

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case No: 842/2008

In the matter between:

BRIDGESTONE SOUTH AFRICA (PTY) LTD

Plaintiff

and

SA TRUCK BODIES (PTY) LTD

Defendant

JUDGMENT:

DAFFUE, J

HEARD ON:

21 NOVEMBER 2013

DELIVERED ON:

12 DECEMBER 2013

INTRODUCTION

- [1] This is a belated application in terms whereof the plaintiff seeks leave to amend its plea to defendant's counterclaim. The application is opposed by the defendant.

THE PARTIES

- [2] Plaintiff is Bridgestone South Africa (Pty) Ltd, a manufacturer and wholesaler of automotive tyres. Defendant is SA Truck Bodies (Pty) Ltd. Advocate J D Maritz SC appeared for plaintiff in this application for leave to amend as well as in the main action referred to *infra*. Advocate S J Reinders appeared for defendant in this application as well as in the main action.

THE RELIEF SOUGHT

- [3] Plaintiff seeks an order in terms whereof a new paragraph 7A be inserted and its plea to defendant's counterclaim amended accordingly, which new paragraph reads as follows:

"7A. PRESCRIPTION

- 7A.1 In paragraphs 6 and 7 of the defendant's Counterclaim, read with annexure "A" thereto, the defendant bases its Counterclaim on purchases commencing on 1 March 2002 until 30 November 2007.
- 7A.2 The Counterclaim was instituted on 3 December 2008, by which time any claim to rebates dating more than three years before institution of the Counterclaim would have become prescribed in terms of Section 11 of the Prescription Act, 68 of 1969.
- 7A.3 In the premises, the defendant is precluded from basing his Counterclaim on any sales, as reflected in annexure "A", predating 4 December 2005."

HISTORICAL BACKGROUND

- [4] On 19 February 2008 plaintiff instituted action against defendant, claiming payment of the amount R1 220 256,00, being the purchase price of tyres sold by plaintiff to defendant from time to time during the period 2001/2002 to 2007, plus interest and costs.
- [5] Defendant not only defended the claim, but filed a counterclaim in terms whereof it claimed the amount of R4 043 326,31, being in respect of a rebate of R70,00 per tyre purchased from plaintiff during the aforesaid period to which it claimed to be entitled to in

terms of the parties' agreement and alleging that a total of 60 854 tyres were purchased during the period.

- [6] The real bone of contention between the parties was whether the agreement between them included a term pertaining to the R70,00 rebate a tyre. On 22 July 2010 a Rule 37 conference was held attended to by both the aforesaid counsel and their instructing attorneys whereupon the following agreement was entered into:

“4. The main disputes:

- (a) The parties agree that the essential dispute between them is:

It is common cause that plaintiff has paid defendant a discount of R200,00 per tyre bought by Defendant from plaintiff and the main dispute hereof is, 'Had it ever been agreed that the plaintiff would pay to the defendant a rebate of R70,00 per tyre, in addition to the R200,00 discount, purchased from the plaintiff by the defendant'.

- (b) It is agreed that, if it is found not to have been the case, judgment for R1 200 256,00 plus interest and costs in favour of the plaintiff should automatically follow. The Counterclaim should then also be dismissed with costs.

- (c) Should it be found to have been the case the matter is to be postponed for the determination of the quantum of the Counterclaim.

5. Separation of issues:

The defendant proposes the separation of the quantum of the Counterclaim to be tried at a later stage, after the remaining disputes had been decided by the Court.

Response:

The plaintiff agrees to a separation.”

- [7] The matter went on trial for the adjudication of the issue agreed upon and on 28 July 2011 Kahn AJ made the following factual finding and came to the following conclusion:

“The said service had been provided by the Defendant itself via its own staff, machinery and infrastructure at its own premises in Bloemfontein and in terms of the agreement; it was entitled to the fitment and alignment fee of 70.00 rands per tyre. The question posed by the parties in the Rule 37 conference is accordingly answered in the affirmative. In the circumstances the matter ought to be postponed for the determination of the *quantum* of the counterclaim.”

Thereupon the following orders were made:

- “1. In addition to the 200.00 rand per tyre rebate, the Defendant is entitled to a further rebate of 70.00 rands for each tyre purchased by it from the Plaintiff from the inception of the agreement to the termination thereof;
2. The matter is postponed *sine die* for the determination of the quantum of Defendant’s counterclaim.
3. The Plaintiff to pay costs.”

- [8] On 2 August 2011 an application for leave to appeal was filed by plaintiff. In paragraph 7 of the application plaintiff concluded as follows:

- “7. Accordingly, there is a reasonable prospect that another Court might find that the Plaintiff had not proved its entitlement to payment of R70,00 per tyre as from February 2002.”

In the absence of Kahn AJ, her acting stint having come to an end by then, the matter was referred to Jordaan, J who heard the application for leave to appeal and dismissed same with costs on 3 November 2011.

- [9] About eighteen months later plaintiff filed its notice of intention to amend. Defendant gave notice to oppose within the time frames allowed by Rule 28. Several grounds of objection were raised which will be dealt with *infra*.
- [10] Contrary to the provisions of Rule 28(4) stipulating that a party wishing to amend may lodge his application for leave to amend within ten days from the delivery of the notice of objection, plaintiff failed dismally in this regard. The application was brought five months later, but I must say that defendant has not taken issue with this delay.

THE ISSUES

- [11] In its application for leave to amend plaintiff dealt with defendant's objections set out in its written notice and claimed in paragraph 7 of its deponent's founding affidavit that "the question of prescription is actually part and parcel of the *quantum* of the counterclaim".
- [12] The grounds of objection, translated freely into English, are the following:
1. The amendment is aimed at relying on a new defence on the merits of the defendant's counterclaim which has already been determined by Kahn AJ;

2. The proposed amendment would be in conflict with the agreement entered into between the parties during the Rule 37 conference;
3. The plaintiff, being dissatisfied with the judgment of Kahn AJ applied for leave to appeal which application was dismissed;
4. Plaintiff's cause of action as pleaded in the particulars of claim is based on an agreement and defendant's claim is based on the same agreement, amplified as pleaded and consequently the counterclaim could not have become prescribed by virtue of the provisions of s 13(2) of the Prescription Act, 68 of 1969;
5. Plaintiff's plea of prescription should have been contained in a special plea and not as the proposed amendment provides for the plea to be part of the plea over on the merits.

THE AUTHORITIES

[13] The granting or refusal of an application for amendment of a pleading is in the discretion of the court which discretion should be exercised judicially in the light of all the facts and circumstances. Generally speaking, our courts have a tendency to allow amendments where this can be done without prejudice to the other party. An amendment will not be allowed if such prejudice that is caused cannot be cured by an order of costs and where appropriate by a postponement. The purpose of allowing an amendment should always be to ensure that a proper ventilation of the disputes between the parties is achieved. See in general Cilliers *et al*, Herbstein and Van Winsen: **The Civil Practice of the High Courts of South Africa**, 5th ed, vol 1, pp 678 - 680 and

Farlam *et al* **Erasmus: Superior Court Practice**, B1-179 and further.

- [14] Generally speaking, once a court has duly pronounced a final judgment or order, it has no authority to correct, alter or supplement it, the reason being that it has become *functus officio* or put otherwise, “its jurisdiction in the case having been fully and finally exercised, its authority over the subject matter has ceased.” See **Firestone South Africa (Pty) Ltd v Genticuro AG** 1977 (4) SA 298 (A) at 306F. This equally applies to an order made on the merits where the issues have been separated in terms of Rule 33(4) – See Herbstein and Van Winsen *supra* at 675 and 681 and **Schmidt Plant Hire (Pty) Ltd v Pedrelli** 1990 (1) SA 398 (D&CLD) at 408B-409C; **David Hersch Organisation (Pty) Ltd v Absa Insurance Brokers (Pty) Ltd** 1998 (4) SA 783 (T) at 787C-H and **Tolstrup NO v Kwapa NO** 2002 (5) SA 73 (W) at 77C-78A.
- [15] In **Tolstrup NO** *supra* Gautschi AJ warned, as the Supreme Court of Appeal has done on numerous occasions, that in separating issues the parties ought to be precise as to which issues are to be determined first and which are to be stayed for later adjudication. Preferably it should be done by reference to specific paragraphs of the pleadings. The learned acting judge dealt with an issue where the parties agreed that the *quantum* only would be heard as follows at 77F.

“Reference could also be made to Rule 34A, which allows for interim payments in actions for damages for personal injuries or death. Rule 34A(4) distinguishes between 'liability' and 'damages' in such cases. An agreement or finding on liability (which is the equivalent of 'the merits')

clearly disposes of everything bar the *quantum* of damages, and hence the willingness to afford the plaintiff interim payments. *Quantum* would not include a consideration of defences on the merits, be they defences raised by way of special plea, such as lack of jurisdiction, *non locus standi*, prescription or the like, or substantive defences such as absence of negligence, mistaken identity, contributory negligence and so on, all of which relate to *whether* damages are payable. Once that is out of the way, the parties can concern themselves with *how much* is payable. The special plea sought to be raised now seems to me to fall within what would generally be understood to be the merits. It is a defence which would logically have been dealt with prior to the parties embarking on an extensive enquiry into the quantum of damages.”

- [16] In **Krawa v Road Accident Fund** 2010 (6) SA 550 (ECG) Bloem AJ had to adjudicate an application for amendment in terms whereof defendant, the RAF, which had formally conceded the merits in favour of the plaintiff, sought an amendment in terms whereof it was denied that the minor child Thandeka was the plaintiff’s natural child and therefore plaintiff had no legal capacity to represent her and furthermore it was denied that the plaintiff received support from the deceased prior to her death as they lived separate lives and not as husband and wife at the time of her death. First of all, although defendant’s concession and consequent compromise of the merits of plaintiff’s action was not made an order of court, Bloem AJ considered that if had been the case he would have been *functus officio* and unable to correct, alter or set aside the order as it would have been definitive of the rights of the parties relevant to the merits of plaintiff’s claim. He was of the view that it did not make any difference whether the agreement of compromise was made an order of court or not and

accordingly the application for leave to amend was dismissed with costs.

- [17] Bloem, AJ's judgment was overturned by the full bench. In **Road Accident Fund v Krawa** 2012 (2) SA 346 (ECG) Van Zyl J, writing for the court, considered the terminology used by parties in order to achieve a separation of issues for trial and indicated that it is important to recognise that those terms are used in a procedural context. He stated as follows at paragraph [42]:

"... Further, the enquiry relating to damages or quantum is not always limited to what would amount to a mere calculation of the amount of damages to be awarded to the plaintiff. Accordingly, the danger that lies in the suggestion in the Tolstrup case, namely that the question of damages or quantum is confined to a mere calculation of the amount in damages to be awarded, is that it fails to recognise that in the context of a separation of issues for trial: (a) the issues between the parties are in the first place to be determined from the pleadings; and (b) unless admitted by the defendant, the enquiry relating to damages or quantum would also include issues relevant to the existence of patrimonial loss or damage."

The learned judge continued as follows:

"[46] The existence of a legal duty and the concomitant right to support are therefore inextricably part of the issues relevant to the question of damages, as that word is to be understood in the context of a separation of the issues on the pleadings for purposes of trial.

[47] Applied to the present matter, the question is then whether the defendant, by having divided the issues into merits and quantum, and thereafter conceding the merits, also conceded that the plaintiff had

suffered patrimonial loss. If not, then it follows that the question whether the deceased during her lifetime was under a legal duty to provide support to the plaintiff remained in dispute.”

Consequently the full bench found that notwithstanding the agreement of compromise, the issue pertaining to the deceased’s duty of support remained in issue and therefore the application for leave to amend the plea was granted.

[18] In so far as reliance was placed on the *exceptio rei iudicatae* it is instructive to refer to **Smith v Porritt and Others** 2008 (6) SA 303 (SCA) at 307 - 308. In para [10] of the judgment the court found that the *exceptio* had over the years been extended by the relaxation in appropriate cases of the common law requirements that the relief claimed and the cause of action be the same (*eadem res and eadem petendi causa*) in both the case in question and the earlier judgment. Where the circumstances justify the relaxation of the requirements those that remain are that the parties must be the same and the same issue - *eadem quaestio* - must arise.

[19] The defence of *res iudicata*, as relaxed by the courts, has become known as issue estoppel. Refer to the as yet unreported judgment of the SCA in **Hyprop Investments Ltd v NSC Carriers** 953/12 [2013] ZASCA 169 (27 November 2013 at paras [13] to [20]. It is clear from the above judgments and others that issue estoppel should be considered on a case by case basis and that a deviation from the requirements of *res iudicata* should not be allowed when it is likely to give rise to potentially unfair consequences in the subsequent proceedings. Leach AJA dealt with the issue as

follows in **Yellow Star Properties 1020 (Pty) Ltd v MEC, Department of Development Planning and Local Government, Gauteng** 2009 (3) SA 577 (SCA) para [22] at p 587A:

“Importantly when dealing with issue estoppel, it is necessary to stress not only that the parties must be the same but that the same issue of fact or law which was an essential element of the judgment on which reliance is placed must have arisen and must be regarded as having been determined in the earlier judgment.”

- [20] In so far as Mr Reinders submitted in his heads of argument – an aspect not persisted with during oral argument - that the amendment should not be allowed because of the fact that prescription, being a plea on the merits, should normally be raised by way of a special plea, it is necessary to briefly consider the judgment relied upon, being **Living Hands (Pty) Ltd and Another v Ditz and Others** 2013 (2) SA 368 (GSJ). The *dictum* of the learned judge that it is time honoured that prescription should be raised by way of a special plea must be seen in proper context. In all the judgments referred to by the learned judge a special plea was always contrasted with an exception as its anti-thesis and in none of those cases a special plea was contrasted with a normal plea or plea over. It does not matter whether a special plea is raised separately or as part of the plea over the merits. It remains apart from the merits and embodies a substantive self-contained defence. See **Brown v Vlok** 1925 AD 56 at 58 and **Viljoen v Federated Trust Ltd** 1971 (1) SA 750 (O) at 760A and further.

EVALUATION OF THE FACTS, THE LAW AND THE SUBMISSIONS BY COUNSEL

[21] Mr Maritz submitted that the question of prescription is part and parcel of the *quantum* of the counterclaim. He relied heavily on the full bench judgment of Van Zyl J in **Road Accident Fund v Krawa** *supra* and submitted that the judgments in **Tolstrup NO** *supra* by Gautschi AJ and **Krawa** *supra* by Bloem AJ were wrongly decided. Mr Reinders, on the other hand, submitted that the prescription plea is a defence on the merits and plaintiff should not be entitled to raise it at this stage of the proceedings in so far as the merits have been adjudicated upon.

[22] I am in respectful agreement with the judgment of Van Zyl J in **Road Accident Fund v Krawa** *supra*. However for the reasons that follow that judgment is distinguishable from the facts in *casu*:

22.1 In **Krawa** the defendant in its plea, except for admitting plaintiff's own *locus standi* and that it failed to pay the amount claimed, placed all the remaining allegations in the particulars of claim in issue. In *casu* no other factual averments were placed in issue by plaintiff, save as to defendant's entitlement to the R70,00 rebate per tyre.

22.2 In **Krawa** the notice of intention to amend was merely to substitute what amounts to a non-admission in the plea with a positive denial. In *casu* plaintiff seeks to rely on a totally new defence which was never raised in the original plea to the counterclaim.

22.3 In **Krawa** it should have been in the minds of the parties that a concession of the merits dealt with the insured driver's alleged negligence only and not to aspects such as the duty to support. In *casu* this aspect did not come into play as the amount of the damages can be established by a mere

calculation, i.e. the number of tyres purchased multiplied by R70,00 per tyre. Thus unlike as pertinently raised in **Krawa** the issue *in casu* is not whether plaintiff is liable to compensate defendant, but only what amount has to be paid.

22.4 In **Krawa** the parties agreed that defendant conceded the merits in favour of plaintiff. *In casu* Kahn AJ made a declaratory order to the effect that defendant is entitled to a further rebate of R70,00 for each tyre purchased by it from “the plaintiff from the inception of the agreement to the termination thereof”. (emphasis added). This is a final judgment definitive of the rights of the parties and the present matter cannot be equated with the facts in **Krawa**.

[23] Plaintiff accepted initially that Kahn AJ’s decision was a final decision definitive of the rights of the parties and appealable and therefore it applied for leave to appeal which was eventually unsuccessful. In doing so plaintiff accepted at that stage that the court was *functus officio*. This was the proper approach. In my view plaintiff, being dissatisfied with the judgment of Kahn AJ, followed the correct procedure to apply for leave to appeal. If still being dissatisfied, it should have petitioned the Supreme Court of Appeal and not approached this court with an application for leave to amend its plea to the counterclaim.

[24] Although it is true that s 17 of the Prescription Act, 68 of 1969 provides that a court may allow prescription to be raised at any stage of the proceedings, this does not mean that such a plea can be raised by way of an amendment to the pleadings after a final

judgment has been pronounced as in *casu*. I do not agree with plaintiff's counsel that the question of prescription is part and parcel of the *quantum* of the counterclaim and in this regard I refer to my reasoning *supra*, distinguishing the full bench judgment in **Krawa** from the facts in *casu*.

[25] I therefore find that this court cannot now entertain the application for leave to amend in the light of the agreement entered into between the parties at the Rule 37 conference and the declaratory order made by Kahn AJ which is definitive of the rights of the parties. Consequently, and in view of this finding it is unnecessary to deal with the other issues raised by counsel during argument.

[26] There is one aspect to be mentioned at this stage. It is possible that defendant may also be blamed for the fact that this matter was not set down long ago for adjudication of *quantum*. The matter could have been finally resolved during 2012 if the parties did not act in a lacklustre manner. The legal representatives of the parties are reminded that their clients are entitled to finality of their disputes as soon as possible. No acceptable explanation has been given as to why it took the plaintiff in excess of seventeen months since the dismissal of the application for leave to appeal to file its notice of intention to amend and why it took a further five months since the notice of objection to file the application for leave to amend. This is particularly as a result of such delays and irresponsible attitude that our Honourable Chief Justice Mogoeng has embarked upon a programme in terms whereof case flow management will probably be introduced into all courts in this country during 2014. Legal representatives should

not be allowed to dictate the pace of litigation. Justice must be seen to be done and justice delayed is often no justice at all.

ORDER

[27] Consequently the following order is made:

27.1 The application for leave to amend is dismissed with costs.

J. P. DAFFUE, J

On behalf of plaintiff: Adv. J D Maritz SC
Instructed by:
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BLOEMFONTEIN

On behalf of defendant: Adv. S J Reinders
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