

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 12512/2012

DATE: 17/2/2017

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

REVISED

IN THE MATTER BETWEEN

UPHAWO TECHNOLOGIES CC

APPLICANT

AND

MARTIN MORGAN MOTORS CC

RESPONDENT

JUDGMENT

MAKHOBHA AJ

[1] This matter came before me as an application to amend particulars of claim and include in the particulars of claim a rectification of a written agreement. The respondent objects to the application on the basis that the amendment seeks to introduce a new cause of action which has prescribed. In addition respondent avers that applicant should have made the application long time ago since the matter has once being postponed for trial as there was no court available to hear the matter. It is further argued by counsel for the respondent that the amendment is excipiable. Counsel for the respondent submitted further that the amendment if granted must be

cured by granting punitive costs against the applicant.

[2] The applicant is Uphawo Technologies CC, a close corporation with the principal place of business at 3[...] R[...] Street, Sinoville Pretoria. Mr S E Kumalo is the sole member of the applicant.

[3] The respondent is Martin Morgan Motors, a close corporation with principal place of business at corner of Grey and Leslie Avenues, Vereeniging Gauteng Province.

[4] Applicant in the main action seeks to cancel a contract of a purchase of a motor vehicle from the respondent and tenders return of the motor vehicle to the respondent. However, respondent's defence in the main action is that it did not enter into any agreement with the applicant, but rather with Mr S E Kumalo in his personal capacity. The written agreement between the parties reflects the purchaser in certain places as Mr SE Kumalo. Applicant says this is an error and seeks to correct it by amending the particulars of claim to reflect the true purchaser of the motor vehicle and the true contracting party being the applicant and not Mr SE Kumalo in his personal capacity.

[5] Rule 28(10) reads as follows:

"The court may, notwithstanding anything to the contrary in this rule, at any stage before judgment grant leave to amend any pleading or document on such other terms as to costs or other matters as it deem fit."

Therefore in terms of this rule it is possible for the applicant to amend a pleading at any time before judgment. Therefore the argument by counsel for the respondent as to why applicant took so long to apply for the amendment is without substance and cannot succeed. Therefore applicant is entitled to amend the particulars of claim at any time before judgment.

[6] In *Bester NO v Schmidt Bou Ontwikkelings* 2013 1 SA 125 (SCA) on p130 paragraphs I-J the court said:

"As in the case of rectification of a contract, it therefore had no correlative 'debt' as contemplated by the Prescription Act, which could be extinguished by prescription."

Thus, therefore it is my view that in this matter before me the application sought by the applicant is not a debt and it is not of monetary value and cannot therefore prescribe. Therefore the respondent cannot succeed in his objection based on prescription.

[7] The second ground of objection to the proposed amendment is that the applicant intends to introduce a new cause of action. In *Boundary Financing Ltd v Protea Property Holdings (Pty) Ltd* 2009 3 SA 447 (SCA) Streicher JA in paragraph [13] said the following:

"Rectification of an agreement does not alter the rights and obligations of the parties in terms of the agreement to be rectified: their rights and obligations are no different after rectification. Rectification therefore does not create a new contract; it merely serves to correct the written memorial of the agreement."

[8] In *Krischke v Road Accident Fund* 2004 4 SA 358 (W) the court held that the party seeking an amendment bears the *onus* of showing that it is made *bona fide* and that there is an absence of prejudice. See also *Macduff and Company (in liquidation) v Johannesburg Consolidated Investment Co Ltd* 1923 TPD 309; *Rosenberg v Bitcom* 1935 WLD 115; *Dumasi v Commissioner, Venda Police* 1990 1 SA 1068 (V) at 1071B; *Brandon v Minister of Law and Order and Another* 1997 3 SA 68 (C) at 75.

[9] The amendment can also be refused on the ground of excipiability. In *Minister of Defence, Namibia v Mwandinghi* 1992 2 SA 355 (NMS) it was held that an amendment should only be refused on the ground of excipiability. In this matter before me it has not been shown how will the amendment, if granted, be excipiable.

[10] In the following matters the substitution of one entity for another has been allowed in order to ensure that the true plaintiff is before court. See *Page v Malcomess and Co* 1922 EDL 284 at 285-286; *Chinnian v Mphephu* 1942 NPD 142; *Yukwan v President Insurance Co Ltd* 1963 1 SA 66 (T); *Samente v Minister of Police and Another* 1948 4 SA 632 (E); *Boland Bank Ltd v Roup, Wacks, Kaminer and Kriger* 1989 3 SA 912 (C); *Kotze NO v Sanlam Insurance Ltd* 1994 1 SA 237 (C).

[11] In *Friend of the Sick Association v Commercial Properties (Pty) Ltd and Another*

1996 4 SA 154 (D) at 157E-F, the court held that an amendment that has the effect of introducing a new *persona* in law as the plaintiff is not itself a bar to the granting of such amendment, subject only to consideration of prejudice to the defendant.

[12] From the host of decided cases referred to above it is clear that applicant in this matter before me must show that there will be no prejudice should the amendment be granted. I am satisfied that should the amendment be granted respondent will suffer no prejudice. There is also no risk that respondent might lose a substantive defence should the amendment be granted.

[13] Furthermore difficulties in respect of prescription do not arise in this case, nor is there any suggestion of *mala fides* on the part of the applicant.

[14] I am satisfied that in granting the amendment it will not constitute a new cause of action. If this court were to dismiss this application, all that would happen is that the action would be instituted afresh in the name of the present applicant and with precisely the same cause of action. Inevitably the defence also would be put up in precisely the same terms, giving rise to the same issues that are to be tried. The result would be a waste of time and a waste of costs.

[15] In the result, I make the following order:

1. Applicant is granted leave to proceed to effect its proposed amendment of its particulars of claim, under case number 12512/2012 dated 15 March 2016.
2. The respondent to pay the costs of this application.

D MAKHOB
ACTING JUDGE OF THE GAUTENG DIVISION
PRETORIA

HEARD ON:

06/02/2017

FOR THE APPLICANT:

ADV. BD STEVENS

INSTRUCTED BY:

JOHAN SYSSCHENS ATTORNEYS

FOR THE RESPONDENT:

INSTRUCTED BY:

ROB LAUBSHER ATTORNEYS