

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION,
JOHANNESBURG

- (1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED. *Yes*

CASE NO: 29566/2016

16/8/2024
DATE

SIGNATURE

In the matter between:

ADVANCED OFFICE AUTOMATION
t/a NASHUA NORTH EAST

Applicant

and

KAREL DU PLESSIS

Respondent

In re:

ADVANCED OFFICE AUTOMATION
t/a NASHUA NORTH EAST

Plaintiff

and

KAREL DU PLESSIS

Defendant

WILLEM JOHANNES IZAK DAVEL

First Third Party

REINETT DAVEL

Second Third Party

JUDGMENT

GRAVES AJ:

[1] The Applicant applies in terms of Rule 28(4) for leave to amend its particulars of claim. Two reasons are advanced by the Applicant for the required amendment. First, it wishes to plead a cession agreement between itself and Phetogo Office Automation (Pty) Limited ("Phetogo") pursuant to a sale of business agreement concluded between the Applicant and Phetogo on 30 July 2020, which included a cession of the right of claim against the Respondent/Defendant to Phetogo. The second reason is to correct instances in the pleadings where details concerning the commercial agreements forming the basis of the claim are inaccurately captured. The Defendant/Respondent opposes the amendment on two principal grounds. First, it complains that Rule 28 is the incorrect procedure to substitute the Applicant for Phetogo. Second, it says that the amendment of the dates in the commercial agreement would have the effect of withdrawing admissions made by the Defendant / Respondent.

[2] The relevant background is as follows:

[2.1] during November 2011, the Applicant and the Fotomatt CC ("the principal debtor") concluded a written rental agreement, followed by a written service agreement concluded during November 2014. The effect of these two

agreements was that the principal debtor would pay the Applicant for the lease of certain equipment and would also pay for servicing of this equipment;

[2.2] on 29 May 2018 the Respondent concluded a deed of suretyship with the Applicant, binding himself jointly and severally with the principal debtor in respect of its indebtedness to the Applicant.

[2.3] during March 2018, the Applicant/Plaintiff instituted action against the Respondent/Defendant for the outstanding rental and service obligations of the principal debtor amounting to some R520 000,00. The pleaded cause of action against the Respondent was the deed of suretyship;

[2.4] the Defendant opposed the action and filed a series of special pleas based *inter alia* on the National Credit Act, 34 of 2005, and a general plea on the merits;¹

[2.5] during January 2023, the Applicant (by then represented by new attorneys) delivered a notice of intention to amend its summons and particulars of claim by deleting the content of the particulars in its entirety and replacing that pleading with revised particulars of claim, in which Phetogo was reflected as the plaintiff, and reference was made to the sale of business and cession;

[2.6] the Respondent delivered a notice of objection raising a number of objections, including a complaint that a substitution as effected should utilise Uniform Rule 15, alleging prejudice through not being able to consequentially

¹ The Third Parties reflected in the heading have been joined, but played no part in this application

amend its plea and objecting to what was termed a withdrawal of admissions made by the Defendant;

[2.7] the Applicant delivered an application for leave to amend in accordance with Rule 28(4) to which an answering affidavit was filed, and a reply;

[2.8] during October 2023, the Applicant served a notice of substitution in terms of Rule 15 for its substitution with Phetogo.

There were various other procedural activities not relevant to this application.

Has the Applicant satisfied the requirements for the substitution of Phetogo as plaintiff?

[3] The High Court has always enjoyed the inherent power under common law to substitute a party to proceedings. The purpose of Uniform Rule 15 is merely to provide a simplified form of substitution.² The wording of Rule 15(1) indicates that the Rule is primarily directed at a procedural substitution in the case of death, marriage or other change of status of a party, unless the cause of such proceedings is thereby extinguished. After the introduction of Rule 15 the High Court still has the power to grant a substitution on substantive application where Rule 15 does not apply.³ Where there is a substantive application for substitution the approach of a Court is as in applications for amendments of pleadings. Broadly, this means that in the absence of any

² **Tecmed (Pty) Ltd and Others v Nissho Iwai Corporation and Another**, 2011 (1) SA 35 (SCA), at para [12]

³ *Id*

prejudice to the opposing party which cannot be remedied by an order for costs, applications are usually granted.⁴

- [4] The Respondent's notice of objection to the notice of the Applicant's intention to amend that this should have been done by Rule 15, in which the grounds of substitution would be set out, and, second that the Respondent is prejudiced because the basis for the substitution is unclear, rendering it impossible for him consequentially to amend his plea.

[4.1] As to the first objection, I understand the authorities to permit the use of Rule 28 to effect the substitution of one party for another where there is no prejudice.⁵ Does it matter that the substantive application for amendment / replacement of its particulars of claim, *inter alia* to substitute the new purchaser as plaintiff, was brought in terms of Rule 28, rather than Rule 15? To my mind the answer is "no". In both instances a party will explain the basis on which the substitution is sought which is what the Applicant did in its application.

[4.2] Further, in accordance with the statement of the SCA in **Tecmed** a notice in terms of Rule 15 would not have been appropriate because the substitution was not a change of status, but rather the substitution of a new party who had succeeded to the rights and obligations of the original plaintiff. Consequently, a substantive application would in any event have been required, and the label attached to this is less significant than the contents of the application. In the

⁴ Id, para [14]

⁵ **Luxavia (Pty) Ltd v Gray Security Services (Pty) Ltd**, 2001 (4) SA 211 (W), at paras [10] to [15] and cases there cited

present case the application set out the basis on which the substitution was sought.

[5] I have difficulty in discerning the basis for the Respondent's complaint that he will not be able to plead to the amended particulars of claim. Although he filed an answering affidavit in response to the application to amend this affidavit merely repeats the assertion that the Respondent will not be able to plead, without saying why this would be so. I cannot discern why there would be such a difficulty. His options appear to be unrestricted: if so advised, he may challenge the basis of the sale of business and cession on factual or legal bases; he may seek to assail the impact of the cession on his liability as surety and co-principal debtor with Fotomatt CC; he may challenge the liability of the principal debtor to the Applicant (as he has already done in his existing plea); or he may seek an indemnity from the Third Parties in respect of his potential liability to the Applicant (as he has done in his existing third party notice). Whether all, some or none of these potential challenges are raised by the Respondent, is a matter for him and his legal representatives to determine. I do not accept that he is prejudiced in his ability consequentially to amend his plea.

[6] When considering the application for amendment which includes an application for substitution, I adopt the principles regarding amendments generally as set out in the authorities referenced above. These authorities in broad compass incline towards permitting an amendment when this will facilitate the proper ventilation of a dispute between the parties and will not result in material prejudice to the other party. I note that the Respondent did not in its papers suggest that the amendment / substitution would result in a prescribed claim being introduced into

the particulars of claim. Counsel for the Respondent confirmed that this point had not been raised in papers and that it was not part of the Respondent's opposition.

[7] I find that the form of process adopted by the Applicant to effect its substitution with Phetogo is not objectionable.

Withdrawal of Admissions

[8] The general principles regarding amendments (*i.e.* prejudice) apply equally to the withdrawal of admissions subject to the qualification that the withdrawal of an admission is usually more difficult to achieve. This is because it involves a change of a front which requires full explanation to convince the Court of the *bona fides*, and it is more likely to prejudice the other party.⁶ In civil proceedings, an admission is a statement against interest which has the effect of binding the party on whose behalf it is made. If that effect is absent then the statement cannot amount to an admission and the well-established rules relating to the withdrawal of admissions cannot apply. In those circumstances prejudice to the other party is not an issue.⁷

[9] The admissions which the Respondent claims to have made are the following:

[9.1] the admission of a series of dates on which the original particulars of claim allege that the commercial agreements (rental, service) were concluded, now sought to be altered by the intended amendment;

⁶ **President Versekeringsmaatskappy Beperk v Moodley**, 1964 (4) SA 109 (T), at 110 H – 111 A

⁷ **Saayman v Road Accident Fund**, 2011 (1) SA 106 (SCA), at para [28]

[9.2] the monthly escalation originally pleaded in respect of one rental agreement was pleaded to be 0% per *annum*, sought to be changed to 10% per *annum* in the intended amendment;

[9.3] the original description of the goods reflected in one of the service agreements is now sought to be altered from SPC430DN to SPC420DN.

[10] In his answering affidavit the Respondent points out that in his plea he has admitted the various dates, and the escalation date and the description of the goods (which is factually correct). He says that the amendment of the dates will prejudice him in that the majority of the Plaintiff's claims concern future rentals alleged to be payable because the amendment of the dates will have a material impact on the amounts claimed. In its answering affidavit the Applicant points out that these dates need to be amended to correlate with the various agreements attached to its particulars of claim. It also says that some of the amended dates of these agreements, referenced in its amended particulars of claim, are themselves wrong due to a *bona fide* typographical error in this notice. It asks that if granted leave to amend, they be permitted to (further) rectify these typographical errors.

[11] The Respondent's opposition to the amendment of dates on the basis that this constitute an admission the withdrawal of which will prejudice him, is mistaken. First, on the authority of **Saayman**, quoted above this is not a statement against interest by the Respondent; it cannot be against the Respondent's interest to admit an incorrectly pleaded date of a written agreement. In fact, on the Respondent's own version the dates of the respective agreements in the original particulars of claim are more favourable to him. This being so, the normal principles relating to

the withdrawal of an admission which consider consideration of prejudice to the opposing party, do not apply.⁸ Further, the Respondent does not contend that the dates of the agreements are originally pleaded are in fact the correct dates reflected on these written agreements. This being so it is opportunism on the part of the Respondent to seek to bind the Applicant to a factual assertion in its own pleadings which is contradictory to the date of a written agreement relied upon. The reason for the erroneous dates in the original particulars of claim was said by the Applicant to be due to *bona fide* typing errors. In my view it was carelessness, but nevertheless *bona fide* (in the sense of not being wilful). I do not find the Respondent's objection to be valid and I reject it.

[12] I find that the Applicant should be permitted to amend its particulars of claim so as properly to reflect (i) the appropriate dates of the written agreements relied upon; and (ii) the description (in truth, the correction of one numeral of the serial number) under claim D and (iii) the appropriate annual, escalation percentage. In effecting these amendments the Plaintiff is also given leave to correct the (further) typographical errors of dates in its notice of intention to amend dated 20 January 2023. Save as indicated in the immediately preceding sentence, no other alterations to the dates in the Applicant's notice of intention to amend are permitted.

Costs

[13] Rule 28(9) provides that a party giving notice of amendment in accordance with that sub-rule shall, unless the Court otherwise directs, be liable for the costs

⁸ The fact that an amendment may cause the other party to lose its case is not itself prejudice: **Amod v South African Mutual Fire and General Insurance Co Ltd** 1971 (2) SA 611 (N) at 615A

occasioned to the other party. The Applicant accepted its liability for wasted costs but disavowed liability for the costs of opposition, which it characterised as unreasonable. There is authority that an applicant for amendment may be required to bear the costs of opposition which are regarded in circumstances as reasonable and not vexatious or frivolous. Also taken into account is whether the matters raised are to a measure *res nova*.⁹ In the present circumstances, I believe that the Respondent's opposition was misguided and largely unfounded. The opposition was unreasonable, but not vexatious. The Applicant has been successful and there is no reason why the unsuccessful respondent should not bear the costs of opposition.¹⁰

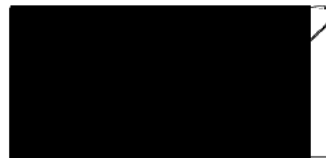
[14] I make the following order:

1. The Applicant is granted leave to amend its particulars of claim dated 16 August 2016 by the replacement in its entirety with annexure "A" to the Plaintiff's notice of intention to amend dated 20 January 2023, subject to the following changes:
 - (a) the date in paragraph 4 of annexure "A" will be changed to '20 November 2011'; and
 - (b) the date in paragraph 28 of annexure "A" will be changed to '20 November 2014'.
2. The Applicant is ordered to pay the costs of the application on an unopposed basis up to and including the notice of intention to amend dated 20 January 2023.

⁹ **Grindrod (Pty) Ltd v Delport and Others**, 1997 (1) SA 342 (W), at 347 C-F

¹⁰ See: **Kirsh Industries Ltd v Vosloo, Lindeque and Others**, 1982 (3) SA 479 (W), at 486

3. The Respondent / Defendant is ordered to pay the costs occasioned by its opposition.
4. All costs are payable as follows:
 - (a) on the party-and-party scale up to 11 April 2024;
 - (b) from 12 April 2024 on scale B in accordance with Rule 69, read with Rule 67A.



N.J. GRAVES

Acting Judge of the High Court of
South Africa
Gauteng Local Division Johannesburg

APPEARANCES:

Date of hearing:	1 August 2024
Date of judgment:	16 August 2024
Counsel for First Applicant: Instructed by:	R. CARVALHEIRA Hammond Pole Attorneys Mr B. Michie
Counsel for Respondent:	V. MACKENZIE Coenraad Kukuk Attorney