



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 1705/2011

In the matter between:

FRIEDRICH CHRISTIAN BRANDT t/a

CHRIS BRANDT ATTORNEYS

PLAINTIFF

and

FOURTH MINING COMPANY (PROPRIETARY)

LIMITED (also known as F M C (PTY) LTD)

DEFENDANT

Neutral citation: *Brandt v Fourth Mining Company (Proprietary) Limited*
(I 1705/2011 [2012] NAHCMD 83 (27 November 2012))

Coram: DAMASEB, JP

Heard: 26 November 2012

Delivered: 27 November 2012

Flynote: Application to amend shortly before trial – raising prescription – application opposed on grounds it's excipiable and not setting out facts giving rise thereto- no allegation of irremediable prejudice if amendment granted- Court holding – absent allegation and evidence of irremediable prejudice that cannot be cured by costs order and or postponement – alleged defect can be cured by provision of further particulars - the allegation that prescription interrupted by service of summons only capable of resolution at trial.

ORDER

I make the following order:

1. Paragraphs 5.4 – 5.8, and paragraph 6.9 (a) – (e) of the notice of amendment dated 7 November 2012 are allowed.
2. The matter is postponed to a date to be arranged with the managing judge, and the costs of opposition to the application for amendment and that of the postponement stand over for future determination on a date to be arranged with the managing judge.

RULING ON APPLICATION FOR AMENDMENT

Damaseb, JP:

[1] I am here concerned with an application for amendment which is opposed. On 6 November 2012, Mr Oosthuizen SC came on record for the defendant. Previously the matter was dealt with for the defendant by different counsel. The trial was scheduled for 26 – 29 November 2012. Mr Oosthuizen then informed the court that as the new instructed counsel he had taken the view that the defendant's plea required amendment, including introducing a plea of prescription. Already at that stage, Mr Oosthuizen also placed on record that certain information requested in the defendant's request for trial particulars had not yet been furnished by the plaintiff. The plaintiff stated that he intended to object to any plea of prescription given that it ought to have been done at the time of the plea and , in any event, that a plea of prescription must be made by way of special plea and not by way of amendment. I made an order on 6 November requiring the defendant to file the notice to amend the

plea no later than 7 November 2012. It did so, introducing , amongst others, a plea of prescription in the following terms :

5.4 During June 2011 the Plaintiff issued Summons against the Defendant. In its Particulars of Claim accompanying its Summons, Plaintiff did not include or make any specific allegations concerning the renewal of EPL 2656, apart from referring thereto in annexure "J" (dated 13 Apr?/2010).

5.5 In Plaintiffs Amended Particulars of Claim of 23 May 2012, paragraphs 8, 9 and 10 Plaintiff claims N\$37,202.50 in legal fees (Vat inclusive) and N\$3,511.50 for disbursements in respect of EPL 2656, which is distinguishable and different from Plaintiff's previous claim in particularity and quantum, as well as the fact that his erstwhile claim was founded upon disbursements, professional fees, acceptance of statements as being Plaintiffs usual costs/fees and non-denial of liability.

5.6 In annexure "POC 2" to its amended Particulars of Claim, under "B", the first recordal in respect of this claim is 14 July 2008 and the last is 22 May 2009.

5.7 In Plaintiffs amended Particulars of Claim he alleged a different claim, ie reasonable fees and disbursements and claim 50% of what he claimed previously.

5.8 Defendant specially pleads that Plaintiffs claim in respect hereof has prescribed in terms of Sections 10 and 11 of the Prescription Act of 1969.

The second prescription plea is embodied in paragraph 6.9 (a) (e) of the notice to amend, as follows:

6.9 Defendant furthermore specially pleads that Plaintiffs claim has prescribed in terms of Sections 10 and 11 of the Prescription Act of 1969 in that

(a) Plaintiff's amended Particulars of Claim was filed on 23 May 2012.

(b) Plaintiffs alleged last work was done on 24 February 2009.

(c) More than 3 years has expired before Plaintiff has particularized its Claim.

(d) Plaintiff's current claim is distinguishable and different from its previous claim in particularity and quantum, as well as the fact that his erstwhile claim was founded upon disbursements, professional fees, acceptance of statements as being Plaintiffs usual costs/fees and non-denial of liability.

(e) In Plaintiffs amended Particulars of Claim he alleged a different claim ie reasonable fees and disbursements.

On 9 November this court issued an order in the following terms:

Whereas the matter is set down for trial on the continuous roll from 26 - 29 November 2012;

It is ordered as follows:

- 1. The plaintiff shall file its objection and grounds therefor to defendant's notice to amend, on or before 15 November 2012;*
- 2. The plaintiff shall file the application to amend on or before 20 November 2012;*
- 3. The defendant shall file the answer to the defendant's request for trial particulars on or before 15* November 2012;*
- 4. The opposed application for postponement shall be adjudicated, in limine, on 26 November 2012 @8:30.*

[3] Following that order, the plaintiff filed its objection to the proposed amendment on 14 November 2012 (confined to prescription), as follows:

'1. Amendment inserting paragraphs 5.4 to 5.8 – plea of prescription

- 1.1 The intended amendment will render the plea of prescription excipiable as the necessary allegations to found a plea of prescription are not made. The plea does not state when payment was allegedly due and when prescription started running.
- 1.2 In the amended paragraphs an attempt is made to distinguish between the cause of action in the pre amended particulars of claim to the amended particulars of claim. The cause of action is substantially the same cause of action and prescription was interrupted by the service in 2011 already.

2. Ad insertion of new paragraph 6.9 – plea of prescription

- 2.1 The intended amendment will render the plea of prescription excipiable as the necessary allegations to found a plea of prescription are not made. The plea does not state when payment was allegedly due and when prescription started running.
- 2.2 In the amended paragraphs an attempt is made to distinguish between the cause of action in the pre amended particulars of claim to the amended particulars of claim. The cause of action was interrupted by the service in 2011 already.”

The applicable test

[5] It is trite that an amendment to introduce a special plea of prescription will not be allowed where to do so would cause prejudice to the opponent that cannot be cured by a costs order and/or a postponement. An example of irremediable prejudice is where evidence is lost prior to the introduction of the amendment and relevant to the adjudication of the issues raised by the plea of prescription.¹ It is equally trite that a plea of prescription can be raised at any stage in the proceedings and not only before close of pleadings.² I agree with the following propositions by the learned author of *Beck's Theory and Principles of Pleadings in Civil Actions*:³ An amendment may always be allowed at any stage before final judgment. A valid defence barring the action may be permitted to be raised by way of an amendment at any time prior to judgment unless the failure to have raised it earlier constitutes waiver. It is unwholesome to keep from the pleadings anything which denies the parties from calling evidence on any material point of law or fact.

[6] *In casu*, the defendant gave notice of its intention to bring an amendment and to introduce a special plea, on 7 November 2012 after pleadings had closed and very

¹*Minister of Health, Gauteng v Brandt* in re: *Brand v University of Pretoria* [2005] JOL 14726 (T)

²*Benson and Another v Walters & Others* 1984 (2) SA 73 (A).

³ 1982 (Juta) 5 Ed. At 187; see also: *Combrink & Co v Strasburger* 1914 CPD 314.

shortly before trial. The proposed amendment introduces other defences in addition to prescription. Only those relating to prescription are however opposed. The plaintiff's objection does not rely on any irremediable prejudice if the amendment is granted. The objections are identical in respect of both proposed amendments. I deal with them in turn.

Plea is excipiable for failure to state when debt became due and payable

[7] Only if the amendment cannot be cured by the provision of further particulars, can it be refused on the ground that, even if granted, it will be excipiable. I will assume for present purposes, without deciding, that the pleas of prescription are excipiable for the reason advanced by Mr Brandt for the plaintiff. As Mr Oosthuizen correctly submitted, assuming that to be so, it can be cured by the provision of further particulars upon being so demanded by the plaintiff. The plaintiff has not demonstrated to me that he will suffer irremediable prejudice if the amendment is allowed. Given that a plea of prescription is possible at any stage of the proceedings, I see no reason why it should not be allowed.

[10] The two objections founded on the premise that the plea is excipiable are therefore not sound and stand to be rejected.

Prescription was interrupted by service of summons in 2011

[11] A plea of prescription raises determination of both factual and legal issues. I agree with Mr Oosthuizen's submission that factual issues giving rise to prescription are best adjudicated upon after the Court has heard the evidence. The allegation by the plaintiff that prescription was interrupted by service in 2011 is one that can only be properly assessed after the parties had led evidence in the matter in the course of the trial. If the plaintiff replicates to the amended plea, if granted, the defendant would be entitled to seek further particulars thereto - at the very least for trial purposes so that the matter is properly ventilated at trial. It constitutes no recognizable basis for refusing the amendment sought, absent any allegation or evidence of irremediable prejudice. This ground too must therefore fail.

Trial particulars were not provided by plaintiff

[12] The trial of this matter was set down for 26 – 29 November 2012. Given that the disputed amendments are allowed, the plaintiff may wish to seek further particulars and to replicate. Postponement therefore seems inevitable. There was also the matter of the documents which the plaintiff had not yet provided to the defendant in answer to the request for trial particulars. The existence of those documents was not disputed and it is common cause that as of yesterday they had not been provided. I made an order yesterday, requiring the plaintiff to make full discovery of those documents by close of business on 26 November 2012.

Postponement inevitable

[13] A postponement seems inevitable on either basis and I make an order postponing this matter to a date to be arranged with me as managing judge. The parties are invited to address me on the question of costs either on the date to which the matter will be enrolled for trial (or before that) on a day to be arranged with the court. In anticipation of that, I wish to make clear that the plaintiff would be entitled to the costs of its opposition to the notice to amend, especially given the rather late hour at which it was introduced. The defendant must demonstrate special circumstances why I must deviate from that general rule. I express no view whatsoever whether the timing of the postponement was also the causal link for the resultant postponement. Unless the parties agree that costs be in the cause, they are entitled to address me on which of them should be condemned in costs for the postponement.

Order

[14] I make the following order:

1. Paragraphs 5.4 – 5.8, and paragraph 6.9 (a) –(e) of the notice of amendment, dated 7 November 2012, are allowed.

2. The matter is postponed to a date to be arranged with the managing judge, and the costs of opposition to the application for amendment and that of the postponement stand over for future determination on a date to be arranged with the managing judge.

P T Damaseb
Judge-President

APPEARANCES

PLAINTIFF:

Mr Brandt
Of Chris Brandt Attorneys, Windhoek.

DEFENDANT:

Mr Oosthuizen
Instructed by Theunissen, Louw & Partners