

REPUBLIC OF SOUTH AFRICA



GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2005/2986

- (1) REPORTABLE: YES / NO  
(2) OF INTEREST TO OTHER JUDGES: YES/NO  
(3) REVISED.

.....  
DATE

.....  
SIGNATURE

In the matter between:

**MELVIN MARGRO**

**APPLICANT/PLAINTIFF**

**versus**

**AMALGAMATED BEVERAGES**

**INDUSTRIES**

**RESPONDENT/DEFENDANT**

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**J U D G M E N T**

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**TWALA AJ:**

[1] On 9 December 2013, the plaintiff filed its notice of intention to amend its particulars of claim in terms of Rule 28 of the Uniform Rules of Court. The Defendant objected to the proposed amendment, in so far as the alternate claim particularised in paragraph 9 of the plaintiff's proposed notice to amend its particulars of claim. The grounds of the objection are as follows:

- I. The right of action to be introduced by the proposed amendment has become prescribed on 27 January 2007;
- II. The plaintiff is mala fide and the defendant would suffer prejudice should the amendment be allowed;
- III. The proposed amendment does not disclose a cause of action.

[2] It is common cause that the plaintiff brought an action against the defendant in 2005 which action is defended by the defendant. The cause of action is based on a written agreement concluded between the parties in 2003.

It is not in dispute that the plaintiff had a contractual relationship with the defendant and that the plaintiff used Melgro Services CC, as a vehicle to discharge its obligations in terms of the contract.

[3] The plaintiff has effected two amendments to its particulars of claim previously which amendments necessitated consequential amendments by the defendant of its plea. In December 2013, the plaintiff filed this notice of amendment which is the subject of this application.

[5] The Defendant argues that the conclusion of the agreement between the parties is common cause. There has been no issue between the parties in relation to the special circumstances existing at the time of the conclusion of the agreement. The amendment brings a claim for special damages, which has all along not been an issue in the

particulars of claim. Therefore the right of action which is introduced by the amendment became prescribed on 27 January 2007.

- [6] It is apparent that when the plaintiff effected amendments to its particulars of claim previously, the defendant responded by amending its plea. In its amended plea, the defendant raised the issue of the relationship between the plaintiff and Melgro Services CC. The defendant pleaded that the plaintiff should have joined the close corporation as a party in these proceedings.
- [7] For a better understanding of the proposed amendment, I deem it appropriate at this stage to outline the proposed amendment. I do not intend to deal with the amendment that is not subject of the objection. I will deal with the alternative to paragraph 8 of the plaintiff's particulars of claim, the proposed paragraph 9 to the particulars of claim, which reads as follows:

*“ 9.1 When the parties concluded the Phase 3 Cartage Agreement in casu they were aware of the following facts and circumstances and the Phase 3 Cartage Agreement in casu was entered into on the basis of the following facts:*

*9.1.1 In or about 1992 the Defendant implemented what it called an owner/driver scheme as part of the Defendant's black economic empowerment and transformation initiatives so as to empower previously disadvantaged persons in the employ of the Defendant. The owner/driver scheme and the Cartage Agreements, were concluded for the benefit of the Defendant as well as the employees of the Defendant for the empowerment of such employees to become contractors so as to be able to render services to the Defendant as owner/driver as opposed to being employees. To this end:*

*9.1.1.1 in order to apply to become owner/drivers applicants had to have been employed with the defendant for more than 2 years;*

9.1.1.2 the Defendant would only contract with an applicant to become and owner/driver, in his personal name so as to ensure that the owner/driver remained contracted to the Defendant;

9.1.1.3 the owner/driver had to be prepared to conduct his business of cartage through the vehicle of a close corporation for the sake of inter alia VAT and statutory requirements;

9.1.1.4 the Defendant would not be contracting with such close corporation;

9.1.1.5 the Defendant preferred that owner/driver used the Defendant's preferred financial service provider namely M Melnick Financial Services for all financial and business needs, from the registration of a close corporation to any and all other required services rendered by the aforesaid M Melnick Financial Services.

9.1.2 In accordance with the aforestated, and in anticipation of alternatively pursuant to conclusion of the Phase 2 Cartage Agreement concluded between the Plaintiff and the Defendant in and about 1998, M Melnick Financial Services had registered Melgro Severices CC of which the plaintiff has at all material times been the sole member.

9.1.3 At all material times the Plaintiff conducted his business of cartage and obligations as a cartage contractor, to the Defendant through the vehicle of Melgro Services CC.

9.2 At all material times the Plaintiff and the Defendant contemplated that were the Defendant to breach the phase 3 Agreement, any damages suffered would be suffered by the Plaintiff notwithstanding that the Plaintiff conducted his business through Melgro Services CC and such damages would consist of the Plaintiff's loss of income (in whatever form) from Melgro Services CC.

*9.3 Accordingly the Plaintiff's damages suffered as a result of the Defendant's breach are the loss of the income and profits which the Plaintiff would have generated through Melgro Services CC but for the Defendant's breach.*

*9.4 Any further reference to the Plaintiff is a reference to Melgro Services CC and vice versa where the context requires."*

- [8] In my view the plaintiff's proposed amendment does not introduce a new right of action. It amplifies the relationship between the plaintiff and Melgro Services CC. Melgro Services CC is not a party to these proceedings and it is not necessary to join it in these proceedings, since there is no contractual relationship between Melgro Services CC and the defendant. The close corporation was merely a vehicle with which the plaintiff discharged its cartage obligations to the defendant. Therefore, the issue of prescription does not arise in this instance. Further, prescription is a special plea which the defendant is entitled to raise and can be properly dealt with at the trial of the matter.
- [9] The defendant argues further that the plaintiff is mala fide in bringing the amendment five years after it indicated it wanted to amend its particulars of claim. The plaintiff will suffer prejudice should the amendment be allowed. It is further submitted that the proposed amendment is tantamount to a withdrawal of an admission and that the facts and circumstances surrounding the conclusion of the agreement were not an issue between the parties. The plaintiff is required to give a full explanation to show his bona fides in seeking the amendment and that no prejudice would be suffered by the defendant should the amendment be allowed.
- [10] The plaintiff argues that there is no prejudice to be suffered by defendant because of the amendment, since the trial of the matter is in February 2015. Time is not of the essence in this regard. The

defendant has failed to detail the prejudice it could suffer should the amendment be allowed. The only concern of the defendant is that the matter is almost 10 years old and employees of such a big company come and go. It would be difficult, if not impossible, to find the people who were involved at the time the agreement was concluded between the parties.

[11] It is trite that an amendment to the pleadings can be effected at any time before judgment in the matter. I agree with the plaintiff in this regard that time is not of essence in this proposed amendment, since the trial of the matter is only in February 2015. The plaintiff will have ample time to effect an amendment to its plea should that be necessary. The issue that the employees of the defendant, who were present at the time of the conclusion of agreement, might have left the employ of the defendant now is not an issue. The defendant has been aware of this action since 2005 and of the plaintiff's intention to amend its particulars of claim since 2009. Therefore, the defendant should have made suitable arrangements in this regard. I therefore accept the view that the defendant has not shown that the plaintiff is mala fide in bringing this proposed amendment at this stage of the proceedings. I am of the view that there appears to be no prejudice that the defendant may suffer should the amendment be allowed.

[12] I disagree that the proposed amendment is tantamount to a withdrawal of an admission. The conclusion of the contract between the parties is not in dispute. The amendment does not bring a new cause of action but simply amplifies the relationship between the defendant, the plaintiff and the close corporation. It amplifies the factual basis upon which the contract was entered into by the parties. It does not withdraw the admission that the parties concluded a contract and that the plaintiff's claim is based on the terms of the contract.

[13] Having regard to the facts and circumstances of this matter, I therefore make the following order:

- 13.1 The application for leave to amend the plaintiff's particulars of claim is granted.
- 13.2 Plaintiff to serve and file its amended pages within 10 days from the date of this order.
- 13.3 Costs are reserved.

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TWALA  
ACTING JUDGE OF THE  
HIGH COURT  
JOHANNESBURG

DATE OF HEARING:	27 October 2014
DATE OF JUDGMENT:	03 December 2014
COUNSEL FOR PLAINTIFF: ATTORNEYS OF PLAINTIFF:	SR WILLIS PATELIA-CACHALIA ATTORNEYS
COUNSEL FOR DEFENDANT: ATTORNEYS OF DEFENDANT:	AJ EYLES SC CLIFF DEKKER INCORPORATED