



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

**CASE NO: 8279/2019**

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

**05.10.2021**

DATE

**Electronic**

SIGNATURE

In the matter between:

**AFRICA WIDE INVESTMENTS HOLDINGS (PTY) LTD**

Plaintiff

and

**MIGAN INVESTMENTS HOLDINGS (PTY) LTD**

Defendant

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**JUDGMENT**

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**CRUTCHFIELD AJ:**

[1] The plaintiff, Africa Wide Investment Holdings (Pty) Ltd, sought leave to amend its replication.

[2] The defendant, Miganu Investment Holdings (Pty) Ltd, objected to the plaintiff's notice of intention to amend dated 14 July 2020, and opposed this application for leave to amend.

[3] The defendant pleaded prescription to the plaintiff's claim. The plaintiff replicated and sought, in terms of this application, to amend that replication. The purpose of the proposed amendment was to avoid the defendant's plea of prescription.

[4] The defendant opposed the application for leave to amend on the basis that if granted, the amended replication would be excipiable.

[5] Whilst the defendant's notice of objection did not record objections to paragraphs 1 to 4 and paragraphs 5.1 to 5.6 of the plaintiff's notice of intention to amend, the defendant argued that it objected to the amendment in its entirety.

[6] The applicant relied on the test for leave to amend referred to in *Trans-Drakensberg Bank Limited v Combined Engineering (Pty) Ltd*,<sup>1</sup> to the effect that:

6.1 'The primary principle appears to be that an amendment will be allowed in order to obtain a proper ventilation of the dispute between the parties, to determine the real issues between them, so that justice may be done'.

[7] In general, amendments will be allowed unless the application to amend is *mala fide* or the amendment will cause an injustice to the opposing party that cannot be

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<sup>1</sup> *Trans-Drakensberg Bank Limited v Combined Engineering (Pty) Ltd* 1967 (3) SA 632 (D) 638A; *Commercial Union Assurance Co Ltd v Waymark NO* 1995 (2) SA 73 (TK) at 77; *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC) at 261; *Blaauwberg Meat Wholesalers CC v Anglo Dutch Meats (Exports) Ltd* [2004] 1 All SA 129 (SCA) at 133.

compensated for by way of costs, or the parties cannot be returned to the position that they occupied when the pleading sought to be amended was filed.<sup>2</sup>

[8] Stated differently, a court's power to allow material amendments is limited only by considerations of prejudice or injustice to the opponent.<sup>3</sup>

[9] There was no suggestion in this matter that the applicant was mala fide in pursuing the amendment or that the parties could not be returned to the positions they occupied prior to delivery of the notice of intention to amend.

[1] The replication was delivered in June 2020, notice of intention to amend on 14 July 2020 and a trial date has not yet been allocated. Thus, the notice of intention to amend has not caused any material delay in the matter.

[2] The defendant objected to the amendment on the basis that if the amendment was granted it would render the replication excipiable.<sup>4</sup> The defendant raised two broad grounds of objection.

[3] Firstly, that the plaintiff's interpretation of the word 'debtor' conflicted with the plain meaning thereof and could not be brought within any reasonable interpretation of the word 'debtor' in section 13(1)(e) of the Prescription Act;<sup>5</sup>

3.1 That the amendment sought to pierce the corporate veil; and

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<sup>2</sup> *Moolman v Estate Moolman* 1927 CPD 27 at 29.

<sup>3</sup> *Devonia Shipping Ltd v MV Luis (Yeoman Shipping Co Ltd intervening)* 1994 (2) SA 363 (C) at 369G.

<sup>4</sup> *Ilima Project (Pty) Ltd (in liquidation) v MEC: Public Transport, Roads and Works & Another* (25981/2011) [2019] ZAGPJHC 71 (12 March 2019) para 10.

<sup>5</sup> Prescription Act, 68 of 1969 ('the Prescription Act')

- 3.2 The amendment would require the court hearing the trial to engage in an enquiry as to who controlled the defendant's board.

[4] Secondly, the defendant alleged that the plaintiff's interpretation or reliance on the concepts of fairness, justice and reasonableness was incorrect in that:

- 4.1 Reliance thereon overlooked the plain meaning of the text of the Prescription Act, and the word 'debtor' did not require extraneous considerations of justice in respect of determining its meaning;
- 4.2 The interests of justice could not override Parliament's express intention in terms of the statute;
- 4.3 The language of the statute conveyed what the legislature considered in the circumstances and the courts could not supplant parliament's intention by way of interpretation of the statute; and
- 4.4 The interests of justice did not constitute a defence to a plea of prescription when the meaning of the statute is clear from the text.

[5] The plaintiff sought pursuant to s 13(1)(e) of the Prescription Act, ('s 13(1)(e)'), to plead an interruption of prescription. Accordingly, the interpretation of 'debtor' in the context of s 13(1)(e) became relevant.

[6] In short, s 13(1)(e) provides for the interruption of prescription where the creditor, is a juristic person, and the debtor is a member of the governing body of the juristic person. In the context of this matter, the plaintiff is the creditor and the debtor is the defendant.

[7] The plaintiff, in terms of the proposed amendment, seeks to allege that the defendant does not act independently of one Mr M G Diliza ('Mr Diliza'), the beneficiary of the plaintiff's BEE scheme. Mr Diliza is a member of the plaintiff's governing body, and, according to the plaintiff the controlling mind of the defendant.

[8] The plaintiff relies for its interpretation of 'debtor' in s 13(1)(e), to section 2 of the Companies Act, 71 of 2008 ('Companies Act'), section 2(1)(b) of which provides that:

(1) 'for all purposes of this Act –

(b) an individual is related to a juristic person if the individual directly or indirectly controls the juristic person, as determined in accordance with subsection (2); ...'

[9] Section 2(2) provides that a person controls a juristic person if inter alia, the juristic person is a subsidiary of the first person, or the first person together with a related or interrelated person, is directly or indirectly in control of the exercise of a majority of the voting rights associated with securities of the company, or is in control of the board.

[10] Thus, the plaintiff argued that regard being had to the relevant circumstances, the context and correct facts of this matter and on a proper interpretation of s 13(1)(e), the word 'debtor' stands to be read so as to include 'the person who directly and/or indirectly controls the debtor' in terms of s 2(2) of the Companies Act.

[11] Furthermore, the plaintiff contended that it would be contrary to public policy to permit the defendant to rely on the statutory prescript, prescription, to avoid the consequences of his conduct and the relief sought by the plaintiff, whilst simultaneously refusing the plaintiff an opportunity to plead an amendment that would, if proved at trial, permit of a defence to the plea of prescription.

[12] In addition, that it would defeat the purpose of s 13(1)(e) to permit the defendant to succeed on the defence of prescription.

[13] The defendant argued, with reference to s 2(2) of the Companies Act, that the defendant was the 'debtor', a corporate entity that was not a member of the plaintiff's board. Mr Deliza was not the 'debtor' and s 13(1)(e) did not apply to the plaintiff's proposed pleaded facts. Accordingly, the defendant contended that the amendment was excipiable.

[14] Moreover, the 'reading in' relied on by the plaintiff was contrary, according to the defendant, to the plain language of the statutory provision, expanded the meaning thereof and was contrary to a contextual interpretation of the provision.

[15] The defendant referred to the *National Coalition*<sup>6</sup> where the Constitutional Court held that:

'In deciding to read words into a statute, a court should also bear in mind that it will not be appropriate to read words in, unless in so doing a court can define with sufficient precision how a statute ought to be extended in order to comply with the Constitution.'

[16] As regards the plaintiff's reliance on the constitutional values of fairness, justice and reasonableness and the defendant's opposition thereto, the Constitutional Court in *Links*<sup>7</sup> stated in respect of s 12(3) of the Prescription Act, the following:

'The provisions of section 12 seek to strike a fair balance between, on the one hand, the need for a cut-off point beyond which a person who has a claim to pursue against another may not do so after the lapse of a certain period of time if he or she has failed to act diligently and on the other the need to ensure fairness in those cases in which a rigid application of prescription legislation would result in injustice as already stated, in interpreting section 12(3) the injunction in section 39(2) of the Constitution must be borne in mind'.

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<sup>6</sup> *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 [2] SA1 (CC) para 75 ('*National Coalition*').

<sup>7</sup> *Links v Department of Health, Northern [Cape] Province* 2016 (4) SA 414 (CC) para 26 ('*Links*').

[17] Section 39(2) of the Constitution<sup>8</sup> directs that when legislation is interpreted, the result must be a construction that promotes ‘the spirit, purport and object of the Bill of Rights’. Accordingly, our courts must seek when interpreting legislation, to afford an interpretation that is consistent with the Bill of Rights.<sup>9</sup>

[18] Akin to *Links*, the focus of this matter falls on the right in terms of s 34 of the Constitution, the right of access to courts.

[19] The interpretation and meaning that this Court applies to the word ‘debtor’ in s 13(1)(e) may have the effect of preventing the plaintiff from raising the dispute in a court and thereby prevent the parties from resolving the issues before a court. Such an outcome would serve to limit the plaintiff’s right of access in terms of s 34 of the Constitution<sup>10</sup> and violate the injunction in s 39(2).

[20] The plaintiff contends for an extended meaning of ‘debtor’ in terms of s 2(2) of the Companies Act.

[21] The Prescription Act predates the Constitution. The legislature did not provide for a definition of the word ‘debtor’ in terms of the Prescription Act.

[22] The interpretation of statutes under our constitutional dispensation is purposive and not literal as contended for by the defendant.

[23] The defendant’s approach to the proposed amendment constrained it to avoid the recent cases dealing with the interpretation of documents be they statutes, contracts or

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<sup>8</sup> The Constitution of the Republic of South Africa, 1996.

<sup>9</sup> *Independent Institute of Education (Pty) Ltd v KwaZulu-Natal Law Society & Others* [2019] ZACC 47.

<sup>10</sup> *Links* note 7 above para 22.

other documentary forms, commencing with *Natal Joint Municipal Pension Fund v Endumeni Municipality*.<sup>11</sup>

[24] The interpretation of statutes turns on the language used in the provision regard being had to the rules of grammar and syntax, the context of the provision, the purpose to which it is directed and the material known to those responsible for its production.<sup>12</sup>

[25] The context of a statute or a provision in a statute may be relevant.<sup>13</sup> The nature of the concern sought to be addressed in a statute, the areas to which the statute relates, thus providing the context for the legislation, mean that context is important in construing statutes. The context of section 13(1)(e) in relation to section 34 and section 39(2) of the Constitution, is an important factor in this matter.<sup>14</sup>

[26] The purpose of section 13(1)(e) is to delay the completion of prescription in the circumstances provided for in the section. Accordingly, the purpose of the provision is to limit the operation of prescription by carving out circumstances to which prescription will not apply.

[27] An approach that focuses on the parties s 34 rights will seek to afford the plaintiff, in fact both parties, an opportunity to invoke the carve out in s 13(1)(e), by way of permitting the amendment.

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<sup>11</sup> *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18.

<sup>12</sup> *Motloun & Another v Sheriff, Pretoria East & Others* 2020 (5) SA 123 (SCA); *Telkom SA SOC Ltd v Commissioner, South African Revenue Service* 2020 (4) SA 480 (SCA).

<sup>13</sup> *Telkom* footnote 14.

<sup>14</sup> *Commissioner, South African Revenue Services v United Manganese With Kalahari (Pty) Ltd* 2020 (4) SA 428 (SCA).



[28] The relevant material facts, in the main, are pleaded in the existing pleadings. These include that the defendant's chairman, Mr Diliza, is a director of the plaintiff and the chairman of the defendant *inter alia*.

[29] The plaintiff, in terms of the proposed amendment, seeks to include facts that will demonstrate that Mr Diliza controls the defendant as envisaged in terms of s 2(2) of the Companies Act, namely, controls the defendant's board, the voting rights and shares of the defendant to the extent that the defendant does not function independently of Mr Diliza, a member of the plaintiff's board.

[30] The fact that the amendment, if allowed, will serve to enlarge the issues for purposes of the trial action, is not a reason to refuse the amendment.<sup>15</sup>

[31] Whilst the amendment will not serve to pierce the corporate veil as alleged by the defendant in its objection, that would not be a basis upon which to deny the amendment.

[32] The Constitutional Court gave meaning to the words of section 12(3) of the Prescription Act, with reference to constitutional values. It follows that an approach to section 13(1)(e) that refers to Constitutional values should ensue, notwithstanding the literal meaning of the text.

[33] In the circumstances, the parties' s 34 rights should be considered, if not prevail, and 'debtor' ought to be interpreted in a manner that serves to give effect to the rights enshrined in s 34. That entails permitting the amendment in order for the parties to proceed to trial in respect of the true dispute between them.

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<sup>15</sup> *Trans-Drakensberg* note 1 above 638A; *Myers v Abrahamson* 1951 (3) SA 438 (C) 450A.

[34] Section 13(1)(e) entails a delay in the commencement of prescription. In giving effect to the provision, a court thereby gives effect to s 34 of the Constitution. Insofar as a confined interpretation of 'debtor' as sought by the defendant would exclude the operation of section 13(1)(e) and confine the parties or limit their s 34 rights, contrary to the injunction in s 39(2), such an interpretation should not prevail. An interpretation that is the 'least intrusive' should prevail.<sup>16</sup>

[35] An approach that permits the amendment will afford the trial court an opportunity to consider the interpretation and application of 'debtor' in the context of s 13(1)(e) and the facts and circumstances relied upon by the plaintiff. Furthermore, the amendment will permit the ventilation of the true dispute between the parties.

[36] Considerations of prejudice or injustice to the defendant do not arise in this matter.

[37] Accordingly, the interests of justice will be served by the granting of the amendment and I intend to grant an order in those terms.

[38] There is no reason for the costs of this application not to follow the outcome in respect of the merits.

[39] By virtue of the abovementioned, I grant the following order:

1. The plaintiff is granted leave to amend its replication in terms of the plaintiff's notice of intention to amend: replication dated 14 July 2020.

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<sup>16</sup> *Makate v Vodacom (Pty) Ltd* 2016 (4) SA 121 (CC); *Off-beat Holiday Club & Another v Sanboni Holiday Spa Shareblock Limited & Others* 2017 (5) SA 9 (CC).

2. The defendant is ordered to pay the costs of the application for leave to amend.

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**A A CRUTCHFIELD SC  
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA  
GAUTENG LOCAL DIVISION  
JOHANNESBURG**

***Electronically submitted therefore unsigned***

Delivered: This judgment was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 5 October 2021.

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INSTRUCTED BY: Tshisevhe Gwina Ratshimbilani Inc

COUNSEL FOR DEFENDANT: Mr L J Morison SC & Mr G Ngcangisa

INSTRUCTED BY: Glen Marais Inc

DATE OF THE HEARING: 26 July 2021

DATE OF JUDGMENT: 5 October 2021