



IN THE HIGH COURT OF SOUTH AFRICA  
**(GAUTENG LOCAL DIVISION JOHANNESBURG)**

Case No: 30320/13

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

**25 July 2014**

**EJ Francis**

In the matter between:

DYNAMIC SPORTS MARINE PRODUCTS CC

Plaintiff/Applicant

And

GRAIG GUTTERIDGE

First Defendant/First Respondent

H20 DYNAMICS CC

Second Defendant/Second Respondent

A RUTHERFORD MARINE PTY LTD

Third Defendant/Third Respondent

---

JUDGMENT

---

FRANCIS J

1. The plaintiff brought an application to join Hudaco Trading (Pty) Ltd (Hudaco) as the third defendant in the place of A Rutherford Marine (Pty) Ltd ( Rutherford Marine), the presently cited third defendant in the action instituted by the plaintiff in this court under case number 30320/2013. It also sought to amend its particulars of claim as contained in its notice to amend dated 6 October 2013. It appears that the defendants do not oppose the granting of the application to amend save for that relating to the joining of Hudaco as a third defendant.

2.

2. The plaintiff instituted an action for damages against the three defendants, jointly and severally, arising from the alleged diversion of business by the first defendant, a former employee of the plaintiff to the second defendant, a close corporation established by the first defendant, to the third defendant. The claim is for unlawful competition claim and the passing of claim. The plaintiff also claims payment of certain amounts from the first defendant in respect of monies allegedly received by the first defendant for which he failed to account to the plaintiff.
3. The plaintiff alleges *inter alia* in its particulars of claim that it had concluded an agreement with the first defendant on 7 September 2006 in terms of which the first defendant was employed by it with effect from 18 September 2006 in the capacity as a business development manager, South Africa. As an employee of the plaintiff, the first defendant owed the plaintiff a duty of loyalty which included the duty to act in the best interest of the plaintiff; the duty not to act adversely to the best interest of the plaintiff and the duty to avoid a conflict of interest between the advancement of the plaintiff's interests and the first defendant's personal interests. The first defendant's employment by the plaintiff was terminated with effect from 31 October 2010 pursuant to notice of termination given to the first defendant by plaintiff on 26 October 2010.
4. It is further alleged in the particulars of claim that prior to the receipt of termination of employment on 26 October 2010 the first defendant breached the duty of loyalty which he owed to the plaintiff in that he *inter alia* caused to be registered the second defendant with the object of competing with the plaintiff in the business of

3.

importation and distribution of marine sports products including a Personal Floatation Device (PFD); he initiated contact with the third defendant and subsequently took employment with the third defendant as a sales representative to market and sell sports marine products including PFDs and other sports marine products in direct competition with the plaintiff; he made contact with the plaintiff's Chinese suppliers of product and placed orders with such suppliers through the second defendant.

5. It is further alleged that on 6 September 2010, and after the first defendant had already sourced the plaintiff's Chinese suppliers of product and made arrangements with the third defendant to supply the third defendant with PFDs (through the second defendant and to act as the selling agent for the third defendant), the first defendant, without disclosing to the said Marks the aforesaid facts, informed Marks that he wished to himself take the risk of using the funds and knowledge which he had to reap personal reward by independently taking on the challenge of funding, sourcing and approving his own range of PFDs with the NRCS and then importing and selling them unto the South African market. The first defendant acted in collusion with the third defendant which had knowledge of the fact that the first defendant's conduct towards the plaintiff was unlawful act but nevertheless engaged with the first defendant to divert business and custom from the plaintiff to the second defendant and the third defendant.

6. The plaintiff is seeking certain relief against the defendants which is contained in its

4.

prayers in the particulars of claim. It seeks a full statement of account, supported by vouchers of all sales effected by the defendants of PFDs during the period 1 August 2010 to date of judgment; a debatement of such statement of account; payments by the defendants of the profits derived from the sale of such PFD's during the said period and an interdict restraining the defendants from utilising, in the marketing of their PFD etc.

7. The first and second defendants in their plea denied that the first defendant is employed by A Rutherford but that he is employed by Hudaco in its Rutherford Marine Division. It is pleaded further that there is no company registered under the name A Rutherford Marine (Pty) Ltd and that Hudaco has a trading division known as Rutherford Marine. It is further admitted that that the first defendant caused the second defendant to be registered and that he took up employment with Hudaco in its Rutherford Marine Division as a sales representative to market and sell sports marine products including PFDs.
8. As a result of the plea, the plaintiff brought an application to amend to substitute Rutherford with Hudcaco as a third respondent in the proceedings.
9. The application to amend was opposed by Hudaco. The opposing affidavit was deposed to by Arusa Asari who described herself as the financial director of the Rutherford Marine Division of Hudcao Trading (Pty) Ltd. The application was opposed on the grounds that the defendant has failed to provide any meaningful explanation as to why or how the erroneous citation of Rutherford Marine as the third

defendant had occurred. The second ground of opposition is that Hudaco would be materially and irreparably be prejudiced if it were to be allowed to be substituted in the place of Rutherford Marine as the third defendant because the alleged unlawful conduct on which the plaintiff's proposed claims against Hudaco are founded occurred prior to the end of October 2010. The claims which the plaintiff seeks to pursue against Hudaco arose not later than the end October 2010. If the actions in respect of those claims were now to be instituted by the plaintiff against Hudaco, such claims will have become prescribed and not enforceable. If Hudaco were to be substituted as the third defendant in the action, the effect of such substitution would be deprive Hudcao of its defence of prescription.

10. It is trite that the general approach of our courts when dealing with an amendment of a pleading is that it should be allowed, unless the application to amend is *mala fide* or unless the amendment would cause such injustice to the other side as cannot be compensated by an order of costs. In this regard see *Embling and another v Two Oceans Aquarium CC* 2000 (2) ALL SA 355 (C).

11. The objection raised by Hudaco in this matter is that if the amendment is allowed it would be deprived of its defence of prescription. The following was stated in *Blaauwberg Meat Wholeslaers v Anglo Dutch Meats (Exports)* 2004 (3) SA 160 SCA at paragraph 17 and 18:

*“[17] There are, no doubt, a great variety of factual possibilities which may arise in the context of deciding whether s15 (1) has been complied with. It is, however, unnecessary to go beyond the facts of this appeal in order to decide its fate.*

*[18] It is, nevertheless, desirable, because of the approach adopted by the Court a quo, to allude to certain considerations. The first is that, in the context of s15(1),*

*though not necessarily in relation to the amendment of pleadings, the existence of another entity which bears the same name as that wrongly attributed to a creditor in a process is irrelevant. That is not the creditor's concern or responsibility. Secondly, an incorrectly named debtor falls to be treated somewhat differently for the purpose of s 15(1). That that should be so is not surprising: the precise citation of the debtor is not, like the creditor's own name, a matter always within the knowledge of or available to the creditor. While the entitlement of the debtor to know it is the object of the process is clear, in its case the criterion fixed in s 15(1) is not the citation in the process but that there should be service on the true debtor (not necessarily the named defendant) of process in which the creditor claims payment of the debt. The section does not say '... claims payment of the debt from the debtor'. Presumably this is so because the true debtor will invariably recognise its own connection with a claim if details of the creditor and its claim are furnished to it, notwithstanding any errors in its own citation. Proof of service on a person other than the one named in the process may thus be sufficient to interrupt prescription if it should afterwards appear that the person was the true debtor. This may explain the decision in Embling (supra), where the defendant was cited in the summons of Aquarium Trust CC whereas the true debtors were the trustees of the Aquarium Trust. Services were effected at the place of business of the trust and came to the knowledge of the trustees. In the light of what I have said such service was relevant to proof that s 15(1) had been satisfied and was found to be so by Van Heerden J (at 700D, 701D)".*

12. It is clear from the aforementioned matter that Hudaco is a true debtor in this matter. Although Hudaco was not cited in the exact terms, it knew of the action instituted by the plaintiff. Hudaco has employed the first defendant as its employee in its Rutherford Marine division. There is a close nexus between Rutherford Marine and Hudaco. It is also to be noted that the opposing affidavit was filed by one Arusa Asari who has described herself as the financial director of Rutherford Marine Division which is for all and intents and purposes the same creditor. It would appear that prescription in this instance will not arise and if it were to arise, it will not succeed based on the *Blaauwberg Meat* decision but that is a decision that I leave to be determined by another court should Hudaco want to raise the issue of prescription.
13. The failure by the plaintiff to have given an explanation about how it came about that it had cited Rutherford Marine as the third defendant and not Hudaco is not fatal to

7.

this application. The explanation is obvious.

14. Hudaco has failed to demonstrate that it will suffer an injustice if the application was not allowed. In my view a greater injustice will be suffered by the plaintiff if the application to amend was not allowed.
15. I do not believe that this is a matter where costs should follow the result. An appropriate order would be that costs are costs in the cause.
16. In the circumstances I make the following order:
  - 16.1 Leave to join Hudaco Trading (Pty) Ltd as the third defendant in the place of A Rutherford Marine (Pty) Ltd, the presently cited third defendant, in the action instituted by the plaintiff under case number 2013/30320 is granted.
  - 16.2 The plaintiff is granted leave to amend the combined summons and particulars of claim in the action in terms of the notice of intention to amend, annexed hereto and marked "A".
  - 16.3 The defendant is granted leave to deliver the amended pages consequent upon the said amendment on the first and second defendants and on Hudaco Trading (Pty) Ltd within 10 days of the granting of this order.
  - 16.4 The costs of this application are costs in the cause of the action.

FRANCIS J

HIGH COURT JUDGE

FOR APPLICANT : H PRETORIUS INSTRUCTED BY SHEPSTONE &  
WYLIE ATTORNEYS INC

FOR RESPONDENT : PT ROOD SC INSTRUCTED BY FLUXMANS INC

DATE OF HEARING : 21 JULY 2014

DATE OF JUDGMENT : 25 JULY 2014