

IN THE SOUTH GAUTENG HIGH COURT**JOHANNESBURG**

CASE NO: 265/2010

DATE: 2012-09-05

In the matter between

SIYATHENGA PROPERTY ONE (PTY) LIMITED

Plaintiff

And

10 **NET ONE APPLIED TECHNOLOGIES SA LIMITED**

Defendant

J U D G M E N T

WILLIS, J:

[1] This is an application brought by the plaintiff for relief to amend its plea to the defendant's counter claim in terms of Rule 28 (4) of the Uniforms Rules of Court.

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[2] The plaintiff's notice of attention to amend its plea was filed on 19 April 2012. On 4 May 2012 the defendant delivered a notice of objection to the plaintiff's notice of intention to amend, in which it raised three grounds of opposition to the proposed amendments. In consequence, the plaintiff brought a substantive application for leave to

amend, supported by affidavit setting out the circumstances under which it discovered that certain amendments to its plea were, it so claims, required as well as the details relating to such amendments and the necessity therefor.

[3] The action was set down for trial on 20 March 2012, but was removed from the roll by agreement between the parties. It was also agreed that the matter would be re-enrolled once the issues relating to the amendments had been dealt with and that the action was thereafter
10 ready for hearing.

[4] The plaintiff proposes to introduce amendments that will have the following two consequences. The first is the introduction of a new defence to the defendant's counter claim for payment. The second is the withdrawal of an admission that was previously made.

[5] In the affidavit in support of the application for leave to amend, the plaintiff alleges as follows at paragraph 13: "The defendant's counter claim against the plaintiff is for payment of an amount allegedly payable
20 in terms of the lease agreement for tenant installation."

[6] In paragraph 14 of this affidavit it is alleged that: "In essence the new defence is a denial of liability by the plaintiff on a basis that prior to the tenant installation allegedly becoming payable, the plaintiff sold the premises to a third party and that in terms of the lease agreement upon

such sale the plaintiff's obligation to the defendant were to be deemed to have been delegated to the third party..."

[6.1] In paragraph 16: " Transfer of the property from the plaintiff to the purchaser was duly registered on 25 June 2008..."

[6.2] In paragraph 18: " The defendant issued the plaintiff with the tax invoice in respect of their alleged tenant installation claim on or about 3 October 2008."

[7] I pause here to reflect that *ex facie* the plaintiff's own affidavit, it
10 became aware of a critical fact relating to this application for amendment on 3 October 2008. *Ex facie* the affidavit, the claim therefore has prescribed. I accept that there are certain circumstances provided for in the Prescription Act that allow for the 3 year period that normally applies for prescription in respect of claims such as this to be extended but one needs to look at the explanation that was afforded by the plaintiff as to why it seeks the amendment. This appears at paragraph 22:

20 "The reasonable and proper consideration was not given to the issue at the time of pleading to the plaintiff's counter claim is because, during the period August 2007 to February 2008 the plaintiff's holding company Pagon Properties Limited, underwent a complete change in the management structure, including a complete change in its management and its board of

directors.”

[8] The effect of the withdrawal of the amendment if the matter is that the defendant will be placed in a position where, approximately four years after it has submitted the invoice giving rise to the claim and more than two years after the pleadings have closed in the matter, the defendant is now called upon to meet a case which suggests that it has otherwise not complied with the conditions precedent to payment of the allowance.

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[9] It is true that we in South Africa have a liberal approach to amendments. The important is an qualification to this liberal approach which was set out in the case of *Moolman v Estate Moolman & Another*, 1927 CPD 27 at 24 (which judgment has been referred to with approval on several occasions in the Appellate Division and the Supreme Court of Appeal), which held that an amendment would be disallowed where the parties cannot be put back for the purposes of justice in the same position as they were when the pleading which it had sought to amend was filed.

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[10] Ms Fischer who appears for the defendant referred me to the case of *South British Insurance Company Limited v Glisson*, 1963 (1) SA (289) in which relates to a situation where at a late stage an amendment was sought that was disallowed by Muller J.

[11] In essence, the claim in this case has prescribed, unless there are circumstances which allow for an extension of time. The explanation that has been given in claiming an extension of time is this one appearing in paragraph 22, namely that during the period August 2007 to February 2008 the plaintiff's holding company Pangon Properties underwent a complete change in the management structure, including a complete change in its management and board of directors.

10 [12] This, it seems to me cannot, as a matter of law, hold water. It is in effect a plea *ad misericordiam* and it cannot be allowed. If we were to allow this kind of explanation to permit this kind of amendment, we might as well tear up the Prescription Act. A party which is a company cannot rely on its own internal difficulties as an excuse to avoid the consequences of prescription.

[13] Accordingly, it seems to me that the proper exercise of a discretion is to disallow the amendment. The following is the order of the court;

The application for leave to amendment by the plaintiff is
dismissed with costs.

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For and on behalf of the plaintiff: Advocate Rebelo

For and on behalf of the defendant: Advocate Fischer