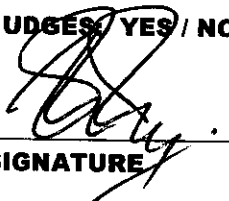




**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

(1) REPORTABLE: YES / NO	
(2) OF INTEREST TO OTHER JUDGES: YES / NO	
(3) REVISED	
<u>5/12/2014</u> DATE	 SIGNATURE

CASE NUMBER: 40956 /12

DATE: 19 ^{DEC} NOVEMBER 2014

ULTIMATE RAFT FOUNDATION DESIGN SOLUTIONS CC
T/A ULTIMATE RAFT DESIGN

FIRST APPLICANT
SECOND APPLICANT

✓

FOXLAKE INVESTMENTS (PTY) LTD
T/A FOXWAY DEVELOPMENTS (PTY) LTD

FIRST RESPONDENT
SECOND RESPONDENT

JUDGMENT

STRYDOM AJ:

Introductory remarks

[1] This is an interlocutory application in which the applicants (the plaintiffs in the main action) seek the following order:

1.1 Granting them leave to amend their particulars of claim as set out in the applicant's notice of intention to amend, dated 22 August 2013.¹

¹ See: Record, p 1, prayer 1 of the notice of motion; Annexure "V14", record p 114.

1.2 That the first respondent (first defendant in the main action) pays the cost of the application, alternatively that the costs of this application be costs in the cause.

[2] For ease of reference, the parties in this application shall be referred to as in the summons. The dispute between the parties that requires determination is whether or not the amendment sought by the plaintiff amounts to an impermissible substitution of the first defendant, or a mere correction of a misnomer.

Factual background

[3] The plaintiffs instituted an action against the first and second defendants on 13 July 2012 and *inter alia* cited the first defendant as:²

“4. Foxlake Investments (Pty) Ltd t/a Foxway Developments (Pty) Ltd, a company duly registered and incorporated in terms of the company laws of the republic of South Africa under registration number 1970/012838/07 with its principle place of ...”

[4] The plaintiffs further alleged that Foxlake Investments (Pty) Ltd t/a Foxway Developments (Pty) Ltd, entered into an agreement, annexure “UP1” to the plaintiffs’ particulars of claim, with the first defendant, in terms whereof the first defendant appointed the first plaintiffs as consulting engineer *“on the Boitekong Project”*.

² Although the original summons and particulars of claim was not on the court file, these facts are common cause between the parties.

[5] On 31 August 2012, the first defendant raised an exception to the plaintiff's particulars of claim, *inter alia* on the basis that:³

"2. Ex facie the content of the agreement, attached to the plaintiff's particulars of claim (Annexure "UP1"), the first defendant is not a party to the agreement as alleged."

3. Accordingly, no cause of action lies against the first defendant in that:

3.1 The contracting parties are reflected as the first plaintiff and Foxway Developments (Pty) Ltd;

3.2 Foxlake Investments (Pty) Ltd with registration number 1970/012838/07 is a separate legal entity that does not trade as Foxway Developments (Pty) Ltd;

3.3 Foxway Developments (Pty) Ltd with registration number 1968/006089/07 is a separate legal entity and is not a trading division of Foxlake Investments (Pty) Ltd."

[6] In answer to the exception the plaintiffs elected to amend paragraph 4 of their particulars of claim by substituting the word *"trading as"* with the word *"alternatively"* and by deleting the words *"under registration number 1970/012838/07"*.⁴

[7] The plaintiffs' particulars of claim would thus have read, once the amendment in respect of paragraph 4, was effected, as follows:

"The first respondent is Foxlake Investments (Pty) Ltd alternatively Foxway Developments (Pty) Ltd, a company duly registered and incorporated in terms of the company laws of the Republic of South Africa with its principle place of business ..."

³ See: Record p 28 and p 139, para 7.

⁴ See: Record p 34 and p 140.

[8] The plaintiffs, however, when the amended pages were served on the defendants, incorrectly prepared their amended pages and recorded paragraph 4 as follows:

“4. The first defendant is Fox Way Developments (Pty) Ltd alternatively Foxway Developments (Pty) Ltd, a company duly registered and incorporated in terms of the company laws of the Republic of South Africa with its principle place of business ...”

[9] The first defendant noted that the amended pages were not prepared in accordance with the plaintiffs’ notice of intention to amend and again filed an exception to the plaintiffs’ particulars of claim on the basis that:⁵

- “1. The plaintiffs have cited the first defendant as Foxlake Investments (Pty) Ltd alternatively Foxway Developments (Pty) Ltd.*
- 2. Foxlake Investments (Pty) Ltd with registration number 1970/0012838/07 is a private company with limited liability, duly registered and incorporated as such in terms of the company laws of the Republic of South Africa, a legal entity distinct from Foxway Developments (Pty) Ltd.*
- 3. Foxway Developments (Pty) Ltd with registration number 1968/006089/07 is a private company with limited liability, duly registered and incorporated as such in terms of the company laws of the Republic of South Africa, a legal entity distinct from Foxlake Investments (Pty) Ltd.*
- 4. The plaintiffs are attempting to introduce Foxway Developments (Pty) Ltd as a defendant to this action without having cited Foxway Developments (Pty) Ltd as a separate defendant.*
- 5 The plaintiffs have failed to comply with the provisions of Rule 17(4) of the Rules of this honourable court in that it has failed to cite Foxway Developments (Pty) Ltd as a party to the proceedings i.e. as*

⁵ See: Record p 74 and p 141.

a second defendant under the circumstances where Foxway Developments (Pty) Ltd is a legal entity distinct from Foxlake Investments (Pty) Ltd.

- 6 *As such, the plaintiff's particulars of claim are vague and embarrassing and the first defendant is embarrassed to plead thereto as it is unclear whether the first defendant is Foxlake Investments (Pty) Ltd or Foxway Developments (Pty) Ltd.*

Ad claim 1

Second ground of exception

7. *The plaintiffs allege in their particulars of claim that the first defendant i.e. Foxlake Investments (Pty) Ltd alternatively Foxway Developments (Pty) Ltd entered into an agreement with the first plaintiff in terms of which the first defendant has appointed the first plaintiff as consulting engineer on their Boitekong Project ("the agreement").*
8. *Ex facie the contents of the agreement attached to the plaintiffs' particulars of claim as annexure "UP1", Foxlake Investments (Pty) Ltd is not a party to the agreement.*
9. *Accordingly, the plaintiffs' particulars of claim are vague and embarrassing and the first defendant is embarrassed to plead thereto, as ex facie the content of annexure "UP1" it appears that Foxway Developments (Pty) Ltd contracted with the first defendant and not Foxlake Investments (Pty) Ltd under circumstances where Foxway Developments (Pty) Ltd, a separate legal entity is not cited as a defendant in the action."*

[10] The plaintiffs failed to remove the cause of complaint raised by the first defendant, but elected, prior to the exception having been enrolled for hearing, to amend their

particulars of claim *by deleting in paragraph 4* of their particulars of claim, the name “*Fox Way Developments (Pty) Ltd*” and the word “*alternatively*”.⁶

[11] After a further error by the plaintiffs, to correctly reflect the amendment, the plaintiffs finally on 20 August 2013 filed a notice of amendment in which notice they sought to amend paragraph 4 of their particulars claim, which at that stage read as follows:⁷

“4. The first defendant is Foxlake Investments (Pty) Ltd alternatively, Foxway Developments (Pty) Ltd a company duly registered and incorporated in terms of the company laws of the Republic of South Africa.”

[12] The amendment which the plaintiffs seek to their particulars of claim, is directed at the deletion of the words “*Foxlake Investments (Pty) Ltd alternatively*” from their summons and particulars of claim and thereby citing Foxway Developments (Pty) Ltd as the first defendant.⁸

The Plaintiffs argument

[13] The plaintiffs rely on the following facts and/or arguments in support of its application for amendment of its particulars of claim:

13.1 The summons in this matter was served on the shared registered address of Foxlake Investments (Pty) Ltd and Foxway Developments (Pty) Ltd;

13.2 Both the latter companies were initially named on the summons;

⁶ See: Record p 95 and p 143.

⁷ See: Record p 51.

⁸ See: Record p144, para 21.

13.3 The *domicilium citandi et executandi* of both the aforesaid companies are situated at the same address where the service of the plaintiff's particulars of claim occurred.

13.4 The aforesaid companies share the same contact details and the same receptionist and the same managing director.

[14] The plaintiffs submitted that the amendment they seek is a correction of a mere misnomer which kind of correction the courts granted on many occasions in the past. The error in citation of the first defendant in this matter, so was it further submitted, is a mistake, stemming from the attorney for the plaintiffs, who could not find the particulars of Foxway Developments (Pty) Ltd, despite having conducted a search for it. This argument is not convincing because the plaintiffs did not deem it fit to attach the record of the search of their attorney to their papers.

[15] It is clear from the plaintiffs founding papers that the mistake in the citation of the first defendant, which it now seeks to correct, was solely due to the plaintiff's attorney of record. The plaintiffs however went further and created the impression that the mistake of the plaintiff's attorney of record was partly due to the alleged fact that the two companies⁹ *"utilise their respective names interchangeable"* in a *"whimsical manner"*.¹⁰ The alleged conduct of the two companies ostensibly created confusion with the Plaintiffs attorney of record. The plaintiffs further indicated that Foxlake Investments (Pty) Ltd initially entered into negotiations with the Plaintiffs, which

⁹ Foxlake Investments (Pty) Ltd and Foxway Developments (Pty) Ltd.

¹⁰ See record p 13. par 16.4.

eventually lead to the agreement between the Plaintiffs and Foxway Developments (Pty) Ltd. This might have been the case, but it does not assist the Plaintiffs case at all. It is common cause between the parties that the contract was entered into between the Plaintiffs and Foxway Developments (Pty) Ltd. Secondly, it was indicated that the companies did business in such a manner that Foxway Developments (Pty) Ltd became the *alter ego* of Foxlake Investments (Pty) Ltd.¹¹ The plaintiffs relied in this regard on an alleged payment which Foxlake Investments (Pty) Ltd would have made on behalf of Foxway Developments (Pty) Ltd in summary judgment proceedings.¹² It is however clear from a close inspection of the document that payment was made from the account of Foxway Developments (Pty) Ltd. It follows that there is no merit in this argument either. The Plaintiffs are solely to be blamed for the predicament they find themselves in.

The first defendants objection

[16] The first defendant vehemently opposed the application for amendment. It was submitted on behalf of the first defendant that the effect of the proposed amendment would be to substitute one legal entity with another. This is not, so it was further submitted, as the plaintiffs contend, the correction of a mere misnomer.

[17] The first defendant's opposition is based on the premise that the plaintiffs, by the amendment, seeks substitution of one legal entity with another, under circumstances where Foxway Developments (Pty) Ltd has never been a party to the action and the

¹¹ See: Record p 14, par 18.

¹² See: Record, p 136.

claim against Foxway Developments (Pty) Ltd has already prescribed.¹³ The amendment does not seek, so the first defendant contends, the correction of a mere misnomer. The counsel for the first defendant submitted that:

- 17.1 The plaintiff instituted summons against Foxlake Investments (Pty) Ltd t/a Foxway Developments (Pty) Ltd, and;
- 17.2 Foxlake Investments (Pty) Ltd and Foxway Developments (Pty) Ltd are two separate and distinct legal entities;
- 17.3 Two separate and distinct legal entities cannot be cited as one defendant in an action;
- 17.4 Foxway Developments (Pty) Ltd was not cited as a defendant in the action distinct from Foxlake Investments (Pty) Ltd.

Principles governing amendments

[18] In deciding whether to grant or refuse an application for amendment, the court exercise a discretion, and in doing so, normally leans in favour of granting it in order to ensure that justice is done between the parties by allowing the real issues to be ventilated between them.¹⁴

[19] An amendment will normally not be granted by the court; if there will be prejudice to the other party, which cannot be cured by an appropriate cost order or a postponement.¹⁵

¹³ See: p145.

¹⁴ See: Commercial Union Assurance Co Ltd v Waymark NO 1995(2) SA 73(TkGD)

¹⁵ See: Cross v Ferreira 1950(3) SA 443 (C); Curtis v Mayer 1973(1) SA 363 (T)

[20] The court may permit a summons to be amended by the addition or substitution of a new party when this will involve no prejudice to the defendant.¹⁶

[21] It is clear from the authority, that there is a clear distinction to be drawn between substitution of a party and the amendment of a mere misnomer. Substitution of a party will as a general rule not be permitted were it will have the effect that a party will be deprived of a defence that the claim has prescribed.¹⁷

[22] In circumstances where one legal entity is substituted with another, the essential question is whether the service on the debtor of the summons, whereby the plaintiff claims payment of the debt, interrupted the running of prescription.¹⁸ It appears as if an amendment of an incorrectly named debtor is treated more lenient, for purposes of section 15(1) of the Prescription Act, 1969 (Act No. 68 of 1969), than amendment of an incorrectly named creditor.¹⁹

[23] Section 15(1) of the Prescription Act, 1969 sets three requirements for the interruption of Prescription: (1) There must be a legal process; (2) the process must have been served on the debtor, and (3) the creditor must claim payment of the debt by the said process.

¹⁶ Compare Trustees Africa Explosive Pension Fund v Near Hotel Properties (Pty) Ltd; Trustees Africa Explosive Pension Fund v Nestol 1961 (3) SA 245 (W)

¹⁷ See: Associated Paint and Chemicals Industries (Pty) Ltd t/a Albestra and Liqueurs v Smith 2000(2) SA 789 (SCA).

¹⁸ Compare: Associated Paint and Chemicals Industries (Pty) Ltd v Smith, *supra* at B798 para 17.

¹⁹ See: Blaauwberg Meat Wholesalers CC v Anglo Dutch Meats (Exports) Ltd [2004] 1 All SA 129 (SCA) at para 18

Prejudice due to prescription

[24] The plaintiffs described the first defendant, when it issued summons as *Foxlake Investments (Pty) Ltd t/a Foxway Developments (Pty) Ltd*. By definition the reference to “*t/a*”, refers to trading as, which in the context used by the plaintiffs indicates that Foxway Developments (Pty) Ltd is the trading name of Foxlake Investments (Pty) Ltd. The first defendant correctly objected that this citation amounts to a legal impossibility.

[25] It is *common cause* between the parties that the summons was served on the address used by both Foxlake Investments (Pty) Ltd and Foxway Developments (Pty) Ltd, and that the latter two companies shared a principle place of business, contact details and managing director, Mr. R Henry. A legal process was accordingly served on the offices of Foxway Developments (Pty) Ltd in which payment of a debt was claimed.

[26] Accordingly it appears as if the Plaintiffs met the requirements set by section 15(1) of the Prescription Act, 1969 when then summons was served, notwithstanding that the description of the defendant was *stricto iuris* a nullity. Due to my finding hereunder, I need not make a finding whether or not the service of the summons indeed interrupted prescription of the plaintiffs claim against Foxway Developments (Pty) Ltd.

The unopposed amendment

[27] It is common cause between the parties that the plaintiffs unopposed amended their particulars of claim by deleting the abbreviation “*1/a*” and replacing the same with the word “*alternative*”. The word “*alternatively*” by definition means “*a choice between two mutually exclusive possibilities*”.²⁰ This amendment made it clear that the plaintiffs intended that either Foxlake Investments (Pty) Ltd or Foxway Developments (Pty) Ltd is to be the first defendant in their claim. If any substitution of a defendant occurred, it came about when this amendment took place. It follows by necessary implication that the latter unopposed amendment, deprived the first defendant of the objection that the plaintiffs by the deletion of the words “*Foxlake Investments (Pty) Ltd alternatively*” from their summons and particulars of claim seek to introduce a new defendant, Foxway Developments (Pty) Ltd. The objection now raised should have been raised when the plaintiffs amended the particulars of claim to the latter extent. Put in another way, the objection to the amendment and the prejudice the first defendant indicates it will suffer, is foregone and belated, due to the earlier unopposed amendment.

Costs

[28] As I have indicated above, I find the reason for the mistake in the citation of the first defendant, advanced by the plaintiffs, as unconvincing. It is in my view indicative of gross negligence on the part of the plaintiff’s attorneys of record. The attempt of the

²⁰ See: The American Heritage Dictionary of the English Language, Fourth Edition. Copyright© 2004, 2000 by Houghton Mifflin Company.

plaintiffs' attorney to blame the two companies²¹ for the mistake he made is, to say the least, unfounded and misguided. The mere fact that the companies ostensibly do business as partners or undertake joint ventures do not warrant any negative inference.

[29] This is not a consideration to be taken into account when considering whether or not an amendment should be granted or not. It is trite that the parties should not be penalised by refusal of an amendment when it made an error in drafting of its pleadings.²²

[30] This is however an aspect that can, in my view, be taken in consideration in determining an appropriate cost order. Firstly a defendant should not be penalised for the negligent drafting by a plaintiff of its summons and particulars of claim. The objections and ultimate exceptions of the first defendant were in my view reasonable. Secondly, Rule 28(9) of the Uniforme Rules of the High Court provides that a party giving notice of amendment shall, unless the court otherwise directs, be liable for the cost thereby occasioned to any other party. The conduct of the Plaintiffs, in repetitive errors and blaming the relevant two companies for its own incompetence, militates that the plaintiffs should bear the costs occasioned by the amendment.

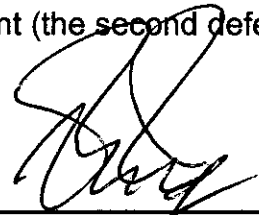
²¹ Foxlake Investments (Pty) Ltd and Foxway Developments (Pty) Ltd.

²² See: Springson v Common Wealth Trading Co Ltd; Mayo v Du Plessis 1948(1) SA 1165 (W) at 1168.

ORDER:

After having read the papers and having heard counsel for the parties; and in view of the above findings, the following order is made:

1. The applicants (plaintiffs in the main action) are granted leave to amend its particulars of claim as set out in the applicants' notice of intention to amend, dated 22 August 2013;
2. The applicants (plaintiffs in the main action) are ordered to pay the costs of the first respondent (first defendant in the main action) in opposing the application for amendment.
3. No cost order is made in respect of the second respondent (the second defendant in the main action).



J.S. STRYDOM
ACTING JUDGE OF THE HIGH COURT

Appearances:***Counsel for the Applicant:******Adv. Y Alli******Instructed by:******DM Kisch Inc.******Counsel for the respondent:******Adv. H Smit******Instructed by:******Cliffe Dekker Hofmeyer Inc.******Date Heard:******17 November 2014******Date of Judgment:******19 ^{Dec} November 2014***