IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2022/4024

In the matter between:

ESSENCE LADING CC **PLAINTIFF**

and

INFINITI INSURANCE LIMITED **FIRST DEFENDANT**

MEDITERRANEAN SHIPPING COMPANY

(PTY) LTD **SECOND DEFENDANT**

Neutral citation: *Essence Lading CC v Infiniti Insurance Ltd / Mediterranean Shipping Company (Pty) Ltd* (Case No: 2022/4024 [2023] ZAGPJHC ???? (9 June 2023)

SUMMARY OF JUDGMENT

FLYNOTE

Summons – citation of wrong defendant – if the plaintiff cited the wrong defendant, the plaintiff should in principle withdraw the action and start afresh against the correct defendant.

Method of correction of errors in citation of defendant – where in conflict, constitutional imperative of a fair and just hearing trumps the need for procedural pragmatism.

Citation of wrong defendant – withdrawal of action not the only outcome - applications for substitution or joinder of new party, on proper notice to the new party, coupled with appropriate amendment, permissible.

Citation of wrong defendant - test to be applied in substitution or joinder applications – test is substantially the same test which is applied to amendments – bona fide amendments will be granted unless it will result in prejudice or injustice that cannot be cured by an appropriate cost order or other order regulating future proceedings - notice to the party to be introduced essential to avoid injustice.

Citation of wrong defendant – appropriateness of the amendment procedure provided in Uniform Rule 28 – the application of rule 28 to situations where a new party, not currently represented before the court, is to be introduced, is generally inappropriate and will lead to incurable injustice. Suggestion in Holdenstedt Farming v Cederberg Organic Buchu Growers (Pty) Ltd *2008 (2) SA 177 (C) that substitution of a defendant can be effected through the application of Uniform Rule 28 not supported by authority relied on, and to be qualified.*

Appropriateness of Uniform Rule 28 in correction of wrong defendant – application of rule 28 will be appropriate if the correct defendant (i.e., the new party to be introduced) has entered an appearance to defend, made himself a party to the proceedings and is represented in the proceedings – no incurable injustice will result. The situation is like the situation where the correct defendant formally intervened in the action.

Appropriateness of rule 28 in correction of wrong defendant – application of rule 28 will be appropriate where, through some form of agency (such as the agency created by a partnership) the new party to be introduced is in law represented in the proceedings by an agent (such as a co-partner) so that the service of process on the existing party can be deemed to be service on the new party to be introduced – no incurable justice will result.

Distinction between misnomer and substitutions – law reports abound with fine distinctions between these concepts – niceties in drawing this distinction unhelpful in the determination of a fair and just process which will prevent incurable injustice – at best distinction a factor in determination of prejudice and no fixed rule attached to the difference between concepts.

Distinction between misnomer and substitutions – amplified emphasis on difference to be avoided in assessing applications for amendment – the distinction should be limited to the effect it has on the question of prejudice, which is the primary test.

Misnomer in citation of defendant – wrong defendant cited - even if error can be characterized as a misnomer, it does not detract from fact that a new party who is not before court needs to be introduced – dictates of fairness and justice requires that new party be joined or substituted by way of application served on new party.

Amendment introducing new party without notice to new party – such procedure unconstitutional and contrary to the basic tenets of our law – order will be a brutum fulmen.

Outcome of application for amendment in terms of Uniform Rule 28 where party to be introduced not given notice – application dismissed with costs.

SUMMARY

[1] This is an application by the plaintiff in terms of Uniform Rule 28 for leave to effect an amendment, by changing the name of the second defendant from Mediterranean Shipping Company (Pty) Ltd ("MEDITERREANEAN") to MSC Logistics (Pty) Ltd ("MSC").

[2] It was common cause that an objective reading of the summons revealed that MSC was intended to be the second defendant and that the mistake in the citation of the defendant was a *bona fide* error.

[3] The court assumed for purposes of argument that the summons was served on MSC (there being indications to that effect).

[4] However, the named defendant, MEDITERREANEAN, entered an appearance to defend and raised an exception.

[5] The intended defendant, MSC, did not enter an appearance to defend, nor intervened in the action, and was not represented before the court.

[6] After the second defendant raised an exception, the plaintiff initiated the amendment of the summons by serving a notice of intention to amend in terms of rule 28 on MEDITERRANEAN's attorneys. After an objection was made, the plaintiff launched the present application for leave to amend, also serving this application on MEDITERRANEAN's attorneys.

[7] No service of the proposed amendment or the application for leave to amend was served on MSC.

[8] This matter concerns the question whether the amendment should be granted having regard to the procedure employed by the plaintiff.

[9] The point of departure is that everyone has in terms of section 34 of the Constitution the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court. Section 173 provides that the High Court has the inherent power to protect and regulate its own process, and to develop the common law, considering the interests of justice. The court is constitutionally enjoined to approach this matter on the basis that fairness and justice must be promoted.

[10] Mistakes in pleadings are a common phenomenon and there is the obvious need for such mistakes to be rectified in an economical and practical manner, while at the same time complying with the need for fairness and justice. Where there is a conflict between the need for procedural pragmatism and the constitutional imperative of fairness and justice, the former is undoubtedly trumped by the latter.

[11] During the first half of the 20th century a practice was in existence in our courts whereby a party in legal proceedings could be substituted by a new party, provided that the process by which the substitution was effected did not result in incurable injustice. In some cases, the amendment went hand in hand with an application for the joinder of the new party and in others, where the court was satisfied that the new party had effectively been served (for example by service on a co-partner), by way of an amendment without a formal joinder. The most important consideration remained prejudice and, in this regard, the main consideration was whether the party who is to be introduced to the action

was given proper notice of the proceedings against him. This practice continued thereafter.

[12] The High Court also has the inherent jurisdiction to grant applications for the substitution of parties.

[13] In *Holdenstedt Farming v Cederberg Organic Buchu Growers (Pty) Ltd* the court held that a substitution can be effected in terms of the rule 28 amendment process, stating that this procedure has already received the approval of the High Court. The cases relied upon, *Kirsh Industries Ltd v Vosloo and Lindeque and Others* and *Embling and Another v Two Oceans Aquarium CC,* cases did not involve the substitution of parties and is no authority for the statement.

[14] *However, Holdenstedt Farming* was similar to the *Gihwala v Gihwala*, where the introduction of one of the partners of a partnership was granted by way of an amendment. The rationale behind these cases is that the partnership is not an entity separate from the partners and that a partner can represent the partnership. Under these circumstances the partnership is already represented before court, and the service of a notice of proposed amendment on one partner is deemed to the notice to the other partners. Under these circumstances the use of rule 28 to effect the substitution did not result in unfairness or injustice to the party to be substituted and was appropriate.

[15] Where there is an error in the citation of the defendant and the correct defendant entered an appearance to defend, or intervened, there would be no prejudice if the amendment is affected by way of an amendment in terms of rule 28. It must be emphasized that this scenario inherently does not introduce a new party to the proceedings.

[16] If the summons, which cited the defendant incorrectly, was served on the correct defendant, but such defendant simply ignored the summons due to the error in the citation (e.g., the citation refers to a different name), as he would be entitled to do, the plaintiff would be unable to use the Rule 28 amendment procedure at the outset. Any notice of intention to amend served on the correct defendant can be ignored, such party not being a party to the action. The solution to the problem lies in the plaintiff either withdrawing the action, or applying for the joinder of the correct defendant, thereby indubitably and fairly making the correct defendant a party to the proceedings, coupled, or followed by an appropriate amendment. An application for a substitution, properly served on the proposed new defendant, would also be appropriate.

[17] Where the summons containing the incorrect citation was not served on the correct defendant, but on the incorrectly cited defendant, who then entered an appearance to defend (and the correct defendant did not), attempts to use rule 28 would be a completely abortive process. A notice of intended amendment cannot be served on the correct defendant. There is no action pending against such a person. Neither can the notice of amendment be served on the incorrect party on whom the summons

was served or its legal representatives. Such a process will lead to an entire failure of fairness and justice, with the most basic of requirements for justice, being proper notice, being absent.

[18] In *MEC for Safety and Security, Eastern Cape v Mtokwana* the Supreme Court of Appeal held that the substitution of a defendant by way of an amendment of the summons, which was never served on the correct defendant, was a wholly inappropriate procedure. The court held that in the circumstances of the case the plaintiff ought rightly to have withdrawn the action, issued a new summons and applied the proper procedures prescribed by the Rules.

[19] It was also held in *MEC for Safety and Security, Eastern Cape v Mtokwana* that if it was intended to effect a joinder of the new defendant (which was not the case), the proper course of action would have been to bring a properly substantiated application for a joinder.

[20] Consequently, the court held *in casu* that rule 28 may only be used to effect a substitution when no prejudice or injustice will result from such procedure. This will generally only be the case where:

[20.1] through some form of agency, the party to be introduced is already represented in the action and service of the process on the agent is deemed to be service on the party to be introduced; and

[20.2] the correct defendant entered and appearance to defend or intervened in the action.

[21] In *Tecmed (Pty) Ltd and Others v Nissho Iwai Corporation and Another* it was also held that the court has the inherent power to grant a substitution of parties, and that such power is not derived from the rules of court. The court also held that the settled approach to matters of this kind follows the considerations in applications for amendments of pleadings.

[22] Once the new defendant is properly joined or substituted, and becomes a party to the action, it would then be open to the plaintiff to appropriately amend the summons either based on the order granted by the court, or in terms of rule 28. Indeed, it is customary in joinder applications for the court to grant leave to all parties to the action to appropriately amend their pleadings after the joinder. The plaintiff can then also withdraw the action against the original defendant, if appropriate.

[23] In matters like the present, one of the issues often canvassed is whether the amendment sought involves correction of a mere misnomer, or whether it constitutes a substitution of a party with another party.

[24] Litigants often seek to elevate this distinction to a rule. However, there is no rule cast in stone in this regard. The applicable general question is whether the amendment will result in an injustice that cannot be cured, in which event the amendment will be refused. The question whether the error is a mere misnomer, or the amendment is a substitution, plays a

role in determining the possible prejudice. In *Tecmed (Pty) Ltd and Others v Nissho Iwai Corporation and Another* it was pointed out that a substitution carries a larger risk of prejudice or injustice, than the correction of a mere misnomer.

[25] The law reports abound with cases involving fine distinctions between misnomers and substitutions. The distinctions that were drawn were often rather artificial and incorrect, which is evidenced by the frequency of judicial criticism regarding previous findings. This is coupled with controversy regarding the consequences of the distinction between these concepts.

[26] The court expressed the view that the distinction between misnomers and substitutions has limited value in applications for amendments. A finding that the amendment of the defendant's citation is just the correction of a misnomer is entirely unhelpful to determine whether the correction of the citation will procedurally be fair or just. Any correction of a wrong defendant, regardless of how the mistake is described, will entail that a new party is brought before court. That being the case the focus must be on ensuring that the process followed is fair and just, as required by the Constitution.

[27] The difficulty facing the plaintiff in this matter is that MEDITERRANEAN, being named as the defendant, entered an appearance to defend, as it was entitled to do. Importantly, MSC did not enter an appearance to defend and is not represented in this action.

[28] Consequently, the circumstances in this case do not present an opportunity to make use of rule 28 to correct the mistake in the citation fairly. A notice of intention to amend cannot be served on MEDITERREANEAN's attorneys, nor on MSC who is not a party before the court. Such a procedure is simply inappropriate and will lead to gross injustice.

[29] Whilst the preferred outcome to this problem would usually be for the plaintiff to withdraw the action, in the judgment in *MEC for Safety and Security, Eastern Cape v Mtokwana* allowance was made for the possibility of an application for a joinder of the proposed new defendant.

[30] An appropriate procedure, which is compatible with the constitutional requirement of a fair hearing, and justice being done, and which will prevent an incurable injustice, would be for the plaintiff to either apply, on proper notice to MSC (by way of service by sheriff of the notice of motion), for the joinder or substitution of MSC, together with prayers for ancillary relief which may include leave to effect the appropriate amendment, or to do so in future.

[31] Accordingly, to grant the amendment under the circumstances of this case will be contrary to the fundamental principles of our law and will result in gross injustice. As pointed out by the Constitutional Court, the granting of an order without notice to MSC will also result in a *brutum fulmen*.

[32] Consequently, the court held that the amendment sought in this application cannot be granted and dismissed the application with costs.
