear the costs including the costs of senior and junior counsel because their opposition to the proposed amendment was frivolous. The defendants' counsel contends that the plaintiff should bear costs of the application because the amendment

⁶ 'Regulations issued under section 91A of the Income Tax Act 58 of 1962, prescribing the circumstances under which the commissioner may write-off or compromise any amount of tax, duty, levy, charge, interest, penalty or other amount', GN 316, GG 29788 of 13 April 2007.

is an indulgence. I am of the view that the issue of costs should be appropriately determined by the trial court.

[9] In the premises the following order is made:

1. The plaintiff's amendment is granted.
2. Costs are reserved for determination by the trial court.



Mathenjwa AJ

Date of hearing: 13 September 2022

Date of judgment: 16 September 2022

Appearances:

Counsel for plaintiff: Adv. BH Swart SC

Assisted by: Adv. J Kiare

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Judgment duly delivered electronically