

**IN THE CONSUMER AFFAIRS COURT FOR THE NORTH WEST PROVINCE  
HELD AT MMABATHO**

Case number: NW04/2017

In the matter between:-

**BHEKANI DLAMINI**

**PLAINTIFF**

And

**R. MOTORS**

**DEFENDANT**

**Coram:** J.Nkomo, P.Hlahane and K.Kgomongwe

**Heard:** 27 February 2018

**Delivered:** 07 March 2018

**Summary:** Application for joinder and amendment. Principles governing application for joinder of defendants by plaintiff: Joinder of 1<sup>st</sup> to 3<sup>rd</sup> defendants allowed. Principles governing application for amendment: Amendment allowed for Section 52 of Act 68 of 2008 read with section 79 Act 68 2008.

**JUDGMENT**

**J.Nkomo (P. Hlahane and K.Kgomongwe concurring)**

**Introduction**

[1] This is an application by the plaintiff for the amendment of the papers so as amend the citation of the defendant. The application also concerns the joining of Auto Sales Warehouse as a defendant in the matter. Lastly the plaintiff wishes to add a prayer in terms of which the conduct of the defendant in trading under a name other than appearing in his identity document be prohibited in terms of Section 52<sup>1</sup>. The current defendant which is R. Motors is opposing the application.

## **Background**

[2] On 9 August 2016 the plaintiff issued summons against R. Motors in the Magistrate's Court for the District of Matlosana. The defendant entered appearance to defend the matter. At a later stage a counterclaim was filed. It appears that at the time of the issuing of the summons, the plaintiff had also reported the same dispute against the defendant in the North West Provincial Consumer Affairs Court. This he had done on 6 October 2015.

[3] The matter served before this court on 15 August 2017. On this occasion the defendant rightfully raised the defense of *lis pendens*. Having listened to the arguments from both sides, the court came to amongst others the following conclusion that:

3.1 The plaintiff would be allowed to proceed with the matter in this court on the condition that he withdraws the matter in the magistrate's court for the district of Matlosana as held in Klerksdorp. This seems to have been done.

3.2 The pleadings that had been exchanged would proceed to be incorporated here in and be used as the founding and opposing papers in this matter.

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<sup>1</sup> Of the Consumer Protection Act 68 of 2008.

[4] On 25 January 2018 the plaintiff filed a substantive application in terms of which he now wishes to have the defendants in this matter appear as follows:-

4.1 Riedwan Gora T/A R. Motors- 1<sup>st</sup> defendant;

4.2 Auto Sales Warehouse duly represented by Z.M.Ismail- 2<sup>nd</sup> defendant.

[5] The wording of the application and the context seems to suggest a combination of an amendment of the particulars of claim, substitution and joinder of parties. This calls for the court to examine the requirements of each of the processes as we will do at the appropriate time in the judgement.

[6] It is not in dispute that R. Motors which trades at 4 Joe Slovo Street, Klerksdorp issued a cash sale receipt to the plaintiff on 18 February 2015. It is further not disputed that R. Motors is not a registered company. It is neither a juristic person nor is it a natural person. It is also indisputable that the plaintiff paid the amount of R 18 000.00 in favour of the ABSA bank account of R. Gora on 27 March 2015 as reflected in the proof of payment. The defendant denies that R.Gora is the account holder but does not disclose the right person. It is lastly not in dispute that the entity called Auto Sales Warehouse<sup>2</sup> conducts business from the same address as R. Motors. Mr. R. Gora denies that he at any stage traded as R. Motors. He is however silent about who the individual is that trades as R. Motors.

### **On the issue of joinder**

[7] Uniform Rule 10(3)<sup>3</sup> provides as follows:-

***“ Several defendants may be sued in one action either jointly, jointly and severally, separately or in the alternative, whenever the question arising between them or any of them and the plaintiff or any of the plaintiffs depends upon the determination of substantially the same***

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<sup>2</sup> Registration number 2015/145749/07.

<sup>3</sup> Rules Regulating the Conduct of Proceedings of the several Provincial and Local Divisions of the High Court of South Africa. These are commonly known as the High court Rules under the Supreme Court Act 59 of 1959.

***question of law or fact which, if such defendants were sued separately, would arise in each separate action”***

[8] It appears from the above dicta that there is nothing wrong in law in the plaintiff suing more than one defendant, provided that the question of law or facts to be decided upon would exist if the several defendants were tried individually. It is trite that the decision to allow an amendment or joinder is a discretionary one. The party seeking to amend or join parties needs to convince the court that the opposing party will not suffer prejudice should the amendment and or joinder be granted. Where there appears that there might be prejudice the court needs to check if such prejudice is not one which can be cured by way of a costs order<sup>4</sup>.

[9] The court needs to check if the proposed amendment and or joinder is not mala fide<sup>5</sup>. Consideration must also be given to the question of convenience in the administration of justice<sup>6</sup>. Lastly, it will also be a determining factor as to whether the party sought to be joined will be affected by the outcome of the matter. If the answer in this regard is in the affirmative then such party must participate in the proceedings.

### **On the issue of amendment**

[10] The decision to grant or to refuse an application to amend is a discretionary one on the part of a court. The consideration is one of prejudice. Where prejudice is proved by the opposing party, the court is enjoined to establish as to whether such prejudice cannot be cured by a postponement or an order as to costs<sup>7</sup>. In this regard the defendant submits that an amendment will result in the summons being excipiable.

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<sup>4</sup> See paragraph 4.2 on page 42 of the bundle of documents.

<sup>5</sup> Ibid.

<sup>6</sup> Crowden Products (Pty) Ltd V Gradwell (Pty) Ltd and Another 1959 (1) SA 231 (T).

<sup>7</sup> See H. Daniels 2002 *Becks Theory and Principles of Pleading in Civil Actions* 6<sup>th</sup> edition Butterworths Durban at page 182.

[11] The position is well described in *Trans Drakensberg Bank Ltd (under Judicial Management) v Combined Engineering (Pty) Ltd*<sup>8</sup> and *Another* where Carvey J stated as follows:-

***“Having already made his case in his pleadings, if he wishes to change or add to this he must explain the reason and show prima facie that he has something deserving of consideration, a triable issue, he cannot be allowed to harass his opponent by an amendment which has no foundation. He cannot place on record an issue for which he has no supporting evidence where evidence is required or save perhaps in exceptional circumstances, introduce an amendment which would make the pleading excipiable”***

[12] In the present case the defendant does not suggest that if the amendment is allowed the plaintiff will not be able to produce evidence in support of the amendment. In the view of the court the amendment seeks to bring all issues to the table for an all-inclusive decision by the court.

[13] The writer Herbstein & Van Winsen in *Civil Practice of the High Court*<sup>9</sup> comments as follows on the issue of the excipiability that may arise:

***“An amendment should be refused on the ground of excipiability only if it is clear that the amended pleading will (not may) be excipiable (see *Krische v Road Accident Fund 2004 (4) SA 358 (W)*). If the excipiability of the pleading is merely arguable or can be cured by the furnishing of particulars then it is proper to grant the amendment where the other considerations are favourable. It will be left to the aggrieved party to file the exception if he so wishes”***

[14] In my view this is a case where the joinder of further parties and amendment should be allowed so as to ventilate all the issues between the parties and to bring finality to the matter.

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<sup>8</sup> 1967 (2) SA 632 (D) at 641A.

<sup>9</sup> 5<sup>th</sup> Edition at page 683 .

[15] Therefore, the following order is made:

1. The first defendant is to reflect as R.Gora t/a R. Motors.
2. Mr. R. Gora is added as a second defendant in the matter.
3. Auto Sales Warehouse (Pty) Ltd (Registration number 2015/145749/07) is added as a third defendant in the matter.
4. The plaintiff is granted leave to amend its papers to include a prayer for an order in terms of section 52 of Act 68 of 2008 in terms of which the defendants are ordered to cease and desist from trading in the name of R. Motors in contravention of section 79 of Act 68 of 2008.
5. The plaintiff is given leave of 10 (ten) days within which to file its amended papers.
6. The defendants will have 10 (ten) days (from the date of being served with the amended papers as per order number 5 above) within which to file exceptions, pleas or amended plea.
7. The issue of costs occasioned by the amendment is reserved to be argued at the end of the main case.

Dated at Mmabatho on this the 6<sup>th</sup> day of March 2018.

John Nkomo  
Chairperson

FOR THE PLAINTIF: MR.LETSOGO

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