

**REPUBLIC OF SOUTH AFRICA**



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

**CASE NO: 2017/16274**

In the matter between:

**MICHAEL GEOFFRY BRAY**

Applicant / Defendant

And

**CHRISTOFFEL HENDRIK BOSHOF N.O.**

First Respondent / Plaintiff

**MARIA BOSHOF N.O.**

Second Respondent / Plaintiff

**ISOBEL MC ALEENAN N.O.**

Third Respondent / Plaintiff

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**JUDGMENT SUMMARY**

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*Rule 28 – application to amend counterclaim – cession and re-cession – whether a party who does not have locus standi at the time of the institution of the action can nevertheless obtain locus standi by re-cession, even after litis contestatio – permissible due to nature of cession and commercial demands – prejudice the primary consideration in court exercising discretion of whether to allow the amendment – unnecessary to establish special circumstances to justify the amendment.*

**Background**

The parties had entered into sale of an immovable property which lapsed because of a non-fulfilment of suspensive conditions. The Trust, which was the plaintiff in the action and the respondent in this application occupied the property for a considerable period. When the applicant who was the defendant sought to evict the Trust, the trustees instituted action proceedings to claim payment for improvements made to the property. In response, the applicant filed a counterclaim for holding over damages.

The immovable property was subject to a mortgage bond in favour of Absa Bank. The mortgage bond agreement provided for a cession of rights in respect of 'rents and other revenues' to the Bank *in securitatem debiti*. Based on the cession, the respondents claimed that the applicant did not have *locus standi* to bring the counterclaim. Absa Bank and the applicant, in the interim entered into a Deed of Re-cession. As a result, the applicant sought leave to amend his counterclaim to refer to the deed of re-cession and to claim *locus standi*.

The respondents objected to the amendment on the basis that allowing the amendment based on the deed of re-cession entered into after *litis contestatio*, would confer a new cause of action which did not exist at the time of the counterclaim. The retrospective effect of the amendment would prejudice and deprive the respondent the opportunity to raise the defence of prescription in respect of a portion of the counter-claim.

### **Argument**

The question which arose was whether a party who did not have *locus standi* at the time of the institution of an action can obtain *locus standi* by a re-cession, after *litis contestatio*.

Relying on the case of *Philotex (Pty) Ltd v Snyman* 1994 (2) SA 210 (T), the respondents contended 'exceptional or special circumstances' justifying the amendment must exist before the court can grant it. By contrast, the applicant contended the presence of special circumstances is not a requirement for leave to amend; and the Court should follow the approach in *Marigold Ice Cream Co (Pty) Ltd v National Co-operative Dairies Ltd* 1997 (2) SA 671 (W) and *Luxavia (Pty) Ltd v Gray Services (Pty) Ltd* 2001 (4) SA 211 (W). The court in *Marigold* took the view that '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' and permitted a cessionary to be substituted for the cedent after *litis contestatio*.

### **The Court**

The Court, in line with criticism of the decision, departed from *Philotex*, finding that there is no need to establish special circumstances to obtain an amendment. The Court followed the approach in *Marigold*, citing the legal nature of cessions, and the fact that practical and commercial exigencies may favour a flexible approach. Further, on the facts of the case, the respondent would be able to raise the same defences, regardless of whether the claim was brought by Absa or the applicant.

On the question of prejudice, the Court confirmed the long-standing position that prejudice is the litmus test for whether leave to amend should be granted. It also affirmed that an amendment which resuscitates a prescribed claim should not be permitted. In this regard, there was a dispute

between the parties as to whether holding over damages fell within the scope of 'rents and other revenues' under the cession agreement. The Court held that this was an issue to be determined at trial and granted the applicant leave to amend his counterclaim.

However, in order to limit the potential prejudice to the respondents occasioned by the amendment, the Court ordered that, in the event that the trial court finds that a portion of the claim raised in the counterclaim was subject to the cession, that portion would have prescribed and could not be recovered.

**Coram:** Siwendu J  
**Heard:** 17 August 2020  
**Delivered:** 28 August 2020