


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG SOUTH LOCAL DIVISION
PRETORIA

22/4/2016.

CASE NO: 2327/2005

(1)	REPORTABLE: YES / <u>NO</u>
(2)	OF INTEREST TO OTHER JUDGES: YES / <u>NO</u>
(3)	REVISED.
22/4/2016	
DATE	SIGNATURE

IN THE MATTER BETWEEN

J. E DE ABREU

1ST PLAINTIFF

J. A FERNANDES

2ND PLAINTIFF

And

PESTANA FAMILY MEAT & CHICKEN CC

1ST DEFENDANT

V. PESTANA

2ND DEFENDANT

J U D G M E N T

NKOSI, AJ:

1. This is an action where the 1st and the 2nd Plaintiff claimed payment in the amount of;

(a) R1500 000-00;

(b) Interests on such amount of 15, 5% p .a from date of summons to date of final payment;

(c) Payments in the amount of R630 000-00 (such lesser amount as the court may find);

(d) Interests in the foresaid amount of R630 000-00 at a rate of 15, 5% p .a from date of summons until date of final payment;

(e) Costs of suite and or alternative relief.

2. The action is defended and the Plaintiff later embarked on summary judgment proceedings, eventually leave to defend was granted.

3. The defendants were given an opportunity to serve and file their plea and all the process in terms of Rule 35 and 37 were followed.

4. A request for further particulars to the Defendant plea was served and filed which followed by the process in terms of Rule 37(4)

5. It must be mentioned that parties had been in court on various interlocutory processes proving that it is not a new matter under the same case number.

6. What is important for this opposed motion proceedings and worth mentioning is that despite various interlocutory process the action finally got underway .The Plaintiffs have led their evidence and their witnesses subjected to the necessary processes:

6.1 While it remains party-heard, the Plaintiffs brought an application to amend its particulars of claim which was objected to, during August 2011.

6.1.1 Amongst reasons furnished the Plaintiff's was that the amendment will properly ventilate the issues between the parties, It is based on the same debt, same cause of action, and there were details of the transaction are properly pleaded as they emerged from the evidence.

6.1.2 It was submitted that the possible prejudice, which the defendants may have suffered, have already been cured with costs award .That the Defendants will have an opportunity to file a consequential plea and will not suffer any further prejudice as a result of the amendment.

6.1.3 It was accordingly submitted that the amendment should be granted with costs as the opposition to the amendment is frivolous and vexatious.

7. The Defendant's objection, it was submitted was based on the introduction by the plaintiff of a new cause of action which bearing the knowledge thereof since 15 June 2005 and Plaintiff's seek to amend their pleadings after

extensive evidence in support of the Defendant's version of events canvassed at the partly –heard trial:

7.1 The Defendant's averred that the proposed amendment was based on introduction of a new cause of action which was said to have already prescribed.

7.2 Further submitted that the Plaintiff's seek to introduce a new cause of action based on a different agreement as a result of the extensive evidence led at trial.

7.3 It was further submitted that on the Plaintiff's version its right to be repaid a purchase price in terms of the written agreement arose on the 31st August 2004 has since prescribed on 31st August 2007 and that;

7.4 The Plaintiffs have failed to satisfactorily explain why such amendment should be granted at such late stage in the proceedings despite having knowledge of the agreement relied upon for roughly seven years.

8. It was further applicants submission that the Plaintiffs have not suffered any prejudice whatsoever and that there has not been any evidence by the Defendants and therefore no tailoring of any evidence:

8.1 The introduction of a special plea of prescription was occasioned by the amendments proposed by the plaintiffs and could not be seen to complain when they chose to introduce a cause of action described as prescribed.

9. CONSIDERATION FOR ALL SUBMISSIONS

9.1 Both parties referred to different decided cases and the unreported case which all deal with issues of amendment of pleadings. The difference between the use of Rule 28 and Rule 6 came to fore.

9.2 It is noteworthy that the Rules of court are there for the parties and to regulate the legal process but not to defeat the purpose of having a commenced trial to be brought on its natural end.

9.3 The primary purpose of allowing an amendment is to obtain a proper ventilation of the dispute between the parties to determine the real issues between them so that justice may not only be done but seen to be done.

9.4 The general approach is that amendments should be allowed unless the application is made in bad faith and would cause injustice which cannot be compensated by an order for costs. A court hearing an application for an amendment has discretion whether or not to grant it and such discretion must be exercised judicially.

9.5 The difference between the cases referred to is that this matter is party-heard where the Plaintiff had its cake but still wants to have it, which is a second bite on the same cherry. The proposed amendment attracted a response about prescription.

9.6 In my view, the Plaintiff proposed amendment of its particulars of claim and must allow the Defendants to raise a special plea on prescription and let the trial court finalise the partly-head matter with equal opportunities to both parties to be heard.

9.7 I could not find any mala fides on the part of the proposed amendment and I could not find any attempt to withdraw an admission by such an amendment.

Consequently upon the above, the court orders as follows:

(a) The amendment of the particulars of claim is allowed and the Defendant is equally offered an opportunity to raise its special plea or accordingly;

(b) That the partly-head matter be allowed to proceed to its natural end; and

(c) Costs be the costs in the course.



VRSN NKOSI
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION,(PRETORIA)

APPEARANCES:

FOR PLAINTIFF

ADV J.G DOBIE

INSTRUCTED BY

DU PLESSIS DEHEUS INC
C/O GILDENHUYS MALATJI INC

FOR DEFENDANT

ADV G. JACOBS

DAVID KOTZEN ATTORNEYS
C/O ANDRE RAE ATTORNEYS