



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>2016.07.29</u> DATE
<u>[Signature]</u> SIGNATURE

CASE NUMBER: 70477/09

DATE: 28 July 2016

MAGNUM SIMPLEX INTERNATIONAL (PTY) LTD

Applicant

V

THE MEC PROVINCIAL TREASURY, THE PROVINCIAL  
GOVERNMENT OF LIMPOPO

Respondent

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JUDGMENT

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MABUSE J:

- [1] This is an application by the defendant in terms of Rule 28(1) of the Uniform Rules of Court for leave to amend some of its counter claims against the plaintiff. This application is opposed.

Firstly, I will deal with the extent of the intended amendments and thereafter the grounds on which the plaintiff objects to the application.

[2] The applicant in this matter is a company registered with limited liability in terms of the company laws of this country with its principle place of business at 78A Biccard Street, Polokwane, in the province of Limpopo. It is the defendant in the main action between the parties. The respondent is MEC Provincial Treasury, the Provincial Government with its offices situated at Ismani Towers 46 Hans Van Rensburg Street, Polokwane, also in the Limpopo Province. The respondent in this application is the plaintiff in the aforementioned main action. For purposes of convenience I will, in this application, refer to the parties by the names they chose to call themselves in the main action.

[3] By the combined summons issued by the registrar of this Court on 17 November 2009, (I hope I am correct as the date stamp is somewhat indistinct), the plaintiff claims against the defendant the following relief:

- "1. An order declaring that the purported approval/exemptions in respect of NTP8419 and 8937 are invalid, void and ab initio and falls to be set aside;*
- 2. an order declaring that annexure 'B' is invalid, void ab initio and falls to be set aside;*
- 3. repayment of the amount of R98,486,141.00 less any amount lawfully paid to the defendant in terms of NTP6891;*
- 4. interest on the amount of R98,486,141.00 at the prescribed legal rate of interest per annum a tempore morae, alternatively from the date of the summons;*
- 5. costs of suit, such cost to include the cost occasioned by three counsel;*
- 6. further and/or alternative relief."*

- [4] The plaintiff's cause of action arises from a written contract comprising of several parts the principle parts of which consist of Project Management and the Licence Agreement. The said agreement, and this is common cause between the parties, was lawfully terminated on 6 October 2008. On the basis of the said agreement the Defendant launched 23 counterclaims against the plaintiff. It is some of these 23 counterclaims, in particular, counterclaims 4-6 and 8-22 that the defendant seeks to amend. Needless to say the plaintiff has delivered a notice of objection to the intended amendment.
- [5] As set out above, the defendant seeks to amend its counterclaims 4-6 and 8-22. In support of its application to amend the said counterclaims, the defendant relies for that purpose on the affidavit of a certain Thamoetharan Pillai Prahakaran ("Prahakaran"), an adult male director and its shareholder. In his motivation of the application, Prahakaran testified that the proposed amendment does not constitute a separate cause of action; that the defendant merely seeks to amend some of its counterclaims without introducing a new cause of action; that the new claims represent fresh quantifications of the original claims and an addition of further items of damages arising from the same cause of action and finally that the amendments consist of triable issues in which the defendant still has to lead evidence and which issues cannot be disposed of at a Rule 28 application.
- [6] Rule 28(3) of the Uniform Rules of Court states that an objection to a proposed amendment shall clearly and concisely state the grounds upon which the objection is founded. The plaintiff has complied with the provisions of the aforementioned sub-rule inasmuch it has, through the answering affidavit of one Perceival Raymond Theodore Rudman ("Rudman"), set out the grounds upon which it objects to the defendant's application to amend its counterclaims.

[7] The respondent has raised several grounds of objection against the application for leave to amend and these grounds are, among others that the new counterclaims:

- 7.1 are founded on an agreement that has been lawfully cancelled;
- 7.2 consist of claims that have been extinguished by prescription;
- 7.3 that there was an inordinate delay in launching them;
- 7.4 that the plaintiff will be prejudiced if they are allowed; and finally,
- 7.5 that the defendant acted mala fide by bringing the new counterclaims.

[8] Before turning to the grounds of objection it is, however, necessary to restate the applicable principles in the application such as the instant one. The onus is on the respondent to establish the objections it has raised. See in this regard *Levitan vs New Haven Holiday Enterprises CC 1991(2) SA 297 C at p 288 A* which dealt with an exception. The principle applicable to the ground of objection raised on exception applies in equal measures to the grounds of objection raised by the plaintiff in the instant application. In granting an amendment, the Court grants an indulgence. It exercises a discretion by leaning in favour of the applicant to ensure that justice between man and man prevails.

[9] It is only apposite at this stage that I contextualise the defendant's counterclaims so as to place the plaintiff's objection in a better perspective. In these contemplated counterclaims the defendant seeks to be paid or compensated for outstanding Annual Fees and interest accrued over the relevant periods. Such periods will become clear at a later stage when I deal with the individual counterclaims. It will also become clear why the plaintiff contends in particular that the counterclaims are based on an agreement that has been cancelled and furthermore why the plaintiff has taken a point that these counterclaims were launched a very long time after the contract was cancelled, in other words, why it contends that the contemplated counterclaims have become prescribed.

[10] In its 4<sup>th</sup> counterclaim, the defendant pleaded, in respect of its original claim 4, that it seeks Annual Licence and Supporting Fees for the remaining modules of Finest as per Schedule 3 for the period 14 May 2009 to 13 May 2010. In the contemplated amendment, the defendant intends deleting the date 13 May 2010 and replacing it with 13 May 2016 so that the counterclaim 4 reads as follows:

*“The Annual Licence and Support Fees for the remaining modules of Finest as per Schedule 3 for the period 14 May 2009 to 13 May 2016 have accrued and increased the amount claimed therein to R98,559,783.70.”*

[11] In counterclaim 5, the defendant seeks Annual Licence and Support Fees for the Procurement Module of Finest as per Schedule 1 for the period 1 December 2009 to 30 November 2010. The defendant intends amending the said claim by deleting the date 30 November 2010 and replacing it with the date 30 November 2016 so that the new claim 5 now reads as follows:

*“The Annual Licence and Support Fees for Procurement Module of Finest as per Schedule 1 for the period 1 December 2009 to 30 November 2016.”*

The amount claimed in the counterclaim, R1,392,331.36, would resultantly be increased to R12,622,274.14.

[12] In respect of the original counterclaim 6, the applicant seeks Annual Licence and Support Fees for the Assets Module of Finest as per Schedule 2 for the period commencing on 1 January 2010 to 31 December 2010. The defendant contemplates amending the original counterclaim 6 by deleting the date 31 December 2010 and replacing it with the date 31 December 2016 so that the new counterclaim 6 reads as follows:

*“The Annual Licence and Support Fees for Asset Module of Finest as per Schedule 2 for the period 1 January 2010 to 31 December 2016.”*

The original amount claimed in respect of the counterclaim R2,500,968.51 would also be automatically increased to R22,819,727.50.

- [13] In respect of counterclaim 8, which is a claim for interest payable as a result for the late payment of software fees for the supply and installation of the software in terms of Schedule 3, the defendant intends amending paragraph 137 of its original counterclaim so that the new paragraph 137 reads as follows:

*“In the premises, the plaintiff is liable to the defendant for payment of a sum of R3,675,064.42 plus interest at the rate of prime plus 2% which interest has accrued to R7,213,352.02 as at 31 January 2016 and thus an interest equivalent to the capital of R675,064.00 payable from the date of demand until date of payment, both dates inclusive.”*

- [14] Counterclaim 9 is in respect of interest payable as a result of late payment of fees for the supply and installation of the Supply Chain Management Module in terms of Schedule 3. The defendant contemplates replacing the amount of R1,739,742.99, wherever it appears in this counterclaim, with the amount of R3,430,474.01 and deleting the date 31 January 2010 and replacing it with the date 31 January 2016.

- [15] Counterclaim 10 is a claim for payment of interest as a result of the late payment of fees for the supply and installation of Interfaces in terms of Schedule 3. The purpose of this amendment is to delete the amount of R657,234.58 wherever it appears in this counterclaim and to replace it with the sum of R1,296,185.00. The amended counterclaim 10 will therefore read as follows:

*“In the premises the plaintiff is liable to the defendant in the sum of R1,296,185.00 plus interest at the rate of prime plus 2% from 31 January 2010 to date of final payment both dates inclusive.”*

- [16] In respect of counterclaim 11, which is also a claim for payment of interest as a result of late payment of Annual Licence and Support Fees in accordance with Schedule 1 for the period 1

December 2007 to 30 November 2008, the defendant contemplates amending the said claim by deleting the amount R125,790.78 and the date 31 January 2010 wherever they appear in this counterclaim and replacing them respectively with the amount R248,150.96 and the date 31 January 2016.

[17] The original counterclaim 12 is also a claim for payment of interest resulting from the late payment of Annual Licence and Support Fees in respect of Schedule 2 for the period 1 January 2008 to 31 December 2008. The purpose of the amendment in respect of counterclaim 12 is to delete both the amount R185,726.82 and the date 31 December 2008 and to replace them respectively with the amount R366,398.14 and the date 31 December 2016.

[18] Counterclaim 13 is also the same as claim 12 save that the fees payable were in respect of Schedule 3 and in respect of the original claim 13 the fees were for the period 14 May 2004 to 13 May 2005. With regards to this counterclaim, the defendant applies for leave to amend it by deleting the date 13 May 2005 and replacing it with 13 May 2016 and by furthermore deleting the amount R2,011,704.94 and replacing it with the amount R3,969,556.86, with the result that the interest payable will be reckoned from 14 May 2004 until 13 May 2016.

[19] Counterclaims 14, 15, 16, 17, 18, 19, 20, 21 and 22 are the same as counterclaim 13 except for the following crucial differences:

19.1 in respect of counterclaim 14 the original amount of R1,874,949.94 is deleted and replaced with the sum of R3,699,699.88 and by the insertion of the words "*calculated from 14 May 2005 until 13 May 2016*";

19.2 in respect of counterclaim 15 the purpose of the amendment is to delete the amount R973,763.17 and the date 31 January 2010 and replacing them respectively with the amount R1,924,458.86 and the date 31 January 2016;

19.3 in respect of counterclaim 16, which originally was for the period 14 May 2007 to 13 May 2008, the intention is to replace the date 13 May 2008 with the date 13 May 2016 and by inserting the following sentence after 13 May 2016:

*"The VAT exclusive of the capital amount is R7,496,128.78."*

and finally to delete the amount of R1,916,721.07 and replacing it with R8,511,078.52 and by inserting the sentence:

*"The capital amount on which interest is charged is R7,496,125.72";*

19.4 in respect of counterclaim 17, in which the original counterclaim was for the period 14 May 2008 to 13 May 2009 the purpose of the amendment is to extend the period from 14 May 2008 and by deleting 13 May 2009 to extend the period to 13 May 2016; to insert the following sentence:

*"The VAT exclusive of the capital amount is R8,475,241.25"*

by deleting the amount of R2,928,179.14 and replacing it with the amount of R15,181,102.26; by inserting the following words:

*"calculated from 13 May 2016";*

19.5 in respect of counterclaim 18, in which the original counterclaim was in respect of Schedule 1 for the period 1 December 2008 to 13 November 2009, the purpose of the amendment is to replace the date 13 November 2009 with the date 13 November 2016; by inserting:

*"The VAT exclusive of the capital amount is R1,095,375.39 after 30 November 2009"*

and by deleting the amount R221,654.28 and replacing it with the amount R1,652,674.61 and finally by the insertion of the words:

*"calculated from 13 November 2009 until 1 December 2016"*

The effect of the amendment will be that the said counterclaim 18 will, in addition, read as follows:

*"In the premises the plaintiff is liable to the defendant in the sum of R1,095,375.39";*



19.6 in respect of counterclaim 19 which in its original form was for fees in respect of Schedule 2 and for the period 1 January 2009 to 31 December 2009 the amendment applied for is for the deletion of the date 31 December 2009 wherever it appears in this counterclaim and to replace it with the date 31 December 2016; to insert the following words after 31 December 2016:

*"The VAT exclusive of the capital amount is R1,095,375.39";*

And by deleting the amount R359,291.39 wherever it appears in this counterclaim and replacing it with the amount R2,891,704.72 wherever it appears in the said counterclaim and by inserting:

*"calculated from 31 December 2009 until 31 December 2016."*

Part of the counterclaim will therefore read as follows:

*"In the premises the plaintiff is liable to the defendant in the sum of R1,967,349.94";*

19.7 the fees in counterclaim 20 were in respect of Schedule 3 and were for the period 14 May 2009 to 13 May 2010. The defendant seeks to amend this counterclaim so that it reflects 13 May 2016 instead of 13 May 2010 wherever these dates appear in the said counterclaim; by the introduction of the following paragraph in paragraph 203 of the counterclaim:

*"in terms of the licence agreement and annual licence and support fee for the schedule 3 is payable on 14 May each year in the present case the relevant period is between 14 May 2009 and 13 May 2016."*

Finally the amendment that is sought here is to delete the amount of R1,020,999.71 and to replace it with the amount of R40,123,272.62;

19.8 In respect of counterclaim 21 which originally was for the period 1 December 2009 to 30 November 2010 the purpose of the intended amendment is to:

1. delete the date 30 November 2010 and to replace it with the date 30 November 2016;

2. to amend paragraph 208 so that it reads as follows:

*"In terms of the licence agreement and annual licence and support fees for schedule 1 is payable on December of each year, in the present case the relevant period is between 1 December 2009 and 30 November 2016";*

3. by deleting the amount R41,696.00 and replacing it with the following amount R4,580,592.49;
4. by inserting certain words outlined in the table set out in the amendment; and
5. lastly, by the addition at paragraph 212, of the following words:

*"In the premises the plaintiff is liable to the defendant in the sum of R4,580,592.45"*

and finally by replacing the year 2010 with the year 2016;

19.9 In respect of counterclaim 22 which originally was for the period commencing on 1 January 2010 to 31 December 2010, the purpose of the amendment is to delete the date of 31 December 2010 and to replace it with the date 31 December 2016; to delete the amount of R36,105.98 and to replace it with the amount R7,961,910.33 and by inserting certain words and finally by amending paragraph 217 of the said counterclaim so that it reads as follows:

*"In the premises the plaintiff is liable to the defendant in the sum of R7,901,910.33";*, and

finally by deleting the date 31 January 2010 and to replace it with the date 31 January 2016.

[20] There are several other amendments sought by the defendant. Some of these are in respect of the dates on which original service fees were to be paid were extended, mostly to 31 December 2016, and others, are in respect of the amounts occasioned by the fees that were supposed to be paid, beyond 6 October 2008, the cancellation date.

[21] I now turn to deal with the specific objections raised by the plaintiff against the defendant's contemplated amendments.

THE PROPOSED AMENDMENTS CONSIST OF CLAIMS THAT HAVE BEEN EXTINGUISHED BY PRESCRIPTION

The plaintiff has raised prescription as a ground of objection against the contemplated amendment. It is contended by the plaintiff that the contemplated agreements are predicated on the enforcement of the aforementioned agreements; that claims 4, 5, 6 and 8 arise from the abovementioned two agreements; claims 9 and 10 arise from the Project Agreement; claims 11 to 21 are all based on the Licence Agreement whereas claim 23 is based on an unsigned Project Agreement. Each of these claims constitute, on its own, a separate claim all arising from the same root, but more importantly, different periods when they are due and enforceable but all of them with a different mathematical calculation applicable to them. Each of the claims for payment is based on a separate cause of action with its own accompanying period of prescription. This description of the periods of prescription is crucial. It was contended by counsel for the plaintiff the fact that in practice the amounts are claimed in a globular amount cannot deprive the debtor from asserting that parts of the amount are prescribed. According to Rudman it is deceptive for the defendant to describe the new counterclaim as being one for arrear annual fees or as claims founded on unjust enrichment. He contends furthermore that it is also misleading to have any regard to the plaintiff's plea in determining whether the contemplated amendments should be allowed.

[22] In particular its notice of objection, the plaintiff states that the claims which the defendant seeks to recover in claims 4, 5 and 6 arose on the anniversary dates set out therein namely 14 May 2009, 14 May 2010, 14 May 2011 and 14 May 2012 in respect of modules 3 and 1 December 2009, 1 December 2010 and 1 December 2011 in respect of module 1 and 1 January 2010, 1 January 2011, 1 January 2012 and 1 January 2013, have become extinguished by prescription.

The remaining claim for claims 4, 5 and 6 namely 14 May 2013, 14 May 2014 and 14 May 2015 and in respect of modules 3, 1 December 2013, 1 December 2014 and 1 December 2015 in respect of claim 5 for module 1 and 1 January 2014, 1 January 2015 and 1 January 2016 in respect of claim 6 for module 2 are by reason of the termination of a contract not recoverable as licence fees in terms of Schedule 1 and Schedule 2 as the duration period was a period stated to be purportedly until terminated as provided for in the respective Schedules. The termination of the contract destroyed the obligation to pay licence fees. Following upon the termination there could be no continuation of the obligation to pay licence fees. The defendant is only entitled to a damages claim properly assessed in accordance with law which is in any event not pleaded.

THE DEFENDANT'S PROPOSED COUNTERCLAIMS ARE BASED ON A CANCELLED AGREEMENT

[23] It is common cause between the parties that the agreement between the parties has been terminated. This is how the defendant pleaded termination of the parties' agreement in its plea:

*"83. On 10 September 2008 the defendant informed the plaintiff in writing that it was in breach of the agreement and called upon it to remedy the breach within 14(fourteen) days failing which it will terminate the agreement. A copy of the said letter is annexed hereto marked "MS113.*

*84. The plaintiff failed, refused and/or neglected to take steps to comply with the breach and the was lawfully terminated on or about 6 October 2008. A copy of the said letter is annexed hereto marked"MS114.*

*85. ALTERNATIVELY, the abovementioned conduct of the plaintiff amounts to repudiation of the contract. The defendant hereby accepts the repudiation of by the plaintiff and accordingly cancels the agreement."*

In essence when a contract has lawfully been terminated neither party may lawfully claim from the other of them performance based on the terms of the terminated agreement save in respect

of rights that have already accrued. When an agreement is terminated the primary rights and obligations flowing from such an agreement are immediately terminated, so that no party is obliged to perform and no party is entitled to claim performance from the other side based on the terminated agreement. Cancellation of an agreement is an unequivocal intimation by one party to the other party that he puts to a stop further performance of the contract. Thereby he puts to a stop his own future performance and also the future performance by the other party, which he cannot thereafter be required to accept. The defendant would not be entitled to claim from the plaintiff any service fee for Licence and Implementation on the basis of an agreement that has been cancelled. In the light of the defendant contention that the agreement has been lawfully cancelled, the defendant may not claim for licence fees or implementation fees in terms of the contract. The defendant ought seek for damages based either on delict or contract. Accordingly an amendment may not be granted if it will amount to an attempt to enforce rights or obligations from a non-existent agreement.

[24] Equally an amendment of a claim may not be granted if it will be met by a plea of prescription.

This principle was demonstrated by the Court in **De Klerk and Another v. Du Plessis and Others** 1995(2) SA 40 (TPD) which dealt with an exception. In the said authority the Court had the following to say at p.43I-J:

*“An amendment which would render a pleading excipiable should not be allowed, and that whether this was in fact so was a matter of law which should be decided by the Court hearing the application for the amendment. It follows that where there are conflicting decisions in different divisions on the point of law it would be incorrect to allow the amendment on the basis that it was eminently arguable.”*

Equally an amendment that may be met with a plea of prescription should not be allowed.

THERE HAS BEEN AN INORDINATE DELAY IN BRINGING THE CONTEMPLATED AMENDMENTS

[25] The plaintiff complains that there was a delay on the part of the defendant in bringing an application for amendment. It is contended by counsel for the plaintiff that although a delay on its own is not the sole determining factor, it is nevertheless one of the factors that a Court is entitled to take into consideration when it decides whether or not an application for amendment should be granted and in particular the timing of the application. The plaintiff opines that, especially if regard is had to the timing of the application to amend, if granted, the application will deprive the plaintiff of the opportunity to canvass the proposed amendments. He contends furthermore that granting the amendment may result in time-wasting because witnesses may have to be recalled or new witnesses may have to be called to testify.

[26] I am not certain as to whether the plaintiff raises this objection with some measure of certitude, considering firstly that a party that applies for an amendment does not have to explain any such delay in launching such an application and secondly considering the fact that such an application may be brought before or after close of the pleadings. Rule 28(8) authorises a Court to allow an amendment during the hearing at any stage before judgment is given upon such terms as to it deemed met. The question seems to be whether or not the other party will be prejudiced by a delayed application for amendment.

[27] The objection by the plaintiff is taken against the background that an application for amendment may be brought before or after the close of the pleadings. Rule 28(8) authorises a Court to allow an amendment during a hearing at any stage before judgment is given upon such terms as to it deemed met. In *Krogman v. Van Reenen* 1926 OPD at 194 the Court adopted the approach that the litigant asking for an amendment is in fact craving an indulgence and he must offer some explanation as to why he requires the amendment and more especially if the application for an

amendment is not timeously made some reasonably satisfactory account must be given for the delay. This is how De Villiers JP put it:

*“Even if the party applying for an amendment tenders to pay wasted costs and to consent to a postponement and to other conditions and terms which will avoid all direct prejudice to the other party as regards to his prospects of succeeding in the action, that will not entitle him to claim an amendment as of right, but he will have to show reasonable grounds; he must show, for instance, that the matter involved in the amendment is of such importance to justify him in putting the court and the other party to manifold inconveniences of a postponement and that the necessity for an amendment has through some reasonable cause, even if it be only a bona fide mistake, which would, I take it, be the maximum reasonable cause admissible in this connexion.”*

[28] In this matter there is no explanation as to why it is only now that the defendant seeks to bring such an amendment more than 5 years after it had lodged its original counterclaims and a little less than eight (8) years after the agreement was terminated. When there has been a delay in bringing an application for amendment, such an application should be refused if its granting would cause great inconvenience to the opposite party and a long delay in bringing the matter to finality. The duty is on the plaintiff to prove such great inconvenience. I am satisfied that the plaintiff has discharged the onus it carries on this aspect.

[29] The contention by counsel for the defendant that the new claims represent fresh quantifications of the original claims and, in addition, of further items of damages arising from the same cause of action is, in my view, simplistic. The new claims do not arise from the cause of action on which the original claims are based. Both the old claims and the new claims do not arise from a single source. The new claims would be met by a plea of prescription. To allow the introduction of a new cause of action which would have the effect of defeating the time within which an action is to be brought should be refused if it will cause prejudice to the other side. See in this regard *Trans*

African Insurance Co Ltd v Maluleke 1956(2) SA p. 273. The issues that the defendant wishes to introduce by these amendments have not been canvassed at the trial. The introduction the amendments will inevitably cause the plaintiff to recall its witnesses again, a costly exercise.

[30] In my view Mr Prabakaran's contention that the amendments consist of triable issues which cannot be resolved at a Rule 28 stage lacks merit, if regard is had to the fact that the parties may be sent back to prepare for another battle on the same points of prescription and cancellation of the agreement at a later stage. By this contention Mr Prahakaran is in fact saying that the plaintiff should not raise his objections to the intended amendment now but should rather allow them and wait for the plaintiff to plead accordingly thereafter. Nothing prevents the plaintiff from raising the objections at this stage. In fact in *De Klerk and Another v. Du Plessis and Others supra* the court had the following to say at p 43I-J:

*"Whether a pleading would or would not become excipiable is a matter of law which should be decided by the court hearing the application for amendment. It would be incorrect, in my view, to hold that it is arguable that the amendment would not render the pleading excipiable, allow it, and send the parties away to prepare for another battle on exception on the same point."*

My understanding of the above paragraph is that where a court deals with an application for amendment and an objection to the amendment is raised, the court should hear the objection and decide whether to uphold or dismiss it. A court should not allow the amendment, send the parties back to prepare for battle, with the hope that the same objection will be raised and dealt with at the pleading stage.

[31] The general approach of the courts in this country has always been to allow amendments where this could be done without causing prejudice to the other party. In *Moolman v. Estate Moolman and Another* 1927 CPD 27, Watermeyer J, as he then was, reflected this widely held view when he remarked that:



*“The practical rule adopted seems to be that amendments will always be allowed unless the application to amend is mala fide or unless such amendment would cause an injustice to the other side which cannot be compensated by cost, or in other words unless the parties cannot be put back for the purposes of justice in the same position as they were when the pleading which is sought to be amended is filed.”*

In this division which, and at the time was called the Transvaal Division, Wessels J adopted the same approach in the case of **MacDuff and Co. (in liquidation) v. Johannesburg Consolidated Investment Co., Ltd** 1923 T.P.D. 309 when he stated as follows:

*“My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting mala fide, so that by his blunder he had done some injury to his opponent which could not be compensated for by costs or otherwise.”*

And he continued as follows at p.310:

*“However and neglectful or careless may have been the first omission and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side; there is no justice if the other side can be compensated by costs.”*

[32] In the defendant's bundle of authorities was the case of **Cordier v Cordier 1984(4) SA 524 C.**

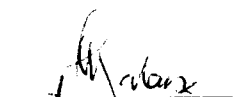
This was the case in which the plaintiff had sought leave to amend its pleadings but in which the defendant had raised an objection against the amendment on a ground, among others, that the claim had prescribed. The court, finding that the claim had indeed prescribed, took the view that prescription might not be the full answer to the plaintiff's claim. It stated that it might be plausible for the plaintiff to prove acknowledgement of liability by the defendant or a waiver of the defence by the defendant. The amendment was granted notwithstanding the objection based on prescription.

[33] This, in my view, is for three reasons not a plausible approach. Firstly, to say that it might be plausible for the plaintiff to prove acknowledgement of a liability by the defendant or waiver of the defence is to involve the court in speculation. A litigant must plead his case specifically so that the other party knows the case it has to meet. Secondly, the Court may not come to the assistance of the litigant, like in the case of *Cordier*, if he has not pleaded acknowledgements by the defendant of liability or waiver of the defence. Thirdly and lastly, prescription may be raised at any stage of the trial. A party does not have to wait for the court first to grant an amendment to the one party so that the other party should, or with the hope that the other party may, raise a special plea of prescription at a later stage and the issue may only be adjudicated upon only at that stage. The principle that the court should have followed was that an amendment that sought to introduce a claim which had become prescribed should not be allowed. I respectfully differ from the approach of the court in *Cordier v Cordier supra*. In my view, the court should not have ignored the objection that the new claim sought to introduce a claim that had become prescribed, no matter what the other reasons were.

[34] In so far as it concerns the instant matter, I am satisfied that the plaintiff's objections against the contemplated amendments are commendable.

[35] Accordingly:

[1] The applicant's application for leave to amend its counterclaims is hereby dismissed with costs, which costs shall include the costs consequent upon the employment of two counsel.



P.M. MABUSE

JUDGE OF THE HIGH COURT

Appearances:

Appearances:

*Counsel for the applicant:*

*Adv. P Mokoena (SC)*

*Adv. E Mokutu*

*Instructed by:*

*Attorneys*

*Counsel for the respondent:*

*Adv. D Gordon (SC)*

*Adv. J. Nxusani (SC)*

*Adv. HC Janse van Rensburg*

*Instructed by:*

*Attorneys*

*Date Heard:*

*8 February – 4 March 2016*

*Date of Judgment:*

*28 July 2016*