REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO
(3) REVISED: 24/8/2022

25/8/2022 _____
DATE SIGNATURE

CASE NUMBER: 26051/2011

In the matter between:

NEDBANK LTD **Plaintiff/Applicant**

and

CENTURION TOWNHOUSES (PTY) LTD **1st Defendant/1st Respondent**

MARTHINUS JOHANNES STRYDOM **2nd Defendant/2nd Respondent**

JUDGMENT

BEFORE: J Holland-Muter AJ:

[1] Every pleading must contain a clear and concise statement of the material facts upon which the pleader relies for his /her claim, defence or answer to any pleading, as the case may be. It must contain sufficient particularity to enable the opposite party to reply to it. See **Prins v University of Pretoria 1980 (2) SA 171 T at 174 G.**

[2] Instances may arise that may necessitate a party to amend an existing pleading for reasons advanced to justify such amendment. Without elaborating on when such need may arise, suffice to state that: *"The practical rule seems to be to allow such amendment unless the proposed amendment would cause an injustice to the other side which cannot be compensated by costs, or in other words unless the parties cannot be put back for the purpose of justice in the same position as they were when the pleading which it is sought to amend was filed"*. See **Moolman v Estate Moolman & Another 1927 CPD 27 at 29.**

[3] The primary object of proper pleadings is to allow a proper ventilation of the dispute between the parties and in justified instances the courts normally grant amendments to achieve above. See **Trans-Drakensberg Bank Ltd (under judicial management) v Combined Engineering (Pty) Ltd 1967 (3) SA 632 D at 637A-641 C.** A similar view was held in **Robinson v Randfontein Estates GM Co Ltd 1925 AD 173 at 198:** *"The object of pleading is to define issues and parties will be kept strictly to their pleas where any departure would cause prejudice or would prevent full inquiry. But within those limits the Court has a wide discretion. For pleadings are made for the Court, not the Court for pleadings"*.

[4] Although the general practice is to lean towards allowing amendments to pleadings, it does not mean that amendments are merely for the taking when asked. A litigant seeking an amendment should offer some explanation why he requires the indulgence sought. An unreasonable delay in bringing the request for an amendment may constitute sufficient reason to refuse the amendment sought. See **Trans-Drakensberg Bank Ltd supra at 641B-642.**

[5] In **Macduff & Co (in liquidation) v Johannesburg Consolidated Investments Co Ltd 1923 TPD 309** the court held that: *"My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting mala fide, or by his blunder, he has done some injury to his opponent which could not be compensated for by the costs or otherwise"* and *"However negligent 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 injustice if the other side can be compensated by costs".*

[6] The proposed amendment before this court concerns replacing an annexed limited suretyship signed by the 2nd respondent with an unlimited suretyship signed by the respondent in the same matter. The second amendment is in relation to the date (year) in Paragraph 3 of the particulars of claim to change the date from 26 November 2006 to 26 November 2003.

[7] The 2nd respondent raised the following objections to the proposed amendments:

7.1 Section 359 of the Companies Act, 61 of 1973 implies that the claim was *abandoned* upon liquidation of the first respondent (the principal debtor);

7.2 There was an inordinate delay in the litigation process;

7.3 The claim against the respondent has prescribed;

7.4 The application for amendment proposes the introduction of a new debt;

and

7.5 The amendment, if granted, will render the particulars of claim vague and embarrassing.

[8] Section 359 of the Act pertains to the suspension of civil proceedings against a company in liquidation (legal entities) until the appointment of a liquidator. The 2nd respondent is not a party to the liquidation or a legal entity. The provisions of section 359 are not applicable on natural persons and thus of no assistance for the 2nd respondent. The defence can only be raised by a legal person under liquidation. The 2nd respondent lacks the necessary *locus standi* to litigate on behalf of the 1st respondent.

[9] There is no indication that the 2nd respondent, a party to this litigation, has instituted any process in terms of the Uniform Rules of Court for the dismissal of the action due to any *inordinate delay*. The chronology time line as set out by Mr Roux is clear that the 2nd respondent was active in the ordinary litigation process. There has been discovery on behalf of the 2nd respondent, he participated in the pre-trial process and objected to the proposed amendments. He however remained silent on any inordinate delay of the process. In my view this ground of the objection is an afterthought and has no merit. The fact that the process was slowed down by the liquidation of the 1st respondent does not justify any reasonable submission that an inordinate delay has taken place. There is no mention of any objective prejudice suffered by the 2nd respondent due to the slow process. This argument cannot succeed.

[10] The third ground of the objection concerns the question of prescription. The effect of extinctive prescription is to extinguish a debt after the lapse of the period of time which applies in respect of that debt. See **Lipschitz v Deschamps Textiles GmbH 1978 (4) SA 427 C and Chapter III of the Prescription Act 68 of 1969.**

[11] As a general rule prescription commences to run as soon as the debt is due. In terms of section 12 (3) of the Act a debt is not deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises. It is deemed that a creditor is deemed to have such

knowledge if he could have acquired it by exercising reasonable care. The general period for debts to prescribe is three years unless differently provided for in the Act. In this matter the three year period is applicable. The summons was issued and served within time and the question now arises whether the amendment introduced a new cause of action. If not, prescription will not play any role.

[12] Prescription is delayed by various reasons as provided for in section 13 of the Act. The question is simple when did prescription start to run in this matter and was prescription interrupted as provided for in section 14 (b) of the Act by the service on the debtor (2nd respondent) of any process whereby payment was claimed of the debt by the applicant.

[13] Service of process is central to the question of prescription in this matter. Service of process is regulated by Rule 4 of the Uniform Rules of Court. It is a cornerstone of the legal process to ensure that a party is entitled to notice of process against the party. It is also known that not all service can be done in person and service by affixing in certain instances is accepted to constitute proper service. The objective of service is to ensure that a party has knowledge of the process. The date when a party obtains knowledge of process is normally the date which delays/interrupts the running of prescription.

[14] The contention here is whether service of process on the 2nd respondent was effective to delay/interrupt the running of prescription. The 2nd respondent relies on **First National Bank of SA v Ganyesa Bottle Store (Pty) Ltd 1989 (4) SA 565 NCD** that no effective service has taken place in this matter. On face value the return of service by the Sheriff seems to support this argument but when compared with **Investec Property Fund Limited v Viker X (Pty) Ltd [2016] JOL 36060 (GJ)** a distinction is drawn between procedural compliance of service requirements and what will constitute effective service.

[15] The 2nd respondent did not only enter a notice of intention to defend the matter but actively participated in the exchange of process all along. In the **Investic** matter the respondent filed an affidavit resisting summary judgment and it was held that there was no prejudice to the respondent resulting from the alleged defective service.

[16] In this matter the 2nd respondent actively participated in the exchange of process to an advanced stadium far beyond the mere filing of a notice of intention to defend. The 2nd respondent (via the plea filed on his behalf by his attorney of record) had full knowledge of the claim to defend and I am of the view that effective service has taken place interrupting the running of prescription. There can be no prejudice towards the 2nd respondent in accepting that effective service of process has taken place. The correct inference is that the 2nd respondent had the necessary knowledge about the process against him and that prescription was effectively interrupted. He exchanged process and participated in pre-trial procedures. His reliance on prescription to extinguish the action against him cannot succeed.

[17] The next objection to decide is whether a new cause of action was introduced by the proposed amendment. It is clear all along from the particulars of claim that the applicant's claim against the 2nd respondent was based on the unlimited suretyship signed by the 2nd respondent on 26 November 2003. The applicant annexed the incorrect limited suretyship, also signed by the 2nd respondent at first in favour of the plaintiff, but the 2nd respondent was aware of the unlimited suretyship from the beginning. He is not caught unaware of what he signed and by mere replacing the incorrect annexed suretyship with the correct suretyship does not introduce a new cause of action. The later proposed amendment of the date (year) in par 3 of the proposed amendment also only corrects the obvious typographic error in the particulars of claim. It is so that the particulars of claim is not a model as to how pleadings should be drafted.

[18] The procedure provided for in Rule 28 to amend pleadings to correct the negligence and carelessness demonstrated in the initial particulars of claim makes an amend of it possible. As set out above the amendment should not prejudice the other party but the applicant should be given the opportunity to amend its pleadings to ensure that the real dispute between the parties is before the court to adjudicate. In my view the 2nd respondent is not prejudiced at all by the proposed amendment and any "advantage" he may have had because of the at first incorrect particulars of claim (the limited suretyship and obvious wrong year-typographical error) ought to be corrected to do justice to both parties. Any prejudice he may have suffered can be compensated for by an appropriate cost order. I am of the view that no new cause of action is introduced by the amendment.

[19] The 2nd respondent has been participating in the pre-trial process and exchange of pleadings and should he be of the view that the amended particulars of claim be vague and embarrassing, the formal procedure to address that concern is to his disposal should he decide so. The amendment sought is to align the particulars of claim with the unlimited suretyship with regard to the date of signature and in my view it does not render the particulars of claim vague and embarrassing.

[20] The amendment will ensure that the pleadings reflect an accurate factual position which will ensure that a proper ventilation of issues can take place. The 2nd respondent will not be prejudiced at all because the amendment will bring the particulars of claim in line with the factual position of which the 2nd respondent ought to be aware.

[21] I am satisfied that the applicant has given a reasonable explanation to request the amendment and the 2nd respondent is not prejudiced should the amendment be allowed.

[22] The issue of the reserved costs orders by Neukircher J and Tolmay J on 8 February 2021 and 11 October 2021 respectively should in my view be adjudicated by the trial court after hearing the whole matter. It may be that at the hearing aspects be argued on the merits that will do justice to a particular party's view with regard to the necessity to amend and whether any opposition thereto was justified. A proper ventilation of the reason(s) for the reserved costs orders should take place and the trial court will be in the best position to determine on that aspect.

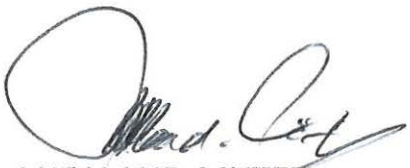
[23] Any amendment sought is in fact approaching the court for an indulgence and the general rule is that the party seeking the indulgence should pay the costs thereof. In this matter it is clear that there was some negligence on the part of the applicant's legal team when drafting the particulars of claim for annexing the incorrect suretyship and the inserting the incorrect date thereof. It would only be fair and just that the applicant be visited with the cost of the application to amend. There is no indication that the 2nd respondent's opposition was frivolous or mala fide. There is no reason to follow the ordinary rule in this regard and order the applicant to pay the costs of the application.

ORDER:

1. The applicant is hereby granted leave to amend its particulars of claim in accordance with the applicant's notice of motion of intention to amend dated 12 May 2022, and is ordered to deliver the amended pages within 10 days of this order; that paragraph 3 of the particulars of claim be amended to read *"26 November 2003"* and not *"26 November 2006"*.

2. The applicant is ordered to pay the costs of the application; and

3. The reserved costs on 8 February 2021 and 11 October 2021 be determined by the trial court in the main action.



J HOLLAND-MUTER

ACTING JUDGE OF THE PRETORIA HIGH COURT

25 August 2022

Matter heard on 10 August 2022 in open court.

Judgment delivered on 25 August 2022

(Judgment date deemed to be the date uploaded onto CaseLines)

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