



IN THE NORTH GAUTENG HIGH COURT, PRETORIA

[REPUBLIC OF SOUTH AFRICA]

- (1) REPORTABLE: YES / NO  
(2) OF INTEREST TO OTHER JUDGES: YES/NO  
(3) REVISED.

11 / 08 / 2017  
DATE

  
SIGNATURE

CASE NO.: 14174/2013

In the matter between:

VICTOR MUEL FERREIRA GRAVATO N.O.

FIRST PLAINTIFF

JACOLIEN FRIEDA JANSE VAN RENSBURG N.O.

SECOND PLAINTIFF

JAYAYANT DAJI PEMA N.O.

THIRD PLAINTIFF

And

MARLIZE DE WET

DEFENDANT

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JUDGMENT

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MAVUNDLA, J.

- [1] The plaintiffs sought an amendment to their particulars of claim. The defendant has objected and opposed the said amendment application.
- [2] The opposition to the amendment is that it seeks to create an entirely new cause of action. On the Plaintiffs version, its right to be repaid the purchase price in terms of the agreements (which it now seeks to rely upon), arose on 31 August 2004. The Plaintiffs' amendment was only served on 31 March 2011. The plaintiffs' cause of action / claim on the new agreement which they seek to rely upon has therefore prescribed on 31 August 2007, so it was submitted on behalf of the defendant. The proposed amendment will therefore be of no consequence as the claim based on the proposed amendment has prescribed. It was submitted that, the defendant would be prejudiced in the conduct of his case by the amendment which is brought at a late stage after the plaintiffs have already led extensive evidence at the trial proceedings. The plaintiffs have been dilatory in the prosecuting of this action and seeking an amendment at this late stage of the proceedings after having been in possession of the defendant's plea since June 2005, relying, *inter alia*, on *Minister van Polisie v Kaatz* 1979 (3) SA 490 at 512E-H(sic) the citation of which is seemingly incorrect; *Gollach & Gomperts v Universal Mills & Produce*<sup>1</sup>. It was further submitted that the amendment will prejudice the defendant in that it would resuscitate a claim which has already prescribed.

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<sup>1</sup>1978 (1) SA 914 (A) at 928D.

[3] The granting or refusal of an amendment is a matter of the discretion of the Court, exercised judicially<sup>2</sup>; vide *Amond v SA Mutual Fire & General Insurance Co.*<sup>3</sup> The Court, in the exercise of its discretion, may grant or refuse a party leave to amend its pleading at any stage before the grant of judgment, or even on appeal; vide *Berllairs v Hodnett and Another.*<sup>4</sup>

[4] In the matter of *Affordable Medices Trust v Minister of Health* 2006 (3) SA 247 at 261 247 p261C-D Ngcobo J (as he then was) held that:

“ [9] The principles governing the granting or refusal of an amendment have been set out in a number of cases. There is a useful collection of these cases and the governing principles in *Commercial Union Assurance Co Ltd v Waymark NO*<sup>5</sup>. The practical rule that emerges from these cases is that amendments will always be allowed unless the amendment is *mala fide* (made in bad faith) or unless the amendment will cause an injustice to the other side which cannot be cured by an appropriate order for costs, or 'unless the parties cannot be put back for the purposes of justice in the same position as they were when the pleading which it is sought to amend was filed'<sup>6</sup>. These principles apply equally to a notice of motion. The question in each case, therefore, is, what do the interests of justice demand?”

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<sup>2</sup> Vide *Gollach & Gomperts (1967) (Pty) Ltd v Universal Mills & Produce Co (Pty) supra* at 928D.

<sup>3</sup> 1971 (2) SA 611 (NPD) at 614A.T.

<sup>4</sup> 1978 (1) AD at 1150F-1151A.

<sup>5</sup> 1995 (2) SA 73 (Tk) at 76D-76I; vide also *Caxton Ltd and Others v Reeve Forman (Pty) Ltd and Another* (3) SA 547 (A) at 565G-566A.

<sup>6</sup> See also *Moolman v Estate Moolman and Another* 1927 CPD 27 at 29.



- [5] In the matter of *Evins v Shield Insurance Co Ltd*<sup>7</sup> the Court of Appeal held that:

*"Where the plaintiff seeks by way of amendment to augment his claim for damages, he will be precluded from doing so by prescription if the new claim is based upon new causes and the relevant prescriptive period has run, but not if it was part and parcel of the original cause of action and merely represents a fresh quantification of the original claim or the addition of a further item of damages."*

- [6] The delay in bringing an application for amendments is no reason for refusal to grant the amendment; *vide Caxton Ltd and Others v Reeva Forman (Pty) Ltd and Another*<sup>8</sup>. Allowing the amendment, belated as it may, will not prejudice the Defendant, in my view, because he would still have an opportunity to file his consequential claim, and if so advised, raise the special plea, which can be properly adjudicated upon by the Court before whom the matter is already part heard. In this regard it needs mention that until the amendment is granted, it does not form part of the pleadings; *vide Miller v H. L. Shippel & Co. (Pty) Ltd*.<sup>9</sup> Consequently a special plea of prescription cannot be raised outside the pleadings.

- [7] It is trite that the purpose of the pleadings is to ventilate the real issues between the parties; *Middleton v Carr*.<sup>10</sup> All necessary and material facts must be placed before the Court to enable it to decide and resolve the issues of dispute; *vide Collen v Rietfontein Engineering Works*,<sup>11</sup> where the Court held that: "This court, therefore, has before it all materials (sic) on which it is able to form an opinion, and this the position it would be idle for it not to determine the real issues which emerged during the course of the trial."

<sup>7</sup> 1980 (2) SA 814 (A) at 836.

<sup>8</sup> 1990 (3) SA 547 (AD) at 565G-566A.

<sup>9</sup> 1969 (3) SA 447.

<sup>10</sup> 1949 (2) SA 374 (A) at 385-386.

<sup>11</sup> 1948 (1) SA 413 (A) at 433.

[8] Indeed the amendment certainly, in my view, reconciles the particulars of claim with the Defendant's plea. The parties are *ad idem* that the plaintiffs have already testified and the Defendant's plea properly canvassed during cross examination. Besides, granting the amendment would not debar the defendant from amending his plea, if so advised. I therefore find that the defendant would not be prejudiced were the amendment to be granted.

[10] It is trite that the question of costs is a matter within the discretion of the court. Equally so too, is it trite that the party who seeks an amendment must pay the costs. *In casu*, the application for amendment was opposed. The general principle applicable is that the costs follow the event. Accordingly, the costs *in casu* must be borne by the unsuccessful defendant in opposing the amendment.

[11] In the premises the following order is granted:

1. That leave to amend is granted to the plaintiff,
2. That the defendant is ordered to pay the costs of the opposition to the amendment.

A handwritten signature in dark ink, appearing to read 'N.M. MAVUNDLA', is written over a horizontal line.

N.M. MAVUNDLA

JUDGE OF THE HIGH COURT

DATE OF JUDGMENT: 11 / 08 / 2017

PLAINTIFFS ADV : ADV J.E. FERREIRA

BRIEFED BY : BERTUS VERSTER ATTORNEYS

DEFENDANT ADV : ADV J HERSHENSOHN

INSTRUCTED BY : CROUSE INCORPORATED