IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.
(3) REVISED.
6/8/12
DATE SIGNATURE

Case number 9638/07

7/8/2012

In the matter between:

SOLENTA AVIATION WORKSHOPS (PTY) LTD **PLAINTIFF**

and

AVIATION @ WORK (PTY) LIMITED **DEFENDANT**

JUDGMENT

J.W LOUW, J:

[1] On 15 March 2007, the plaintiff ("Workshops") caused a summons to be served on the defendant in which it is alleged that it had leased a certain Cessna aircraft to the defendant in terms of a written lease agreement. The plaintiff claims

payment of damages as a result of the defendant's operation of the aircraft on 13 May 2006 in an alleged breach of its obligation in terms of the agreement to properly maintain the aircraft, as a result of which it is alleged that the plaintiff had to incur certain repair costs. A copy of the lease agreement is annexed to the plaintiff's particulars of claim as an annexure. *Ex facie* the agreement, Solenta Aviation (Pty) Ltd ("Aviation"), and not Workshops, is the lessor of the aircraft.

[2] On 18 August 2009, Workshops served and filed a notice of intention to amend its pleadings by deleting the word "Workshops" where it appeared in the summons and in the particulars of claim. The defendant objected to the proposed amendment on the ground that Workshops and Aviation were two separate companies, that the proposed amendment was an attempt to substitute one plaintiff with another and that, because the amendment was being sought more than three years after the date on which the cause of action allegedly arose, the claim which Aviation wished to enforce had become prescribed.

[3] The amendment application was argued before Potterill J on 31 March 2010. She held that the identity of a creditor claiming payment does not only depend on its name, that the true identity of the plaintiff could be ascertained from the contract attached to the particulars of claim, that the defendant knew the true identity of the plaintiff and that the citation of the plaintiff was therefore a misnomer. On page 5 of the judgment she said the following:

> *"I am thus satisfied that the citation of a* (sic) *creditor can be ascertained from the summons in conjunction with the contract and the summons did in terms of Section 15(1) of the Prescription Act interrupt prescription."*

The amendment sought was accordingly granted.

[4] The defendant thereafter amended its plea to introduce a special plea that Workshops was not a creditor of the defendant when the action was instituted, that a period of more than three years had elapsed from the date of the alleged breach of the agreement until Aviation was substituted as plaintiff, that the summons served on the defendant did not amount to a process whereby the creditor of the defendant (Aviation) claimed payment of the alleged debt and that, accordingly, the running of prescription in respect of the alleged debt was not interrupted by the service of the summons as contemplated in s. 15(2) of the Prescription Act, 68 of 1969. The reference to s. 15(2) should obviously have been to s. 15(1).

[5] Aviation thereafter filed a replication in which it admitted that Aviation and Workshops were two separate companies and that Workshops was not a creditor of the defendant at the time when the action was instituted. It pleaded that the summons conveyed to the reader the intention of Aviation, the creditor, to claim payment from the defendant, its debtor, and that the court had held that Aviation

was not a substituted party in the action and had determined that prescription had been interrupted by the service of the summons. It further pleaded that the issue raised in the defendant's special plea was identical to the issue determined by the court when dismissing the defendant's objection to the plaintiff's proposed amendment and that the defendant was accordingly, in addition, issue estopped on the issue raised in the special plea.

[5] The first question to be decided is whether the defendant is "issue" estopped from raising its special plea of prescription, i.e. whether that issue is *res judicata*. In *Blaauwberg Meat wholesalers CC v Anglo Dutch Meat (Exports) Ltd*[1] the circumstances were very similar to the present matter. The facts are set out in the judgment of the Supreme Court of Appeal. On 12 April 1996 a summons was served on the appellant in which Anglo-Dutch Meats (UK) Ltd claimed payment of the price of beef sold and delivered by it to the appellant during March to June 1995, the last due date for payment being 23 August 1995. During November 1998, the plaintiff's legal representatives became aware that the seller of the meat had been Anglo-Dutch Meats (Exports) Ltd (the Respondent). An application was brought to amend the citation of the plaintiff to reflect the true position. The appellant opposed the application, but Cleaver J granted the relief, holding that the plaintiff had been wrongly described. He found that prescription *'will not be a consideration if the amendment is granted on the basis that the plaintiff was incorrectly described or that the description of the plaintiff amounted*

---

1 2004 (3) SA 160 (SCA)

to a misnomer, for in such event the service of the summons on the defendant will have interrupted prescription'.[2]

[6] The appellant then raised a special plea of prescription against the respondent's claim. The trial proceeded before Hodes AJ. He ruled that he was entitled to reconsider the application for the amendment of the citation of the plaintiff and concluded that Cleaver J had been clearly wrong in granting the amendment because the summons did not constitute a process whereby the creditor claimed payment of the debt and that the running of prescription had therefore not been interrupted by service of the summons. He therefore upheld the special plea of prescription.

[7] The respondent then appealed to the Full Court, which found that Hodes AJ had been wrong and accordingly upheld the appeal. The Full court, whose judgment is reported at 2002 CLR 292 (C)[3], considered the question whether the finding by Cleaver J had been binding on Hodes AJ[4] and concluded that he was not so bound. The Court said the following:

> "*[17] An order granting an amendment of a pleading would, under normal circumstances, be interlocutory unless it can be shown that it is final in nature in that it wholly or partially disposes of an issue in the main action. In the present matter the amendment granted by Cleaver J did not have the effect of disposing of any issue in the main action. It likewise did not cause the defendant irreparable prejudice by depriving him of a special*

---

2 This passage of the judgment of Cleaver J is quoted in para. [4] of the judgment of the SCA.
3 Also at [200] JOL 9908 (C)
4 See paras. [13] to [20] of the judgment.

plea of prescription, or by anticipating or precluding any relief anticipated in the particulars of claim. On the contrary, as mentioned before (par 6 above), if in fact the amendment introduced a new legal persona, as alleged by the defendant, it furnished him with such a plea for the first time.

[18] It must be remembered, of course, that Hodes AJ was not considering an appeal against the decision of Cleaver AJ, but was dealing with a special plea of prescription raised for the first time after Cleaver J had granted the amendment. As such, I believe, he was at large to consider afresh the effect of the amendment for purposes of assessing whether or not it had merely corrected a misnomer or had indeed introduced a new plaintiff. In accordance with the authorities cited above, he would in fact have been empowered to vary or set aside the amendment (par 13 above). .....

[19] At the stage Cleaver J considered the application for amendment, prescription had not yet been pleaded and was at most a potential defence that could be raised at some future time. The facts and circumstances relevant to a plea of prescription could differ substantially from those before the court at the time of considering only the amendment. And even if they should remain the same, the trial court could, conceivably, approach their meaning, ambit and interpretation from a totally different perspective. That is why a court may be reluctant to consider such a potential defence before it has been pleaded. The defendant is certainly not precluded from raising it after the amendment has been granted and can hence not submit that he has been prejudiced."

[8] The Full court then proceeded to enquire whether the amendment corrected a misnomer or whether it introduced a new plaintiff.[5] It concluded that the finding of Hodes AJ was wrong and that the incorrect citation of the plaintiff was a

---

[5] Paras [20] to [47] of the judgment.

misnomer and dismissed the special plea of prescription. This finding was overturned on appeal by the defendant to the Supreme Court of Appeal. I referred above to the judgment of the Supreme Court of Appeal. Although the appeal succeeded, the court did not question the correctness of the finding of the Full Bench that Hodes AJ had not been bound by the decision of Cleaver J and that he was entitled to reconsider whether or not the citation of the plaintiff was a misnomer and whether or not the plaintiff's claim had become prescribed.

[9] I am in respectful agreement with the above findings by the Full Court. An application for amendment is an interlocutory application. Any findings of fact made in such application will not bind a subsequent court unless such finding can be said to finally dispose of an issue in the action between the parties. The finding of Potterill J is not such a finding. It follows that the defendant was entitled to raise a special plea of prescription after the amendment was granted and that the plaintiff's plea of issue estoppel or res judicata must be dismissed.

[10] I therefore proceed to consider whether or not the plaintiff's claim had become prescribed by the time the amendment was granted. Section 15(2) of the Prescription Act, 68 of 1969, provides that the running of prescription shall be interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt. The question therefore is whether the summons which was served on the defendant was a process whereby Aviation claimed payment of the debt.

[11] The Supreme court of Appeal in *Blaauwberg* was critical of the Full Court for not considering whether a difference in approach was called for between applications for amendment of pleadings and the determination of whether there has been compliance with a statutory provision such as s. 15(1) of the Prescription Act,[6] and said the following in paragraphs [12] to [14] of the judgment:

> *[12] ..... Amendments are regulated by a wide and general discretion which leans towards the proper ventilation of disputes and are granted according to a body of rules developed in that context. Whether there has been compliance with a statutory injunction depends upon the application of principles wholly unrelated to the rules just mentioned and without the exercise of a discretion.....*
>
> *[13] For obvious practical reasons the Legislator ordained certainty about when and how the running of prescription is interrupted. That certainty is important to both debtors and creditors. It chose an objective outward manifestation of the creditor's intentions, viz the service on the debtor of a process in which the creditor claims payment of the debt. That is not a standard which allows for reservations of mind or reliance on intentions which are not reasonably ascertainable from the process itself. Nor does it, as a general rule, let in, in a supplementation of an alleged compliance with s 15(1), the subjective knowledge of either party not derived from the process .....*
>
> *[14] Applying these considerations to the facts of the case, the question which requires answering is 'Was summons served on the defendant before prescription in which the creditor which asked for judgment, viz*

---

[6] See para [12] of the judgment

Exports, claimed payment?' That there was no exact compliance is beyond dispute, because the original plaintiff was not the creditor and did not seek judgment. Of course the identity of a creditor does not depend only on its name. Place of residence or business, registered office, occupation or nature of business, details of some or all of which one would expect to find in a process, may also serve to establish identity or clarify an ambiguous or incorrectly stated name. (There may be other indicators, such as a previous name of a company, company registration details or an identity number, which are sometimes encountered.) In the present instance, however, the only possibly pertinent details in the summons are that UK was

> *'a company with limited liability registered in accordance with the laws of England with registered office at Arkwright Road, Highfield Industrial Estate, Eastbourne, East Sussex, United Kingdom'.*

When Exports was later introduced into the summons exactly the same description was applied to it. Of itself that is insufficient to assist Exports. The fact remains that the summons failed entirely to communicate to it the intention of Exports to claim payment. The summons did not, therefore, achieve the objects of s 15(1) and was not effective to interrupt prescription."

[12] In my respectful view, the facts of the present matter cannot, in principle, be distinguished from the facts in *Blaauberg*. The summons is not, objectively, a process in which Aviation claims payment of the debt from the defendant. To allow the reference in the declaration to the lease agreement concluded between Aviation and the defendant to supplement the description of the

plaintiff in the summons would be to introduce the subjective knowledge of the parties which is not derived from the process, i.e. the summons. What is more, the declaration is not a process as contemplated by s. 15(1) of the Prescription Act. The fact that the defendant admitted in its plea that it had concluded the lease agreement with Aviation does not avail Aviation because it did not bring about an automatic substitution of one plaintiff for another.[7] As in *Blaauwberg*, the summons failed to communicate to the defendant the intention of Aviation to claim payment and did therefore not achieve the objects of s. 15(1) of the Act. It therefore did not interrupt prescription.

[13] It follows that Aviation's claim against the defendant had become prescribed at the time when the amendment was allowed. The claim is accordingly dismissed with costs, such costs to include the costs of two counsel.

Plaintiff's counsel:	Adv. D. Vetten
Defendant's counsel:	Adv. M.C. Erasmus SC Adv. N.C. Hartman

[7] See Associated Paint & Chemical Industries (Pty Ltd t/a Albestra Paints and Lacquers v Smit 2000 (2) SA 789 (SCA) paras [5] – [6]; Dischem Pharmacies (Pty) Ltd t/a Mondeor Pharmacy v United Pharmaceutical Distributors (Pty Ltd t/a UPD Lea Glen, 2004 (2) SA 166 (W), para [8]

Plaintiff's attorneys:	Darryl Furman & Associates Johannesburg Ref: D. Furman
Defendant's attorneys:	Mathys Krog Attorneys Pretoria Ref: M. Krog