


IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG
(REPUBLIC OF SOUTH AFRICA)

CASE NO : 05/25647

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE YES/NO	<input checked="" type="radio"/> NO
(2) OF INTEREST TO OTHER JUDGES YES/NO	<input checked="" type="radio"/> NO
(3) REVISED	<input checked="" type="radio"/> YES
DATE 11/6/2013	SIGNATURE 

In the matter between:

JONATHAN MARK FOX N.O.	First Applicant
ANDRE PIERRE LE ROUX N.O.	Second Applicant
ROBERT ALLAN COLLINS N.O.	Third Applicant
THE BEST TRUST COMPANY (JHB) (PTY) LIMITED	Fourth Applicant
SOLUTION 1 (PTY) LIMITED	Fifth Applicant
DATAFORCE TRADING 193 (PTY) LIMITED	Sixth Applicant

And

CONNIE MYBURGH	First Respondent
ANNA CATRINA MAGRIETHA BARNARD	Second Respondent
ADRIAAN BARNARD	Third Respondent
MELROSE ARCH HOLDINGS (PTY) LIMITED	Fourth Respondent

JUDGMENT

KOLBE AJ:**INTRODUCTION**

[1] According to the notice of motion and founding papers, this application seeks to join Connie Myburgh Inc ("CMI") as a Fifth Respondent to the application. Notwithstanding the wording of the notice of motion and founding papers, it is clear, from the replying affidavit¹ that CMI is in fact the Fifth Respondent and the Applicants are seeking the joinder of CMI as the Fifth Defendant in the main action instituted by the Applicants.

BACKGROUND

[2] On 2 October 2005, the Applicants caused summons to be issued against the First to Fourth Respondents claiming damages suffered as a result of certain alleged misrepresentations made by the First Respondent when representing a then undisclosed principal, the Fourth Respondent.

[3] These misrepresentations, so it is alleged, resulted in the coming into existence, on 10 June 2004, of a binding agreement between the Fourth Respondent and the Applicants in terms of which the Fourth Respondent agreed to acquire all issued shares and loan accounts held by the Applicants

¹ paragraph 14 of the replying affidavit

in Katharra Investments (Pty) Limited ("Katharra").

[4] After the hearing of certain exceptions and amendments to the Particulars of Claim, the trial was enrolled for hearing on 14 February 2012 when the action was withdrawn against the First Respondent.

[5] This application seems to have been prompted by the plea of the First Respondent that his firm CMI, the Fifth Respondent, and not him in his personal capacity represented the Fourth Respondent.

[6] It is not clear why the First Respondent is cited in these proceedings as the action was withdrawn against him and I agree with the submissions by counsel for the First and Fifth Respondents that the Applicants' stated reasons for doing so namely that he was cited "for....convenience" is misplaced.

THE GROUNDS ON WHICH JOINDER IS SOUGHT AND OPPOSED

[7] Although the proposed amended Particulars of Claim are not attached to the application (it is stated in the replying affidavit that once the joinder application has been granted, the Particulars of Claim will be amended) it is clear that the joinder of the Fifth Respondent is sought on the basis that it is alleged that it made certain misrepresentations on 8 June 2004 when acting

for and on behalf of the Fourth Respondent in presenting the offer to purchase to Imara Corporate Finance South Africa (Pty) Limited (acting on behalf of the Applicants) to acquire the entire issued share capital of Katharra.

[8] The Applicants' case seems to be that relying on these misrepresentations in the offer to purchase; the Applicants made a counter-offer and concluded an agreement which they would not have done had they known the true facts.

[9] It is clear from Annexure "A" to the founding affidavit that the Fifth Respondent made the offer to purchase and not the First Respondent.

[10] The application for the joinder of the Fifth Respondent in the main action was only launched on 19 July 2012, some 10 years after the claim against the Fifth Respondent arose and has long since become prescribed in terms of the Prescription Act, Act No. 68 of 1969("the Act").

[11] The running of prescription was not interrupted by the service of summons on the First Respondent. Section 15(1) of the Act provides that:

"The running of prescription shall, subject to the provisions of ss (2), be interrupted by the service on the debtor of any process whereby the

creditor claims payment of the debt."

[12] It is submitted on behalf of the Applicant that the Fifth Respondent is the alter ego of the First Respondent, that the present application will result in the mere substitution of the First Respondent by the Fifth Respondent and would result in no prejudice to the Fifth Respondent.

[13] There is in my view no merit in this contention.

[14] I agree with the submissions on behalf of the First and Fifth Respondents that the present case is not a matter of a simple misnomer of a party. The proceedings against the First Respondent in his personal capacity were withdrawn and the Fifth Respondent is not a party to the action. Allowing the joinder of the Fifth Respondent at this stage will result in the Fifth Respondent being deprived of his defence that the debt against it had become prescribed.

[15] As a general rule, a Plaintiff is not precluded by prescription from amending his claim, provided the debt which is claimed in the amendment is the same or substantially the same debt as originally claimed, and provided of course that prescription of the debt originally claimed has been duly

interrupted.² An amendment cannot add an additional cause of action or a new party to the action.

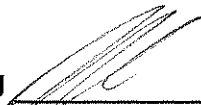
[16] It is clear that the service of the summons on the other Respondents did not interrupt the running of prescription with respect to the claim against the Fifth Respondent and that any claim the Applicants may have had against the Fifth Respondent, has become prescribed.

[17] The Applicants have therefore failed to show that they have an enforceable claim against the Fifth Respondent.

[18] In the result I make the following order:

The application is dismissed with costs, such costs to include the costs consequent upon the employment of Senior Counsel.

KOLBE AJ



² See: **Associated Paint and Chemical Industries (Pty) Limited t/a Albestra Paint and Lacquers v Smit** 2000 (2) SA 789 (SCA) at 794 C