REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2017/16274

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

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SIGNATURE **DATE:** 28 August 2020

In the matter between:

MICHAEL GEOFFRY BRAY	Applicant
And	
CHRISTOFFEL HENDRIK BOSHOFF N.O.	First Respondent
MARIA BOSHOFF N.O.	Second Respondent
ISOBEL MC ALEENAN N.O.	Third Respondent

In re:

CHRISTOFFEL HENDRIK BOSHOFF N.O.	First Plaintiff
MARIA BOSHOFF N.O.	Second Plaintiff
ISOBEL MC ALEENAN N.O.	Third Plaintiff
And	
MICHAEL GEOFFRY BRAY	Defendant

JUDGMENT

SIWENDU J

INTRODUCTION

[1] The Applicant, Mr. Michael Geoffry Bray is the defendant in an action instituted by the Trustees for the time being of the Mc Bosh Family Trust (Trust Number: IT 2929/99), a trust duly registered under the Trust Property Control Act. For convenience, I refer to the plaintiffs/respondents as the Trustees and the Applicant/ Defendant, Mr. Michael Geoffry Bray as the Applicant. The Applicant seeks the leave of the Court to amend his counterclaim in terms of the notice of amendment dated 18 December 2019. The Trustees object to the amendment in terms of a notice delivered on 17 January 2020.

[2] The background to the action and application is that during or about March 2013, at Edenvale, the Trust (duly represented and the Applicant) entered into a written agreement in terms of which the Applicant sold to the Trust immovable property described as Erf 416 & 417 Eden Glen ('the property').[1] The Trustees claim that the agreement lapsed on account of non-fulfilment of suspensive conditions.

[3] It is alleged that during the intervening period, between the date of the agreement in March 2013 and the lapse, with the knowledge and agreement of the Applicant, the Trustees renovated and effected certain necessary and useful improvements on the property. As a result, the value of the property appreciated by R1 200 000, from R2 400 000 to R3 600 000.

[4] The Trustees claim that on or about 13 March 2015, again, at Edenvale, they entered into another written agreement ('the second written agreement') in terms of which the Applicant sold the property to the Trust. The agreement was subject to

[1] Although the Particulars of Claim refer to 'Erf 216 & 217 Edenglen', the Offer to Purchase describes the property as 'Erf 416 + 417 Eden Glen'.

certain suspensive conditions which, once again, were not fulfilled by the agreed date. The second agreement lapsed on account of non-fulfilment.

[5] The Trustees claim payment of R777 035.21 from the Applicant in respect of the improvements to the property as Claim A. As Claim B, they claim the payment of the deposit of R400 000; and as Claim C, they seek an order for an interdict preventing their eviction on account of the improvement lien they state they have over the property.

[6] The Applicant defended the action and filed a counterclaim. In the counterclaim, he states that during the subsistence of the first agreement, he agreed to a reduction of the rental due from R20 000 to R10 000, to accommodate the costs of improvements made. Thereafter, and during the duration of the second agreement, the occupational rental increased to R22 500.

[7] The Applicant claims that as a result of the Trust's failure to vacate the property, he has suffered a loss in respect of holding damages over in the amount of R697 500. The amount is what the Applicant would have received from a paying tenant, calculated based on the rental amount of R22 500 per month for June 2016 to December 2018. He claims the amount is the equivalent of a reasonable and market-related rental for the occupation of the property.

[8] Also, he claims that the Trustees failed and/or refused and/or neglected to make payment of the municipal charges for the months the Trust remained in occupation of the property.

[9] Despite due and proper demand, alternatively, demand in terms of the summons, the Trust has failed and/or refused and/or neglected to vacate the property, and therefore the Applicant has suffered damages in the amount of R744 280.40.

[10] To this counterclaim, the Trustees alleged a material non-joinder and also claim the Applicant lacks *locus standi*. They assert the property in question is subject to a mortgage bond in favour of Absa Bank Ltd ('Absa'). The Applicant ceded the right to claim rental from the Trustees as well as the right to eject the Trustees irrevocably to Absa. Accordingly, he lacks *locus standi* to proceed with the counterclaim. The application for amendment is in response to this averment.

THE AMENDMENT

[11] It is a common cause that on 6 December 2019, Absa entered into a Deed of Recession with the Applicant. The applicant now seeks to amend his counterclaim as follows:

[12] By adding the following sentences to paragraph 4 of the counterclaim:

'On 6 December 2019, the Defendant obtained from ABSA Bank Limited a Notice of Re-Cession in terms of which ABSA Bank re-ceded back to the defendant the right, title and interest in and to all rent and revenues which may accrue from the mortgaged property and all other rights referred to in clause 7 of the standard mortgage conditions applicable to all mortgage bonds registered in favour of ABSA Bank Limited concluded between the defendant and ABSA Bank Limited ("the standard mortgage conditions"). A copy or the deed of re-cession is attached hereto marked "MB1A". The defendant has complied with all the terms and conditions of the deed of re-cession. The claim for damages arising from the holding over does not constitute such rent or revenue which may accrue from the mortgaged property as referred to in clause 7 of the standard mortgage conditions and therefore such claim was never ceded by the defendant to ABSA Bank Limited and the defendant always retained the right to institute a claim for holding over damages. Insofar as the claim for holding over damages constitutes rent or revenue as referred to in clause 7 of the standard mortgage conditions, such has been re-ceded to the defendant in terms of the deed of re-cession.'

[13] By deleting the contents of paragraph 27 of the counterclaim in its entirety and replacing such with the following:

'As a result of the Plaintiff Trust failure to vacate the property the Defendant has suffered damages as a result of the Plaintiff Trust holding over in the amount of R 967 500.00 (NINE HUNDRED AND SIXTY SEVEN THOUSAND FIVE HUNDRED RAND) being the amount the defendant would have received from a paying tenant in the amount of R 22 500.00 (TWENTY-TWO THOUSAND FIVE HUNDRED RAND) per month for the months of June 2016 to December 2019, which amount is the equivalent of a reasonable and market related rental for the occupation of the property.'

[14] By deleting the contents of paragraph 30 of the counterclaim in its entirety and replacing such with the following:

'Despite due and proper demand, alternatively summons constitutes demand, the Plaintiff Trust has failed and/or refused and/or neglected to vacate the property and therefore the Defendant has suffered damages in the amount of R 1 014 280.40 (ONE MILLION FOURTEEN THOUSAND TWO HUNDRED AND EIGHTY RAND AND FORTY CENTS), which amount is due, owing and payable to the Defendant.'

[15] By deleting the contents of the prayer contained in of the Counterclaim in its entirety and replacing such with the following:

'1. The Plaintiff Trust be ordered to make payment to the Defendant of the amount of R 1 014 280.40;

2. The Plaintiff Trust be ordered to make payment of interest a tempore more on the aforesaid at the rate prescribed rate of interest of 10% per annum calculated from 1 June 2016 to date of payment in full;

3. Costs of suit on a scale as between attorney and client;

4. Such further and/or alternative relief as the Honourable Court may deem fit.'

THE OBJECTION

[16] The objection to the amendment, which the Trustees contend is interlinked and must be considered as one, is that:

16.1. Since the Applicant had ceded his right, title, and interest in and to all 'rents and other revenues' in *securitatem debiti* to Absa, he did not have the right to institute the action for holding over damages. The Applicant cannot rely on the Deed of Recession executed after *litis contestatio* to found a claim against the Trustees, as it constitutes a new cause of action which did not exist at the time the counterclaim was instituted.

16.2. The amendment would be retrospective in effect, and, would allow the Applicant to claim amounts that would, but for the amendment, have become prescribed. Allowing the amendment would prevent the Trustees from raising the defence of prescription.

[17] It was a common cause on the papers that the Deed of Recession the Applicant seeks to introduce by way of amendment was only entered into on 6 December 2019,

after the special plea of a lack of *locus standi* was raised by the Trustees. Mr. Campbell for the Trustees argued that at *litis contestatio* the Applicant lacked *locus standi*. The question that the Court needs to consider is whether this can be cured *ex post facto* and allow the amendment.

LEGAL PRINCIPLES

[18] It is by now trite that the court is vested with wide discretion to determine whether to grant or refuse an application for leave to amend. The nub of the issue, in this case, is whether it is permissible for a court to grant the amendment, thereby retrospectively clothing the Applicant with a cause of action he did not have at commencement of the action. Interlinked with this, is whether on the facts, the Trustees will be prejudiced by the amendment.

[19] Mr. Campbell for the Trustees contended the Court must follow the decision in *Philotex (Pty) Ltd and Others v Snyman and Others.*[2] The court in *Philotex* considered the question of amendments that seek to cure a lack of *locus standi* and/ or cause of action, and found (after referencing substantial precedent) that such amendments are permissible only in exceptional or special circumstances. The court, after considering the approach in *African Diamond Exporters*[3] and the recent case of *Simonsig Landgoed and Coastal Wines (Edms) Bpk v Theron, Van der Poel, Brink, Roos*,[4] noted as follows:

'On the other hand, practical considerations have in the past dictated that causes of action which arose after issue of summons be joined to the existing ones in the same action (see *OK Motors v Van Niekerk* (*supra*); *Pullen v Pullen* 1928 WLD 133; *Ritch v Bhyat* (supra at 592); *Van Deventer v Van Deventer and Another* 1962 (3) SA 969 (N); and see also *Du Toit v Vermeulen* 1972 (3) SA 848 (A) at 856G-857A).

This is not the *ex post facto* introduction of a fresh cause of action to an action between parties who are properly before Court, because there is no objection to the *locus standi* of some plaintiffs. The effect of this amendment is that it seeks to introduce parties to an existing action with causes of action which arose after the issue of summons.

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[2] *Philotex (Pty) Ltd and Others v Snyman and Others; Textilaties (Pty) Ltd and Others v Snyman and Others* 1994 (2) SA 710 (T).
[3] *Barclays Bank International Ltd v African Diamond Exporters (Pty) Ltd* (1) 1976 (1) SA 93 (W).
[4] Decided by Howie J on 26 August 1991 in the Cape Provincial Division, Case No. 14131/89.

Without expressing an opinion on the correctness of the approach in the African *Diamond Exporters and Simonsig Landgoed* cases, even on the basis of their reasoning, the plaintiffs fail. Exceptional circumstances are required by these cases. These are absent in the present case. There is nothing exceptional in a plaintiff who jumps onto the bandwagon without his trumpet, even though it might be classified as rather unusual. There are no compelling reasons of convenience for making him welcome in this case. The indications are that the proceedings will be shortened by the absence of these plaintiffs. The probabilities are that once liability or the absence thereof is established, the matters of these particular plaintiffs will follow the overall result, as the Credit Guarantee Insurance Corporation of Africa Ltd by subrogation is in fact the real plaintiff in the case of all plaintiffs. There is no compelling reason to deviate from the general rule that a cause of action is required for institution of action.'[5]

[20] To this, Mr. Kairinos, on the other hand, contended that the Court should follow the decision in *Marigold Ice Cream Co (Pty) Ltd v National Co-operative Dairies Ltd*,[6] where Wunsh J held that a plaintiff who has no *locus standi* at the institution of an action can nevertheless obtain *locus standi* by re-cession even after *litis contestatio*.

[21] The court in *Marigold*, citing various other decisions, went on to hold that:

'The reference to *litis contestatio* is to fix not the time before which the substitution of the correct plaintiff must be effected but the time after which *res litigiosae* cannot be alienated without the consent of the Court. Even after *litis contestatio* a cession by the plaintiff would effectively transfer the right in question to the cessionary if the Court allowed the cessionary to be substituted for the cedent as the plaintiff and thereby gave its seal of approval to the transfer….

…. There can be no difference in principle where the plaintiff remains the same and the cessionary of first instance, by revesting the right of action in the plaintiff, steps out of the picture.'[7]

[22] A similar approach to *Marigold* was adopted by the court in *Luxavia (Pty) Ltd v Gray Security Services (Pty) Ltd*,[8] a case involving a substitution of a plaintiff. Even though Mr. Campbell for the Trustees argues that *Marigold* is distinguishable from the

[5] *Philotex* (note 2 above) at 716F-717B.
[6] *Marigold Ice Cream Co (Pty) Ltd v National Co-operative Dairies Ltd* 1997 (2) SA 671 (W)
[7] Ibid at 678E-F and 678I.
[8] *Luxavia (Pty) Ltd v Gray Security Services (Pty) Ltd* 2001 (4) SA 211 (W).

current case because there had been no objection to the amendment, he conceded the criticism levelled at the *Philotex* case he sought to persuade the Court to follow.

[23] In *Erasmus: Superior Court Practice*, the issue is approached as follows:

'The vital consideration is that an amendment will not be allowed in circumstances which will cause the other party such prejudice as cannot be cured by an order for costs and, where appropriate, a postponement. The following statement by Watermeyer J in *Moolman v Estate Moolman* [1927 CPD 27 at 29] has frequently been relied upon:

"[T]he practical rule adopted seems to be that amendments will always be allowed unless the application to amend is mala fide or unless such amendment would cause an injustice to the other side which cannot be compensated by costs, or in other words unless the parties cannot be put back for the purposes of justice in the same position as they were when the pleading which it is sought to amend was filed."

The power of the court to allow material amendments is, accordingly, limited only by considerations of prejudice or injustice to the opponent.'[9]

[24] I favour an approach that grants latitude towards an application for an amendment, more so where there are triable issues between the parties. Further, I take account of the accessory nature of the cession, including that it could be discharged at any time when the underlying obligation is extinguished. Practical and commercial exigencies may favour this flexible approach, because there may be a lapse of time between the date of the extinction of the principal debt (giving rise to a cession) and the execution of a deed of recession, unduly depriving a creditor of a right and cause of action. Besides, on the facts of this case, the parties remain the same, and, the Trust would have raised the same defences regardless of who between the Applicant and Absa Bank exercised the right of action. The long-standing position that prejudice is the litmus test for the latitude to allow an amendment must apply. I align with the decision in *Marigold* and find in favour of allowing the amendment without the need to establish special circumstances.

[25] That finding does not put the end to the matter. Mr Campbell pressed further that even if the Court finds that the *Marigold* created a new precedent and that special

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[9] D E van Loggerenberg *Erasmus: Superior Court Practice* 2 ed (2015) Vol. 2 (RS 11, 2019, D1-332) (footnotes omitted).

or exceptional circumstances are not required, it is clear that the question of prejudice must be considered before such amendments should be allowed. It is argued that a portion of the claim by the Applicant from October 2016 to 6 December 2016 has prescribed. On this score, he argued the Trustees will be denied the right to raise the defence of prescription to a portion of the claim since amendments act retrospectively.

[26] The question of whether and which part of the right to enforce the claim has been extinguished through a lapsed time is an important consideration to determine the prejudice. The wording of the cession refers to 'rent or other revenues'. Mr Kairinos argued that the claim the Applicant seeks to introduce is in respect of holding over damages and not 'rent or other revenues' derived from the property. Based on the decision in *Hyprop Investments Ltd v NCS Carriers and Forwarding CC*, holding over damages are not rent or revenue.[10]

[27] Harms' *Civil Procedure in the Superior Courts* describes the approach toward amendments as follows:

'Applications for amendments should not deteriorate into minitrials since amendment proceedings are not intended or designed to determine factual issues such as whether the claim has become prescribed. Likewise, an amendment to a plea will not be allowed if the particulars of claim do not disclose a cause of action; it would be an exercise in futility.'[11]

[28] Even though Mr Kairinos contends there is no prejudice to the Trustees because: (a) regardless of the identity of the creditor, they face the same cause of action; and (b) the objection on account of prescription could be raised in a special plea, since the plaintiff may have a replication thereto, this question of prescription and prejudice loomed large during the argument. The argument by Mr Kairinos misses the vital question of the retrospective effect of the amendment.

[29] Once more the law is clear that '*An amendment which introduces a new claim will not be allowed if it would resuscitate a prescribed claim or defeat a statutory*

[10] *Hyprop Investments Ltd and Another v NCS Carriers and Forwarding CC and Another* 2013 (4) SA 607 (GSJ) para 42.
[11] D Harms *Civil Procedure in the Superior Courts* SI 67 at B28.18, citing De Klerk v Du Plessis 1995 (2) SA 40 (T); *Nxumalo v First Link Insurance Brokers* (Pty) Ltd 2003 (2) SA 620 (T). Harms further cites *Cordier v Cordier* 1984 (4) SA 524 (C); *Stroud v Steel Engineering Co Ltd* 1996 (4) SA 1139 (W), stating that it may be otherwise if, for example, the issue of prescription is conceded. According to Harms, the issue to be introduced must be a triable issue.

limitation as to time.'[12] However, the principle must surely apply in cases where a claim or part thereof is '*known to have prescribed*'.

[30] The majority of the Applicant's claim is formulated thus:

'27. As a result of the Plaintiff Trust failure to vacate the property the Defendant has suffered damages as a result of the Plaintiff Trust holding over in the amount of R697 500.00 (SIX HUNDRED AND NINETY SEVEN THOUSAND FIVE HUNDRED RAND) being the amount the Defendant would have received from a paying tenant in the amount of R22 500.00 (TWENTY-TWO THOUSAND FIVE HUNDRED RAND) per month for the months of June 2016 to December 2018, which amount is the equivalent of a reasonable and market related rental for the occupation of the property.'

[31] Even though the cession and re-cession are a common cause, the dispute about whether the right to claim 'rent and other revenue' includes the holding over damages claimed or vice versa, and, what of these had been ceded to Absa and/or has prescribed remains. That, as well as in respect of which portion of the claim is known to have prescribed, is a matter for the trial court. Regardless, the Court agrees with Mr Campbell about the potential for prejudice if the Trustees are met with a claim that has prescribed, given the retrospective effect of the amendment. That dispute is not one capable of resolution at this stage. Accordingly, it befits this Court to fashion an order that allows the amendment, but equally limits the potential prejudice alleged.

[32] In so far as the order for costs, I observe that the case raises a genuine triable issue between the parties. The objection is not one made mala fide nor is it superfluous or opportunistic.

[33] Both parties have successfully persuaded the Court, therefore, it is appropriate that the costs of the application are costs in the cause.

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[12] Erasmus (note 9 above) at D1-336, citing the following cases: *Trans-African Insurance Co Ltd v Maluleka* 1956 (2) SA 273 (A) at 279B; *Miller v H L Shippel & Co (Pty) Ltd* 1969 (3) SA 447 (T); *Dumasi v Commissioner, Venda Police* 1990 (1) SA 1068 (V) at 1071C–D; *Minister of Safety and Security v Molutsi* 1996 (4) SA 72 (A) at 84H–85C, 87C–D, 95C–D and 99D–E; *Sentrachem Ltd v Prinsloo* 1997 (2) SA 1 (A) at 15H–16C; *Associated Paint & Chemical Industries (Pty) Ltd t/a Albestra Paint and Lacquers v Smit* 2000 (2) SA 789 (SCA) at 794C–G; *Embling v Two Oceans Aquarium* CC 2000 (3) SA 691 (C) at 697J–698A; *Malinga v Road Accident Fund* 2012 (5) SA 120 (GNP) at 124C–G. See also *Blaauwberg Meat Wholesalers CC v Anglo Dutch Meats (Exports) Ltd* [2004] 1 All SA 129 (SCA) at 133g–134h.

In the result, I make the following order:

ORDER

1. The applicant is granted leave to amend its counterclaim in terms of the notice of amendment dated 18 December 2019 and is directed to perfect its amendment within ten days of the granting of this order.

2. If the trial court finds that the damages claim referred to in the counterclaim was the subject of the cession to Absa Bank Limited contained in clause 7 of the standard mortgage conditions and re-cession from Absa Bank Limited dated 6 December 2019, then any damages claim for the period before the recession date up to the date when action proceedings were instituted, shall have prescribed.

3. The cost of the application will be costs in the cause.

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JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

This judgment was handed down electronically by circulation to the parties' and/or parties' representatives by email and by being uploaded to CaseLines. The date and time for hand-down is deemed to be 10h00 on 28 August 2020.

Date of hearing: 17 August 2020

Date of judgment: 28 August 2020

Appearances:

Counsel for the applicant:	Adv. G Kairinos SC
Attorney for the applicant:	Jurgens Bekker Attorneys
Counsel for the respondents:	Adv. A Campbell
Attorney for the respondents:	Bennett McNaughton Attorneys