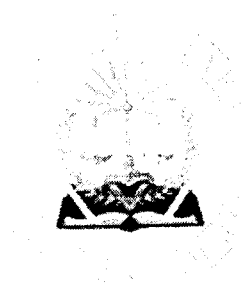


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

29/4/16

CASE NO: 69411/2014

- (1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED

29 APRIL 2016

FHØ VAN OOSTEN

In the matter between

MARTHINUS JOHANNES DE WET BOTHA

APPLICANT

and

SEIKO EPSON KABUSHIKI KAISHA
(t/a SEIKO EPSON CORPORATION)

RESPONDENT

J U D G M E N T

VAN OOSTEN J:

[1] This is an opposed application for the amendment of the applicant's combined summons and particulars of claim. The applicant (the plaintiff) gave notice of intention to amend in terms of rule 28. The proposed amendment in essence, was first, to correct the date of the dismissal of the defendant's infringement of intellectual property action against the plaintiff (the counterfeit action), second, the substitution of the plaintiff with a partnership known as Global Ventures, of which the applicant

and one Johannes Christoffel Greyling are alleged to be the partners, and third, the amount of the claim. The respondent (the defendant) filed a notice of intention of objection only in regard to the second proposed amendment, on the grounds:

'...that the plaintiff or applicant attempts, by way of amendment, to introduce another and different plaintiff, namely a partnership known as Global Ventures. Summons was served on 22 September 2014 and the present plaintiff, by seeking to be replaced by a partnership as plaintiff, is seeking to be replaced by a partnership as plaintiff, is seeking to avoid the running of prescription which would legally be considered to be interrupted only by service of a new summons reflecting particulars of the new plaintiff.'

The plaintiff accordingly duly amended the particulars of claim in respect of the first and third proposed amendments and launched the present application in respect of the second proposed amendment.

[2] The plaintiff instituted the action against the defendant on 16 September 2014. In the citation of the plaintiff it is alleged that the plaintiff 'at all times to this action' conducted business as 'a natural person under the name and style of Global Ventures'. The plaintiff conducted business in the import and sale of ink and toner cartridges for use in computer printers and electronic photocopy equipment. The defendant is a foreign business entity, registered in Japan and trading in South Africa. The defendant is the registered holder of the trademarks Epson, under two trade mark numbers, in terms of the Trademarks Act 194 of 1993. The plaintiff's main claim against the defendant is based on an alleged 'unlawful and intentional confiscation, retention or appropriation' of the plaintiff's property, caused by the defendant in lodging a criminal complaint against the plaintiff of contravening the Counterfeit Goods Act 37 of 1997. In consequence a search and seize warrant was authorised by the Magistrate in Klerksdorp at the behest of the South African Police Service, in the execution of which 2789 ink cartridges bearing the Epson trademark and the property of the plaintiff, were confiscated and removed. The defendant subsequently unlawfully appropriated the ink cartridges. As a result the plaintiff alleges having suffered damages in the sum of R9 794 993.00, which is made and computed as set out in an actuarial report which is attached to the particulars of claim (the actuarial report).

[3] The plaintiff's alternative claim is based on the outcome of an action for infringement of intellectual property rights instituted against him by the defendant in this court (the counterfeit action). The claim was dismissed on 7 December 2012. The plaintiff accordingly, in terms of s 13 of the Counterfeit Goods Act 37 of 1997 (the Counterfeit Act), claims payment by the defendant of the sum of R9 794 993.00, being compensation 'for any injury or prejudice caused to or suffered' by the plaintiff as a result of the steps taken by the defendant in the unsuccessful counterfeit action.

[4] In argument before this court the 'ground' upon which the defendant's notice of objection was founded, was wisely not persisted with. Instead counsel for the defendant attacked the bona fides of the plaintiff in seeking the amendment and further directed his argument to one objection which is that the amendment, if granted, would render the plaintiff's particulars of claim excipiable and cause prejudice to the defendant. I shall first deal with the first leg of the argument.

[5] The attack on the plaintiff's bona fides is premised on the ambivalence that now arises if regard is had to the way he described himself in the present action as well as in the counterfeit action. In the founding affidavit in this application the plaintiff states that he misdescribed himself in the summons and particulars of claim as a result of a bona fide mistake. The relevant part of the 'mistaken' description reads: 'At all times to this action the plaintiff conducted business as a natural person under the name and style of Global Ventures'. It has quite rightly been pointed out that the wording of the description specifically disavows a partnership. The same 'mistaken' description, in one instance that the plaintiff conducted business as a sole proprietor, repeatedly appears in the counterfeit action and moreover appears to have been confirmed under oath by the plaintiff when he gave evidence at the trial. Lastly, reference was made to the actuarial report containing a verbatim quotation of the plaintiff's instruction to the actuary, in which he clearly deals with the damages *he* has suffered resulting from a forced closure of Global Ventures.

[6] The plaintiff has not filed a replying affidavit in this application. No reason for such failure has been forthcoming. Nor has a confirmatory affidavit by the alleged co-partner been filed or is there any explanation before me for the absence thereof. Except for the plaintiff's bold statement that he had made a bona fide mistake in describing himself, not an iota of evidence exists that a partnership in fact existed. In

the consideration of this issue I am alive to the difficulty that lay persons experience in understanding, appreciating and describing the capacity in which they operate, in particular when they act in different capacities wearing more than one hat. But, this goes no further than speculation: had this been the difficulty here I would have expected the plaintiff to say so. He has not done so notwithstanding ample time and opportunity having been available to him to properly deal with this aspect, which was specifically, right from the outset, raised by the defendant. Indeed, to advance one step further: nothing to support the existence of a partnership has been advanced.

[7] Having considered all the facts I have thus far referred to, I am unable to uphold the challenge to the plaintiff's bona fides. However, the importance of the prior descriptions and the lack of any evidence concerning the existence of a partnership is this: sufficient doubt as to the existence of the partnership, as now alleged by the plaintiff, exists, which I am driven to conclude, in the exercise of my discretion, disentitles the plaintiff to the amendment sought.

[8] I turn now to the question whether the amendment, if allowed, would render the plaintiff's particulars of claim excipiable. It is accepted law that a court will not allow amendments where their effect would render such a pleading excipiable (*Erasmus Superior Court Practice* service1, 2016 D1-338) and, further, that in the event of a mere possibility of the pleading being rendered excipiable the more correct course would be to allow the amendment (*Crawford-Brunt v Kavnat and Another* 1967 (4) SA 308 (C) 310G).

[9] Applying the above principles to the facts before me the point of departure is to consider, first, the nature of the plaintiff's alternative claim which, as I have alluded to, is founded on s 13 of the Counterfeit Act. The plaintiff, notably in his personal capacity, was the successful respondent in the counterfeit action, and in that capacity becomes entitled to claim compensation in terms of s 13 as the 'erstwhile successful respondent'. The partnership did not feature in any way in these proceedings. This fundamental difficulty permeates into the plaintiff's main claim which is clearly for damages in his personal capacity. How the partnership can in any way be integrated into the allegations in the particulars of claim, to the exclusion of the plaintiff in his personal capacity, remains unanswered. The corollary to this of course, is the actuary's report, which, but for one vague reference to the assumption

made by the actuary in regard to the damages caused to the business as a whole, that the 'split between T Botha and JC Greyling will be handled by them', in all other respects contains an assessment of the quantum of damages the plaintiff, trading as Global Ventures, has sustained. Counsel for the applicant heavily relied on this reference as constituting proof of a partnership. I am unable to agree: it is at best an oblique pointer in that direction.


[10] In summary: on a conspectus of all the facts before me, any sustainable basis for the proposed amendment to substitute the plaintiff with the partnership, as the plaintiff, in the action, is simply lacking. The amendment would moreover, undoubtedly, render the plaintiff's particulars of claim excipiable, for the reasons I have dealt with. Even, at best for the applicant, if the mere possibility of excipiability is assumed, I would still be inclined to hold against the applicant because of the lack of evidence concerning the existence of the partnership.

[11] The outcome of this application may well eventually determine the fate of the action. That however, as rightly conceded by plaintiff's counsel, would not finally non-suit the plaintiff: prescription does not yet loom and the institution of fresh proceedings, hopefully this time after careful consideration as to who the correct plaintiff should be, remains alive.

[12] For all the above reasons the defendant's opposition to the application is well founded and must be upheld.

[13] In the result the following order is made:

1. The application is dismissed.
2. The respondent is ordered to pay the costs of the application such costs to include the costs consequent upon the employment of senior counsel.


FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

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ADV DA PREISS SC

RESPONDENT'S ATTORNEYS

ADAMS & ADAMS

DATE OF HEARING

26 APRIL 2016

DATE OF JUDGMENT

29 APRIL 2016