

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: 4926/2017

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

Date: 25/6/19

Signature:

A handwritten signature in blue ink, appearing to be "B. C.", is written over the signature line.

In the matter between

HARRY MARK DEON BATH

APPLICANT

AND

VAN HEERDEN & BRUMMER INC

RESPONDENT

JUDGMENT

THOMPSON, AJ

[1] The Plaintiff (the Respondent in this application for amendment) was formerly involved in divorce litigation during which the ante-nuptial contract ("the ANC") regulating his marital regime was declared void for vagueness.¹ The Plaintiff has now instituted action against the First and Second Defendants (the Applicants in the application for amendment) for damages arising out of an alleged breach of mandate and/or professional negligence.

[2] As part of the Defendants' defence to the Plaintiff's claim, the Defendants raised a special plea of prescription. In this regard the Defendants have pleaded certain *facta probanda* relating to consultations that took place between the Plaintiff and his legal team on various dates. The Plaintiff took the view that the pleaded averments will lead to the introduction of privileged communications as evidence. Despite taking such view, the Plaintiff did not seek to have the allegations struck out on any basis. Rather, the Plaintiff replicated to the special plea by stating "*the contents thereof are privileged as being communications between the Plaintiff and his legal advisors/team*". In doing so, the Plaintiff

¹ *B v B* (952/12) [2014] ZASCA 14 (24 March 2014)

created, in my view, a triable issue on the unamended pleadings on whether communications the Defendant seeks to rely on is privileged or not.

[3] The Defendants have subsequently sought to amend their special plea of prescription by *"deletion thereof and by substituting same with the special plea that will read as set out"* in the annexure to the Rule 28 notice. The proposed amended special plea is substantially the same as the existing special plea, save for the introduction of additional averments relating to 26 July 2012, 6 August 2012, 3 to 22 September 2012, 23 September 2012 and 11 April 2013. Each of these averments relate to alleged communications between the Plaintiff and his legal team.

[4] The Plaintiff has objected to such proposed amendment on the basis that the plea of prescription has been separated from all other issues in terms of Rule 33(4) and the Defendants are seeking to introduce evidence that *"is privileged as being communications between the Plaintiff, then the client of the First Defendant and the First Defendant representing the Plaintiff in his divorce action and counsel that represented the Plaintiff in the divorce action and the Plaintiff does not waive such privilege and according such privilege remains."* During the course of argument the objection was refined to i. the proposed amendment is premature

and ii. the evidence that is introduced by the amendment is privileged, resulting in it being irrelevant and therefore inadmissible.

[5] As a result of the objection the Defendants have launched an application to have the amendment authorised, which application is opposed by the Plaintiff.

[6] It is trite law that an amendment will always be allowed unless it is made *mala fide* or it would cause an injustice that cannot be compensated for by way of an order for costs,² in order to ensure that there is a proper ventilation of the dispute between the parties.³ This is the *modern* tendency pertaining to amendments, which *modern* tendency was expressed some 84 years ago.

[7] It was argued on behalf of the Plaintiff that the amendment is premature in light of the objection on the pleadings regarding the issue of privilege. It was contended that the amendment should be postponed to the hearing of the trial and moved once the trial judge has made a ruling on whether the evidence objected to is admissible.

² *Moolman v Estate Moolman* 1927 CPD 27 at 29y

³ *Rosenberg v Bitcom* 1935 WLD 115 at 117

[8] In my view this argument has two fundamental flaws. The first flaw arises as a matter of law. It is trite law that an amendment must be timeously effected and, if objected to, the application to affect the amendment must be timeously made.⁴ If the seeking of the amendment is to stand over to trial, then the issues sought to be raised by way of the amendment is not properly contained in the pleadings and there is no need to plead thereto, make discovery thereto and there is no right to request further particulars in relation thereto. In addition, the trial judge will only be called upon to determine the admissibility of evidence that is relevant to that which is contained on the pleadings. Even if the trial judge is to rule that certain evidence emanating from the consultations are admissible, it does not follow that all evidence emanating from the consultations will be admissible. It does not, in my view, automatically follow that a ruling on admissibility on certain evidence emanating from the consultations will have the effect of rendering evidence pertaining to the consultations now sought to be introduced as admissible. The line of argument proffered by the Plaintiff has the effect, in my view, of potentially creating a situation where the trial may not be ripe for hearing if the amendment is only sought at the trial and granted.

⁴ *Zarug v Parvathie NO* 1962 (3) SA 872 (D) at 876C

[9] The second flaw in the argument that the amendment should only be moved at the trial lies within the Plaintiff's own approach relating to the prescription point. Although the Plaintiff objects to the introduction of certain evidence in his replication on the basis of privilege, the Plaintiff indicated during argument that he has proposed a stated case to the Defendant on the prescription point wherein the pleaded averments relating to the consultations and the contents thereof, as pleaded, are admitted. As the proposed stated case statement is not by agreement as required in terms of Rule 33(1), I enquired from Mr Smith appearing for the Plaintiff what the status of seeming admissions in the stated case document is. Mr Smith confirmed that the pleaded averments relating to the consultations and the contents thereof are, for the purposes of the separated prescription triable issue, admitted.

[10] To borrow form the law of contract, the Plaintiff seems to be approbating and reprobating on the privilege point in so far the prescriptive issue is concerned. He is impermissibly blowing both hot and cold. This is so as, for the trial on the prescription point, the Plaintiff is not proceedings with the privilege objection but for the purposes of objecting to the proposed amendment pertaining to the prescription point the Plaintiff is relying on the privilege objection.

[11] Even if I am wrong in my assessment of the submissions on behalf of the Plaintiff, it matters not. In this matter the Defendants are not seeking to raise a new special plea. They are merely seeking to introduce further instances in the already pleaded timeline of events in substantiation of the existing special plea. According to the Defendants a consultation was only had with an important witness, who is a retired attorney, after the close of pleadings. It is the Defendants submission that all they are seeking to do is to facilitate the proper ventilation of disputes between the parties by making the Plaintiff aware of all instances of consultations and discussions they intend to rely on in relation to the issue of prescription.

[12] The mere fact that the Defendants have raised the issue of consultations and discussions on the pleadings does not mean that the evidence in relation to such pleaded issues will be admissible at the trial in due course. This remains an issue for the trial court to determine. The Plaintiff stands to suffer no prejudice or injustice as the Plaintiff's position would be the same as it was at the time that the pleadings stood at the time that the proposed amendment was filed as the Plaintiff can merely extend his already pleaded averment in his replication to the new averments introduced by way of the amendment.

[13] The Plaintiff, in a final volley, sought to convince me that by allowing the amendment I will be prescribing to the trial court that the evidence sought to be introduced by way of the amendment is admissible. This submission, in my view, is misguided. Averments in pleadings do not constitute evidence. It is still incumbent on the Defendant to lead the evidence in support of the pleaded averments and it is only, at that juncture, that the trial court would need to make a ruling on the admissibility of such evidence.

[14] For greater clarity and for the avoidance of any doubt, in making the order that I intend to make, I express no view, opinion or judgment, directly or indirectly, regarding the privilege issue raised. Whether the communications to be relied upon is privileged and/or admissible as evidence is a matter for the trial court to decide upon a proper ventilation of the issues and evaluation thereof.

[15] As the proposed amendment, in my view:

- i. Facilitates in making the Plaintiff aware of the true extent of the disputes between the parties and thereby will ensure a proper ventilation of such disputes;

- ii. Allows for the Plaintiff to still object to the introduction of the evidence relevant to the pleaded averments at the trial;
- iii. Does not change the nature and scope of the special plea; and
- iv. Leaves the Plaintiff no worse off than he was before;⁵

I can see no reason to refuse the proposed amendment.

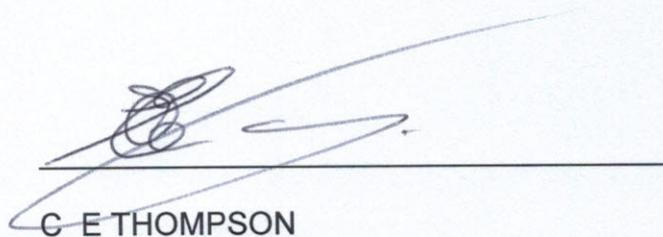
[15] This leave the issue of costs. Rule 28(9) provides that the party who gives notice of an amendment shall be liable for the costs thereby occasioned to the other party. I may depart from this general principle in the exercise of my unfettered discretion on the issue of costs. The Plaintiff has not alleged that the proposed amendment is *mala fide*. The Defendant has also not sought to introduce issues that are unrelated to the issue at hand, in other words sought to introduce irrelevant pleaded averments. It is the Plaintiff who has averred that the evidence that will result from the pleaded averments is irrelevant. This matter of relevance of the evidence is for the trial court to determine and not for me. In any event, the Plaintiff would have been in no worse position on the pleadings if the proposed amendment had been effected without opposition thereto. The objection to the proposed amendment and the opposition of the

⁵ *Magnum Simplex International (Pty) Ltd v MEC Provincial Treasury, Provincial Government of Limpopo* (556/17) [2018] ZASCA 78 (31 May 2018)

application to effect the amendment was, in my view, unreasonable. In my view there is no reason why the costs should not follow the result in this instance.

[16] In the premises I make the following order:

1. The Defendant's amendment dated 24 May 2018 is granted;
2. The Plaintiff is to pay the costs occasioned by the objection to the amendment, including the costs of the application to effect the amendment,



C E THOMPSON

ACTING JUDGE OF THE HIGH COURT

COUNSEL FOR APPLICANT

: ADV G F HEYNS

APPLICANT'S ATTORNEYS

**:KRAJEVICH JANSE VAN VUUREN
INC**

COUNSEL FOR RESPONDENT

: D A SMITH SC

RESPONDENT 'S ATTORNEYS

:VDT ATTORNEYS INC

DATE OF HEARING

: 19 June 2019

JUDGMENT DELIVERED ON

: 25 June 2019

REGISTER OF UNOPPOSED MOTION APPLICATIONS

ENROLLED FOR 27 JUNE 2019

INTERLOCUTORY APPLICATIONS FOR ALLOCATION BY THE SENIOR JUDGE THOMPSON J

ROLL NUMBER:2

NO:	CASE NUMBER	APPLICANT	RESPONDENT	NATURE OF APPLICATION
A	23908/18	NA NHLEKO	RAF	OTHER

