



AN IMPORTANT JUDGMENT WITH NO REASONS WRONGLY DECIDED 62 YEARS AGO

by JUDGE EZRA GOLDSTEIN

The case of *Tweefontein United Collieries Ltd v Lockers Engineers S.A. (Pty) Ltd*¹ is reported on less than a single page of the South African Law Reports. The report reads as follows:

“Trial action. During the hearing the question of the admissibility of certain further particulars arose.

A. Suzman, Q.C. (with him B.L.S. Franklin), for the plaintiff.

A. Fischer, Q.C. (with him A.D. Davidson), for the defendant.

GALGUT J.: This matter was set down for trial. When the matter was called this morning Mr. Fischer said he wished to argue an exception which was filed after the close of pleadings and only a few days before trial. Mr. Suzman, for the plaintiff, whose declaration was being attacked, had no objection.

During argument counsel referred the Court to certain further particulars for trial in addition to the

further particulars to the pleadings. The Court asked whether these particulars for trial could be regarded as forming part of the pleadings and whether they could be considered when considering the exception. Mr. Fischer urges that this can be done. Mr. Suzman does not agree and did not consent to the Court having regard to them when dealing with the exception. Neither counsel is able to quote authority for his contention.

I am of the view that particulars for trial do not form part of the pleadings and cannot be considered when dealing with an exception to a pleading.

I rule accordingly.

Plaintiff’s Attorneys: *Edward Nathan, Friedland, Mansell & Lewis.*

Defendant’s Attorneys: *Webber, Wentzel, Hofmeyr, Turnbull & Co.”*

Despite the eminence of both senior counsel, their not inept juniors, both of whom later graced the bench, and their not insignificant instructing attorneys, the learned judge felt no need to record the arguments each side must have raised on the important issue involved, and more seriously, and quite wrongly,² he decided too to give no reasons for his far reaching decision.

The decision was entirely impractical. Both sides wished the exception to be argued. If it had been argued successfully, including the points made in the further particulars for trial, that would have ended the legal questions raised in the exception. We don't know what the fate was of the exception, or of the trial which may have followed it. Let us assume, however, that, with the further particulars for trial excluded, the exception failed and the trial ensued and was concluded by argument on both sides. At that stage, the argument would surely have included both the issues on the pleadings and those elicited by the further particulars for trial, which would surely have been fully ventilated, in which case the century old dictum of that great juristic giant, Innes CJ, in *Robinson v Randfontein Estates GM Co Ltd*,³ allowing a decision on such an unpleaded issue, would have had to have been applied. And let us assume that the defendant then succeeded in having the claim dismissed on a basis which included the allegations in the further particulars for trial. If that occurred, the trial would have proved unnecessary. The judgment overlooks too the practicalities of a high court trial. Obviously, once issues are raised in further particulars for trial, they will be fully canvassed at the trial and will have to be adjudicated upon, and this will occur in practice despite the difficulty that further particulars for trial cannot be pleaded to.

An issue related to further particulars for trial arose in a trial in the Northern Cape division in *Ruslyn Mining & Plant Hire (Pty) Ltd v Alexkor Ltd*.⁴ Besides the customary particulars of claim the plaintiff had provided further particulars for trial. The plaintiff led evidence deviating from both the particulars of claim and the further particulars without objection from the defendant's counsel, and the plaintiff's witness was cross-examined on this evidence.

After closure of the plaintiff's case the defendant's counsel applied for absolution and completed his address in this regard. Counsel for the plaintiff argued, and, towards the end of his address, stated that he was unable to complete his argument without applying to amend the plaintiff's further particulars for trial. The matter was thereupon postponed so that a substantive application could be brought. This occurred. In considering the application the court, very properly I would argue, regarded the further particulars for trial as if they were part of the pleadings, and all the cases the learned judge cited related to the amendment of pleadings. Applying those cases, he decided to refuse the application for amendment and to grant absolution.

The unsuccessful plaintiff appealed with the leave of the court to the Supreme Court of Appeal whose judgment is reported in [2012] 1 All SA 317 (SCA). Para [18] of that judgment echoing the ruling in *Tweefontein* includes the following:

"To deal first with the principle, the cases cited by the learned judge all deal with applications to amend

pleadings. Further particulars for trial are not pleadings. The opportunity to request them arises after the close of pleadings: uniform rule 21(2). They are limited to obtaining information that is strictly necessary to prepare for trial. They do not set up a cause of action or defence by which a party is, in the absence of amendment or tacit concurrence, bound and by which the limits of his evidence are circumscribed. Nor can they change an existing cause of action or create a new one (as the trial judge appears to have believed). The purpose of particulars for trial is to limit waste of time and costs by providing the other party with additional insight into the case which has been pleaded, thus avoiding, where possible, delays or postponements to seek evidence to meet a case. See for example, *Thompson v Barclays Bank DCO 1965 (1) SA 365 (W)* at 369D-E. Such particulars are only required if and when the other party asks for them

“THE DECISION WAS ENTIRELY IMPRACTICAL. BOTH SIDES WISHED THE EXCEPTION TO BE ARGUED. IF IT HAD BEEN ARGUED SUCCESSFULLY, INCLUDING THE POINTS MADE IN THE FURTHER PARTICULARS FOR TRIAL, THAT WOULD HAVE ENDED THE LEGAL QUESTIONS RAISED IN THE EXCEPTION.”



and what will be furnished is to a large extent dependent on the skill and foresight adopted in the formulation of the request. Because they are not pleadings, they do not limit the scope of the case being made by the party that supplies them. A party has a right to rely on all and any evidence that is admissible and relevant to his pleaded cause or defence and, save within the parameters set by the purpose of such particulars in so far as ensuring a fair trial is concerned, no stultification of that right should be permitted. Thus, unless there is clear evidence of bad faith in the furnishing of the original further particulars or in the withholding of the intention to change the thrust of the evidence or irremediable prejudice to the other party caused by reliance on incorrect or insufficient particulars furnished by his opponent, relevant evidence which goes beyond the terms of particulars for trial should be admitted subject to a postponement, if necessary and an appropriate award of costs to cure the element of surprise.”

If particulars for trial are not pleadings, a number of questions arise. How do they differ from pleadings? What is their effect in practice if they delineate or expand on, or even add to, one or more of the *facta probanda*? The answer to these questions is that in the live arena of a trial they perform the function of pleadings.

Para [19] of the judgment reads as follows:

“Applications to amend particulars for trial seem to me to be largely inappropriate and unnecessary, particularly once the trial has got under way. It should be sufficient for counsel to notify his opponent at an early stage when he becomes aware that his evidence may depart materially from the information in the particulars for trial. The latter can then take the matter up with the trial court if necessary. In appropriate circumstances (where the contemplated evidence involves great complexity, for example) the court may consider it fair to order the party

proposing to lead such evidence to reduce particulars of the changes to writing but that is not a rule.”

With respect, the suggested route to dealing with applications to amend further particulars for trial is by no means clear. All of these difficulties arise from *Twefontein* which has, I suggest, ruled for long enough, and should now be overruled.

Incidentally, in *Thoroughbred Breeders Association of SA v PriceWaterhouse*,⁵ I lamented the demise of requests for further particulars for purposes of pleading and the resultant imprecise definition of the disputes involved, and I recounted difficulties I had encountered in adjudicating cases as a result of that abolition – difficulties in that case and in two others, and difficulties which I now suspect have led to a proliferation of requests for particulars for trial aimed at definition of the issues, and also to many of the formalities various courts have introduced to attempt to cope with the lack of precision in pleading which the present procedure facilitates and exacerbates. Regrettably, my pearls of wisdom in *Thoroughbred* have so far fallen on deaf ears. But I am comforted by the hope that they may one day experience the favourable fate of Von Gogh’s paintings. **A**

Notes

- 1 *Twefontein United Collieries Ltd v Lockers Engineers S.A. (Pty) Ltd* 1964(1) SA 186(W).
- 2 Madlaga ADCJ recently delivered a unanimous judgment of the Constitutional Court in *Vodacom (Pty) Ltd v Makate and Another* (CCT 51/24) [2025] ZACC 13 (31 July 2025). In paras [47] – [49], [51], [53], and [54] – [66] he emphasised at length the need for a court to give reasons for its decisions. In footnote 28 he qualified that, stating that “(t)here are exceptions to the duty to provide reasons, a ready example being that apex courts do not have to give reasons for refusing leave to appeal” – a view which I believe may have to be revisited, but that is a discussion for another day.
- 3 *Robinson v Randfontein Estates GM Co Ltd* 1925 AD 173 at 198.
- 4 *Ruslyn Mining & Plant Hire (Pty) Ltd v Alexkor Ltd* (642/2009 [2010] ZANHC 8 (26 February 2010).
- 5 *Thoroughbred Breeders Association of SA v PriceWaterhouse* 1999 (4) SA 968 (W) at 1035D-1037J.



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