CASE NO.: (P) I 1769/06

SOUTH BAKELS (PTY) LTD **PLAINTIFF/RESPONDENT**

and

QUALITY PRODUCTS **1ST DEFENDANT/1ST APPLICANT**

N LIEBICH **2ND DEFENDANT/2ND APPLICANT**

MANYARARA, AJ

25 JUNE 2008

SUMMARY

- Application for amendment.
- Principles governing whether to grant or refuse application.
- Amendment which would render relevant pleading excipiable should not be granted.
- Applications not to deteriorate into mini-trials to determine factual issues.
- Amendment not to be granted if there will be prejudice to the other party which cannot be cured by an order for costs or postponement.
- Application for amendment which if granted cannot put the parties back in the same position as they were when the pleading sought to be amended was filed dismissed with costs.

CASE NO. (P) I 1769/06

IN THE HIGH COURT OF NAMIBIA

In the matter between:

SOUTH BAKELS (PTY) LTD **PLAINTIFF/RESPONDENT**

and

QUALITY PRODUCTS **1ST DEFENDANT / 1ST APPLICANT**
N LIEBICH **2ND DEFENDANT / 2ND APPLICANT**

CORAM: MANYARARA, A.J.

Heard on: 27 May 2008

Delivered on: 25 June 2008

JUDGMENT

MANYARARA, A.J.: [1] This is an application for amendment of a plea in terms of Rule 28 of the Rules of Court. I shall refer to the applicants as the first and second defendants, respectively, and to the respondent as the plaintiff. Mr. Mouton represents the defendants and Mr. Barnard represents the plaintiff.

[2] The facts are these. On 7 April 2000 the plaintiff and the first defendant concluded an agreement in writing, in terms of which the former granted the latter credit facilities for all goods supplied on condition that the defendant

would effect payment for the goods within 30 days from the month of delivery. The first defendant was represented by the second defendant who bound himself as surety and co-principal debtor jointly and severally with the first defendant.

[3] On 20 June 2006 the plaintiff issued summons against the defendants jointly and severally, the one paying the other to be absolved, for payment of the amount of N$610 561,64 with interest and costs of suit on the attorney and client scale as set out by the agreement between the parties.

[4] The defendants filed a special plea of mis-joinder of the second defendant and a plea on the merits that the claim be dismissed with costs and for judgment to be entered in their favour.

[5] A Rule 37 conference was held on 3 May 2007 and it is recorded in the minutes of the conference as follows:

> *"The parties suffice by the pleadings and no further admission of fact and of documents are made (sic)."*

[6] Issue was joined thereon and an application for trial dates was made on 20 June 2007. Thereafter, each party filed a request for particulars for trial. The defendants' pleading filed on 13 December 2007 requested particulars of the transactions as well as the agreement to which the claim related. There is no record of the reply thereto but the point is colourless and will be disregarded.

[7] The matter was set down for hearing on 19 to 21 February 2008. However, on 11 February 2008 the plaintiff's attorneys had the matter removed from the roll for unexplained reasons. The special plea which is the subject of this application was filed on 25 February 2008.

[8] The proposed amendment seeks prescription of the plaintiff's claim in terms of the Prescription Act of 1969 (the 1969 Act). Mr. Barnard submitted that this was a misunderstanding of the legislation on the part of the defendants. According to Mr. Barnard, it was the Prescription Act of 1943 which provided for prescription of "claims" and this was no longer the position under the 1969 Act which provides for prescription of "debts". Indeed, said Mr. Barnard, paragraph 7 of the particulars of claim alleged that as on 4 July 2005 the (first) defendant was "indebted" to the plaintiff in the amount claimed in the summons as the "debt" due by the defendants to the plaintiff and section 10(3) of the 1969 Act allows for valid and effective payment of a debt even after the date of prescription of the debt.

[9] Mr. Mouton disputed the validity of Mr. Barnard's submissions and much debate followed, with each counsel relying on his interpretation of the terms "claim" and "debt" made by JONES AJA in *CGU Insurance Ltd v Rumdel Construction (Pty) Ltd* 2004 (2) SA 622. I do not propose to deal with the

conflicting interpretations of the judgment referred to. Suffice to state that Mr. Mouton ultimately relented without abandoning his position but as will emerge from the rest of my judgment it is not necessary to explore the point further.

[10] The principles governing amendments are enunciated by Harms: Civil Procedure in the Superior Courts Service Issue 33 paragraph B28.18. I shall quote only the portions of the passage which are relevant for present purposes as follows:

> *"Approach towards amendments In deciding whether to grant or refuse an application for an amendment the court exercises a discretion and, in so doing, leans in favour of granting it in order to ensure that justice is done between the parties by deciding the real issue between them.*
>
> *An amendment which would render the relevant pleading excipiable cannot lead to a decision of the real issues and should not be granted. On the other hand, it may be more sensible in a given case to grant the amendment and let the other party file an exception. Applications for amendments should not deteriorate into mini-trials since amendment proceedings are not intended or designed to determine factual issues such as whether the claim has become prescribed……..*
>
> *An amendment must raise a triable issue – ie, it may be of sufficient importance to justify any procedural disadvantages caused by the amendment proceedings in the sense that the issue is viable and relevant*

or will probably be covered by the available evidence. It will normally not be granted if there will be prejudice to the other party which cannot be cured by an order for costs or a postponement. Prejudice in this context is not limited to factors which affect the pending litigation but embraces prejudice to the rights of a party in regard to the subject-manner of the litigation……..

There will not be prejudice if the parties can be put back for the purpose of justice in the same position as they were when the pleading, which is sought to be amended, was originally filed. The onus rests upon the applicant seeking the amendment to show that the other party will not be prejudiced by the amendment."

[11] The proposed amendment seeks to introduce what it describes as "an Additional Plea of Prescription to the existing plea of mis-joinder" in the following terms:

"1. The Plaintiff alleges that the Defendants on or about 7 April 2000 completed a written application for credit facilities with the Plaintiff.

2. The Plaintiff further alleges that the Defendant would effect payment to the Plaintiff for all goods supplied by the Plaintiff to the Defendant, within 30 (Thirty) days from the month of delivery thereof.

3. The Plaintiff also alleges that on 4 July 2005, the Defendant was indebted to the (Applicant (sic)) Plaintiff in the amount of N$610 561.64 (Six Hundred and Ten Thousand Five Hundred Sixty One Namibia Dollars and Sixty Four Cent).

4. The Plaintiff however does not say when the amount so claimed became due and payable.

5. Summons was delivered on or about 20 June 2006.

6. *Regard to the provisions of the Prescription Act 68 of 1969, it is submitted that any claim by the Plaintiff, which arose prior to 20 May 2003 had become prescribed by virtue of the fact that a period of more than three years have lapsed since 20 May 2003 and until Summons was issued on 20 June 2006.*

7. *It is consequently pleaded that any amounts due by the Defendants to the Plaintiff (which is denied), in relation to goods delivered by the Plaintiff to the Defendants for which the Defendants allegedly did not pay the Plaintiff, had become prescribed by virtue of what is pleaded hereinbefore.*

WHEREFORE the Defendants plead that the portion of the Plaintiffs claim which arose prior to 20 May 2003 had become prescribed and ought to be dismissed with costs."

[12] Mr. Mouton elaborated his contention as follows:

> *"The Defendant avers in paragraph 1.6 of the Notice of Amendment, that regard to the provisions of the Prescription Act, a claim which arose prior to 20 May 2003 had became prescribed because a period of 3 (three) years have lapsed since 20 May 2003 until 20 June 2006 when Summons was delivered."*

[13] Mr. Barnard disputes Mr Mouton's contention on the ground that the proposed amendment is bad in law because it lacks the averments which are necessary to sustain a defence or justify the conclusions drawn therein. See *Miller v Muller 1965(4) SA 458 (CPD) at 465A*. He clarified the submission as follows:

> *"1. The Defendants allege that: "….any claim by the Plaintiff, which arose prior to 20 May 2003 had become prescribed…..".*

2. *However, the relevant of the agreement provides as follows:*

   "2. Payment for all goods supplied shall be made in full within 30 days from the last day of the month of delivery."

3. *Thus, payment for goods delivered in the month of May 2003 had to be made before or on 30 June 2003. Payment was accordingly due on 30 June 2003.*

4. *Prescription only stated running on 30 June 2003 in respect of deliveries in May 2003. As summons had been served on 20 June 2006 prescription was interrupted for all debts which became due after 20 June 2003.*

5. *The relevant date for prescription is thus 20 June 2003 and not 20 May 2003.*

[14] A perusal of the papers shows that it is correct that the defendants got their facts wrong. The true position is that prescription for goods delivered during the month of May 2003 only started running on 30 June 2003 and was interrupted by service of the summons on 20 June 2006. By virtue of that mistake, the allegation necessary to sustain a defence of prescription is lacking and the application is defective in that respect. See *Miller v Muller, supra*.

[15] Mr. Mouton deals in the second place with the plaintiff's criticism of the proposed amendment for not stating that payments were <u>not</u> made between the cut off date of 30 June 2003 and due date which was 4 July 2003 in terms of the credit agreement. He has submitted that any facts not pleaded in the

proposed amendment are contained in the pleadings already before the Court and another attempt to have pleaded such facts would have been a duplication and/or repetition of facts already before the court. Mr. Mouton adds that, assuming that the proposed amendment is excipiable (which he denied), the plaintiff will have the opportunity in terms of Rule 21 to obtain further

particulars of an amended plea, or to except to the amended plea in terms of Rule 23.

[16] What Mr. Mouton has overlooked is that it was necessary to make the further allegation referred to by Mr Barnard in the proposed amendment because the allegation was admitted unequivocally in the plea filed in the action. With regard to the submission that, if the amendment is allowed, the plaintiff will have the opportunity of requesting further particulars of the amended plea or to except thereto, Harms, op cit, cites with approval the passage by VAN DIJKHORT, J in *De Klerk and Another v Du Plessis and Others* 1995 (2) SA 40 (TPD) which proceeds at 43J 44B as follows:

> *"An amendment which would render a pleading excipiable should not be allowed. Whether a pleading would or would not become excipiable is a matter of law which should be decided by the Court hearing the application for amendment. It would be incorrect, in my view, to hold that it is arguable that the amendment would not render the pleading excipiable, allow it, and send the parties away to prepare for another battle on exception on the same point. I agree with views expressed in this respect in R M van der Ghinste & Co (Pty) Ltd v Van de Ghinste 1980 (1) SA 250 (C) 256H-259C. Insofar as certain remarks in Crawford-Brunt v Kavnat and Another 1967 (4) SA 308 (C) and National Union of South*

African Students v Meyer 1973 (1) SA 363 {T} 368H are susceptible of a different interpretation, I respectfully differ.

It follows that where there are conflicting decisions in different Divisions on the point of law it would be incorrect to allow the amendment on the basis that it is eminently arguable. I have to follow the decisions to which I am bound or, if there are none, decide the issue."

[17] It follows in my respectful view that if the amendment were allowed the Plaintiff would be seriously prejudiced in its claim as pleaded in the particulars of claim. See *Moolman v Estate Moolman and Another* 1927 CPD 27 (which went the other way on the facts) at 29 which reads as follows:

"The question of amendment of pleadings has been considered in a number of English cases. See for example: Tildesley v. Harper (10 Ch.D. 393); Steward v. North Met. Tramways Co. (16 Q.B.D. 556) and the practical rule adopted seems to be that amendments will always be allowed unless the application to amend is mala fide or unless such 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 purposes of justice in the same position as they were when the pleading which it is sought to amend was filed."

[18] I respectfully suggest that the *Moolman* judgment is good law. In my view, the proposed amendment would cause an injustice which cannot be compensated by costs, which were not tendered anyway, because the parties cannot be put back for the purposes of justice to the same position as they were when the plea was filed.

[19] As Mr. Barnard submitted, quite correctly in my view, the objection is not to block a plea of prescription: prescription, if raised properly is a good defence; the possible solution is for the defendants to withdraw their defence and formulate it properly.

[20] For the reasons set out in my judgment, the application is dismissed with costs.

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MANYARARA, AJ

ON BEHALF OF THE APPLICANTS/DEFENDANTS **Mr Mouton**

Instructed by: **Engling, Stritter & Partners**

ON BEHALF OF THE RESPONDENT/PLAINTIFF **Mr Barnard**

Instructed by: **Du Toit Associates**