
ORDER

1. The plaintiff be and is hereby granted leave to amend the particulars of claim in accordance with the notice given by it on 13 October 2017.
2. The plaintiff is to pay the costs occasioned by this application.
3. The case is postponed to **19/04/2018 at 15:00** for Status hearing (Reason: Amendment of Pleadings).
4. Plaintiff must file amended particulars of claim on or before 29/03/2018.
5. Defendant must plead to the amended particulars of claim on or before 12/04/2018.
6. Plaintiff must file replication, if any, to the Defendant's plea on or before 17/04/2018.

RULING IN TERMS OF PRACTICE DIRECTIVES 61

Introduction

[1] The plaintiff intends to effect a single amendment, which the plaintiff seeks leave to introduce relating to paragraph 5 of the particulars of claim.

[2] The original paragraph 5 of the particulars of claim reads as follows:

'5. During March 2016 the Plaintiff, whilst attending to a reconciliation of his deposit receipts with his statement provided by the Defendant, Plaintiff noticed that the payments mentioned in paragraph 3 above were not reflected on the said statement.'

[3] The plaintiff is seeking leave to introduce an amendment to the date of March 2016 to March 2015 however the remainder of the paragraph would remain unchanged.

Facts leading up to the amendment

[4] The plaintiff brought a claim wherein he seeks recovery of an amount of N\$99 156.70 from the defendant.

[5] The plaintiff alleges that during the period of January 2013 – January 2014, the plaintiff deposited the above amount into an account held with the defendant. During March 2016, the plaintiff caused a letter of demand to the defendant informing it that the said amount was not reflected on his statement and that same has become due and payable. This is due to the fact that the plaintiff was of the opinion that the funds were stolen or misappropriated by the defendant's employees and the defendant is therefore liable.

[6] The defendant brought a special plea wherein it raised prescription to the plaintiff's claim on the following grounds:

6.1 The claim is based on a transaction emanating from 18 January 2013 and due to the fact that the plaintiff had access to the account at all times, payment in respect of the claim would have been due and payable on 18 January 2013.

6.2 Plaintiff instituted action on 2 May 2017, more than 3 years after the said debt became due and payable.

6.3 As a result, the claim has prescribed.

Submissions by plaintiff

[7] The plaintiff submits that a discrepancy exists between the particulars of claim and a document contained in the plaintiff's discovery affidavit in which the plaintiff stated that he only became aware of the cause of action during February 2015. The plaintiff further submits that the discrepancy is a result of its legal practitioner erroneously basing dates stated in the particulars of claim on the fact that the first letter of correspondence between the legal practitioner and the plaintiff was dated March 2016. This error was only realized when the legal practitioner attended to discovery.

[8] Plaintiff submits that the amendment is merely to bring the contents of the particulars of claim in line with the documentation which will be used in support of the plaintiff's claim against the defendant.

[9] Plaintiff further submits that it gave sufficient explanation for the court to allow the amendment and further that there won't be a need for the defendant to amend its pleadings, particularly the special plea based on the submission that prescription began in January 2013.

Submissions by defendant

[10] The defendant submits that the primary reason for the amendment application is to cure the special plea of prescription raised by the defendant and to further waste the court's time and that of the defendant, leading to prejudice against the defendant.

[11] The defendant further submits that if the amendment is to be allowed by this court, it would result in the defendant's legal practitioner to have to take further instructions from the defendant and file further pleadings to align its case with that of the plaintiff, which proceedings would be costly to the defendant.

[12] The defendant further submits that amending a date as the plaintiff wishes to do, would have the effect of changing a material term of the pleadings which would subsequently cure the issue of prescription. The defendant submits that prescription began to run from January 2013 when the alleged funds were deposited and not from January 2015 as the plaintiff submits to only having become aware then and that prescription should run from January 2015.

The relevant law

[13] In *Trans-Drakensberg Bank Ltd (under Judicial Management) v Combined Engineering (Pty) Ltd and Another* 1967 (3) SA 632 (D) at 641A – C — Eds the court made it clear that:

'Having already made his case in his pleading, if he wishes to change or add to this, he must explain the reason and show prima facie that he has something deserving of consideration, a triable issue; he cannot be allowed to harass his opponent by an amendment which has no foundation. He cannot place on the record an issue for which he has no supporting evidence, where evidence is required, or, save perhaps in exceptional circumstances, introduce an amendment which would make the pleading excipiable (*Cross v Ferreira*, supra at p 450), or deliberately refrain until a late stage from bringing forward his amendment with the purpose of catching his opponent unawares (*Florence Soap and Chemical Works (Pty) Ltd v Ozen Wholesalers (Pty) Ltd* 1954 (3) SA 945 (T)), or of obtaining a tactical advantage or of avoiding a special order as to costs (*Middleton v Carr* 1949 (2) SA 374 (AD) at p 386).'

[14] Prior to the introduction of judicial case management, the principles relating to applications to amend pleadings had become well settled. The fundamental principle followed by the courts in Namibia has been that amendments should be allowed in order to ensure a proper ventilation of the real disputes between the parties so that justice may be done, following the often-cited case of *Trans-Drakensberg Bank Ltd (under Judicial Management) v Combined Engineering (Pty) Ltd and Another* to that effect.

[15] This principle is subject to an opposing party not being prejudiced by the amendment and if that prejudice cannot be cured by an appropriate costs order and, where necessary, a postponement.

[16] This approach was reaffirmed by the Supreme Court in *DB Thermal (Pty) Ltd and Another v Council of the Municipality of the City of Windhoek* case no. SA 33/2010, unreported 19 August 2013. As was further stressed by the Supreme Court at para 38 in that matter:

'As mentioned above, the main purpose of amendments is to permit the proper ventilation of the issues between the parties. Where the proposed amendment will not result in the ventilation of such issues because it does not disclose a cause of action, it will be rare for it to be appropriate to grant the amendment. As Selikowitz J stated in *Benjamin v Sobac South African Building and Construction (Pty) Ltd*, (i)f the claim is, in the circumstances of this case, not in law a viable claim I would be doing not only the respondent but also the applicant an injustice by granting the amendment.'

[17] It is however important to distinguish between an amendment introducing a new cause of action (i.e. right of action), and one which merely introduces fresh and alternative facts supporting the original right of action as set out in the cause of action. An amendment which introduces a new claim will not be allowed if it would resuscitate a prescribed claim or defeat a statutory limitation as to time.¹

[18] When it comes to the determination of opposed amendments, one of the grounds, on which an amendment can be refused, is that such amendment would introduce a new claim which has prescribed.

[19] Plaintiff argued that regards need to be had to the provisions of the Prescription Act 68 of 1969 and more specifically section 12(3) which provides that:

¹ *South Bakels (Pty) Ltd and Another v Quality Products and Another* 2008 (2) NR 419 (HC) at [16] to [19], *Finch Opportunities Fund SPC v van Rooyen* (I 3663/2009) [2012] (28 June 2012) at [8], see also: *Sentrachem Ltd v Prinsloo* 1997 (2) SA 1 (A) at 15A-C etc.

'(3) A debt which does not arise from contract shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.'

[20] If one goes strictly on the terms of the Prescription Act, the issue whether the debt came to the attention of the plaintiff in March 2015 or March 2016 would not affect the issue of prescription. If the debt came to the attention of the plaintiff in March 2015 it would prescribe in March 2018 and if it came to attention of plaintiff in March 2016, it would prescribe March 2019. Summons was issued May 2017.

[21] There would therefore not be an issue of resuscitation of a so-called prescribed claim.

[22] This is however purely from applying section 12(3) of the Prescription Act to the facts. The trial court will be in a much better position to decide on the matter when the issue of prescription is fully argued.

[23] There is thus merit in the submission of the plaintiff that the amendment won't necessarily change the special plea raised by the defendant. If the amendment is allowed, the defendant may still hold firm to its stance that prescription began at a date different from what the plaintiff submits, which would be an issue to be dealt with by a trial court.

[24] In the result I make the following order:

1. The plaintiff be and is hereby granted leave to amend the particulars of claim in accordance with the notice given by it on 13 October 2017.

2. The plaintiff is to pay the costs occasioned by this application.
3. The case is postponed to **19/04/2018** at **15:00** for Status hearing (Reason: Amendment of Pleadings).
4. Plaintiff must file amended particulars of claim on or before 29/03/2018.
5. Defendant must plead to the amended particulars of claim on or before 12/04/2018.
6. Plaintiff must file replication, if any, to the Defendant's plea on or before 17/04/2018.

Judge

APPEARANCES:

FOR THE PLAINTIFF: Mudzanapabwe

of Etzold-Duvenhage, Windhoek

FOR THE DEFENDANT: Jason

of Shikongo Law Chambers, Windhoek