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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case Number: 7246/2022

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: YES/NO

DATE **12/02/25**

SIGNATURE

In the matter between:

**EAST AND WEST INVESTMENTS (PTY) LTD
AND SIXTY OTHERS**

Applicants

and

MARSH (PTY) LTD

Respondent

In re:

**EAST AND WEST INVESTMENTS (PTY) LTD
AND SIXTY OTHERS**

Plaintiffs

and

AIG SOUTH AFRICA LIMITED

First Defendant

OLD MUTUAL INSURE LIMITED

Second Defendant

CENTRIQ INSURANCE COMPANY LIMITED

Third Defendant

GUARD RISK INSURANCE COMPANY LIMITED

Fourth Defendant

MARSH (PTY) LTD

Fifth Defendant

JUDGMENT

Joyini AJ

INTRODUCTION

- [1] This is an application by the applicants for leave to amend the particulars of claim in the main proceedings.
- [2] The application for leave to amend is aimed at correcting the pleading in the following respects:
- [2.1] The applicants seek to introduce the averment that, in the stead of Fortress, it is Capital Propfund (Pty) Ltd, a private company with registration number 2014/013211/07 that holds the proportionate interest of 50% in Polokwane Building at Cnr Hospital & Market St, Polokwane Central, Polokwane, together with the first plaintiff.
- [2.2] The applicants seek to introduce the averment that, in the stead of Group 44, it is Mark Batchelor Investments CC, a close corporation with registration number C[...] that holds the proportionate interest of 20% in Polokwane Building at Cnr Hospital & Market St, Polokwane Central, Polokwane, together with the first plaintiff.
- [2.3] The applicants seek only to amend the parties that are no longer forming part of consortium and the joint venture in order to correctly cite the actual entities, namely, Capital Propfund (Pty) Ltd and Mark Batchelor Investments CC.
- [2.4] Counsel for the applicants argued that the debt that would be claimed in the intended amendment is the same debt claimed in the existing particulars of claim and that the institution of the main proceedings had interrupted the running of the prescription when the summons was served.

- [3] The 1st, 2nd, 3rd, and 4th defendants [the insurers] do not oppose the application.
- [4] It is only the respondent (the 5th defendant in the main proceedings) who opposes the application on the ground that the intended amendment would allegedly introduce claims by Capital Propfund (Pty) Ltd and Mark Batchelor Investments CC that have prescribed.
- [5] Counsel for the respondent argues that the claims now sought to be introduced have thus prescribed and the amendment should therefore be refused. The court was referred to **Section 15(1)** of the **Prescription Act 68 of 1969** which provides: *'The running of prescription shall, subject to the provisions of ss (2), be interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt.'*
- [6] Counsel for the respondent submits that for prescription therefore to be interrupted by service of process on the debtor, the summons has to be one in which *"the creditor claims payment of the debt."*
- [7] Counsel for the respondent further argues that the authorities on the correct interplay between an application for leave to amend and section 15(1) of the Prescription Act are the Supreme Court of Appeal judgments in *Associated Paint & Chemical Industries (Pty) Ltd t/a Albestra Paint and Lacquers v Smit*¹ and *Blaauwberg Meat Wholesalers CC v Anglo Dutch Meats (Exports) Ltd*².

LEGAL PRINCIPLES

- [8] When adjudicating the dispute between the parties, the court should be guided by the following legal principles, set out in the ancient *Moolman v Estate Moolman*.³

¹ 2000 (2) SA 789 (SCA).

² [2004] 1 SA 129 (SCA).

³ 1927 CPD 27 at 29.

- [8.1] it is trite that a litigant may amend his or her pleadings at any stage of the proceedings before judgment;
- [8.2] a court hearing an application for an amendment has a discretion to grant it. Such discretion must be exercised judiciously.
- [8.3] the general approach to amendments is that they should be allowed, unless the amendment application is made in bad faith and would cause an injustice which cannot be compensated with a costs order;
- [8.4] an amendment that would render the particulars of claim excipiable is impermissible.⁴

ANALYSIS AND DISCUSSION

- [9] The court has the discretion to grant or refuse the amendment, which must be exercised judiciously. For the court to exercise its discretion in favour of granting an amendment, the seeker must demonstrate a measure of good faith and must offer a reasonable explanation for why the amendment is required. The court must then weigh the reasons or explanation given by the applicant for the amendment against objections raised by the opponent, and where the proposed amendment will prejudice the opponent or would be excipiable, the amendment should be refused.
- [10] In *Trans-Drakensburg Bank v Combined Engineering (Pty) Ltd*,⁵ the court said: "*Having already made his case in his pleadings, 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 record an issue of which he has no supporting evidence where evidence requires or save perhaps in exceptional circumstances, introduce an amendment which would make the pleading excipiable.*"

⁴ *Krischke v Road Accident Fund* 2004 (4) SA 358 (W) at 363B; *Bowring Barclays & Genote* (Edms) Bpk v De Kock [1991] 3 All SA 42 (SWA).

⁵ 1967 (3) SA 632(D) at 640H. See also *Krogman v Van Reenen* 1926 OPD 191 at 194 -195

[11] In *Union Finance Holdings (Pty) Ltd v Bonugli and Another* NNO⁶ the court held the following: “[6] The core issue raised by the plaintiffs is that the conditional counterclaims have become prescribed. Before I deal with it any further, it is necessary to decide whether prescription can be raised in these proceedings, being interlocutory in nature. The defendant, with reliance on the judgment of Viljoen J (as he then was) in *Rand Staple-Machine Leasing (Pty) Ltd v ICI (SA) Ltd* **1977 (3) SA 199** (W), submitted that the defence of prescription can only be raised by way of a special plea in the main action and therefore not in an interlocutory application as the plaintiffs have done. In *Rand Staple-Machine* the learned judge, in dealing with an application for an amendment with reference to the proceedings envisaged in s 17(2) of the Prescription Act 68 of 1969 (the **Prescription Act**), **held** that prescription could only be raised in main proceedings, such as trial proceedings, and not in intermediate or interlocutory proceedings. The judgment has not been referred to in subsequent cases dealing with this aspect. The opposite view was expressed by Foxcroft J in *Grindrod (Pty) Ltd v Seaman* **1998 (2) SA 347** (C), where in regard to an application for amendment the learned judge held that prescription could be raised either if it were common cause or in situations where the claim or right to claim were 'known to have prescribed'. The last-mentioned phrase is a quotation from the judgment of Fleming DJP in *Stroud v Steel Engineering Co Ltd and Another* **1996 (4) SA 1139** (W) at 1142, where the learned judge, in regard to an application to amend by substituting the existing cause of action with a new cause of action, held that 'it would make no sense to permit a claim which is known to have prescribed'. I prefer, and agree with, the approach adopted in *Grindrod* which, as correctly pointed out by counsel for the plaintiffs, is in line with the judgment of the Supreme Court of Appeal in *Associated Paint & Chemical Industries (Pty) Ltd t/a Albestra Paint and Lacquers v Smit* **2000 (2) SA 789** (SCA) para 9 where Grosskopf JA, in regard to an opposed application for amendment, remarked: 'By raising the question of prescription in his opposing affidavit the defendant, in my view, complied with the provisions of **s 17(2)** of the **Prescription Act 68 of 1969**.'

⁶ **2013 (2) SA 449**.

- [12] In *Stroud v Steel Engineering Co Ltd and Another*⁷ the court held: “There remains the contention that because the claim is prescribed, it should not be allowed. I accept that the Court normally would not permit an allegation which has no possibility of advancing the situation of a litigant and can at best serve as basis for the need to hear evidence which leads nowhere. Accordingly, it would make no sense to permit a claim which is known to have prescribed. But if the supervening of prescription is not common cause, the application for amendment is normally not the proper place to attempt to have that issue decided.”
- [13] It is quite interesting to note that a judgment by a full bench of the Kwazulu-Natal High Court has revitalized the debate whether an amendment to a pleading should be allowed if the claim, as amended, has prescribed. In *Heramoney Salligram and Others v Nalin Salligram and Others*,⁸ the court was presented with a case where the first appellant sought to amend its particulars of claim by replacing an alleged oral agreement involving a debt payable by the first respondent with a cession agreement.
- [14] By way of summary, the respondents opposed the amendment, and argued that, by referring to a new cession agreement, the claim in question was based on a different and separate agreement, and therefore a different debt was now being claimed. Since this debt had prescribed, they argued that the amendment ought not be allowed.
- [15] The KZN High Court framed the question in the following terms: was the appellant claiming payment of the same debt or a different debt in its amended particulars? To answer this question, the court stressed that the term “debt” referred to in the Prescription Act of 1969 is not the same as the cause of action upon which the debt is based. A cause of action refers to the factual basis, the set of material facts that forms the basis of the plaintiff’s legal right of action. That can be amended. However, the debt which forms

⁷ **1996 (4) SA 1139** (W).

⁸ [2019] ZAKZPHC 63 (20 September 2019).

the basis of the plaintiff's right of action needs to remain the same if an amendment is to be allowed.

[16] The court explained that, even an original summons which fails to disclose a cause of action may interrupt the running of prescription provided that the right of action in the amended summons is recognizable as the same or substantially the same right of action as that disclosed in the original summons.

[17] In conclusion, the court held that the application for an amendment is not normally the proper forum to decide the issue of prescription. Once prescription is not common cause, the plaintiff should not be deprived of his chance to put his claim before the court. The defendant will have the opportunity to raise the defence of prescription in its plea in the same way that it would raise any other defence once the amendment has been granted.

CONCLUSION

[18] In determining this matter, I must be guided by the well-established principles referred to above applicable to applications to amend particulars of claim. In this regard, I need to draw certain inferences and weigh probabilities as they emerge from the parties' respective submissions, affidavits, heads of argument and oral submissions by parties' counsel.

[19] There is a view that the issue of prescription is best left to the pleadings and ultimate resolution at trial. I align myself with this view.

[20] I also align myself with the view that the respondents in *Salligram supra* may have made a decision that is not one of the best by opposing the amendment on the basis that the claim had prescribed. The same goes for the respondent in *casu*. Even if an amendment incorporates a fresh cause of action, our courts are usually inclined to allow it as long as no prejudice results that cannot be cured by an order of costs.

- [21] In *Mabaso v Minister of Police*,⁹ Goldstone AJ (as he then was) said that ‘*even in a gross case*’ the court should grant an amendment unless there is a likelihood of prejudice which cannot be cured by a suitable order for costs.
- [22] In *Myers v Abramson*,¹⁰ it was held that even though the amendment has the effect of changing the character of the action and will necessitate fresh evidence to be led, our courts will still allow it if it is necessary to determine the real issues between the parties.
- [23] In *Cordier v Cordier*,¹¹ the court, in an application for an amendment, found that the plaintiff’s claim had actually prescribed, both in its original form and in its amended form. The court, however, granted the amendment, taking the view that the plaintiff might be able to counter the defence of prescription by proving an acknowledgement of liability by the defendant, a waiver of the defence of prescription, or some other argument. The grant of the amendment would leave it open to the plaintiff to raise these arguments, whereas refusal of the amendment would leave the plaintiff no option but to appeal.
- [24] It is trite that the court has the discretion to grant or refuse the amendment, which must be exercised judiciously. For the court to exercise its discretion in favour of granting an amendment, the seeker must demonstrate a measure of good faith and must offer a reasonable explanation for why the amendment is required. The applicants have done this to the court’s satisfaction. The court must then weigh the reasons or explanation given by the applicant for the amendment against objections raised by the opponent, and where the proposed amendment will prejudice the opponent or would be excipiable, the amendment should be refused. Having weighed the reasons and explanation given by the applicants against objections raised by the respondent, I am of the considered view that the proposed amendments are not excipiable and as such, the respondent will not be significantly prejudiced if the application is granted.

⁹ SA 319 (W) at 323D1980 (4).

¹⁰ 1951 (3) SA 438 (C).

¹¹ 1984 (4) 524 (CPD).

[25] In considering the matter, and taking into account all the additional facts, circumstances together with submissions and authorities referred to by counsel, I am of the considered view that the applicant has made out a case for the relief sought. I am of the view that the applicant has satisfied all the legal principles referred to above. It is therefore reasonable and fair that I should grant the applicant's application for the amendment of particulars of claim.

COSTS

[26] I am entitled to consider all the relevant circumstances surrounding this matter. In substance, the applicants have been successful against the respondent. The rule that costs should follow the event is still applicable in these circumstances. The respondent has not shown any good reason why this rule should not be applied.

[27] I have considered both parties' argument relating to the costs of this application. I am accordingly inclined to grant costs in applicants' favour. The respondent/fifth defendant shall pay the costs of the application, including costs of two counsel, where so employed, both counsel on scale C.

ORDER

[28] **In the circumstances, I make the following order:**

[28.1] The applicants are granted leave to amend their particulars of claim as per the notice of intention to amend dated 10 November 2023, by:

[28.1.1] replacing the description of the twenty-seventh plaintiff on page 2 of the combined summons to reflect the following: "*Capital PropFund (Pty) Ltd REG NO 2014/013211/07;*"

[28.1.2] replacing the description of the twenty-seventh plaintiff on page 13 of the combined summons to reflect the following description: "*Capital PropFund (Pty) Ltd, a private company with registration number 2014/013211/07 and registered address situated at C[...] P[...], B[...] [...], C[...] C[...], Morning Side, Gauteng, 2196, dully registered and incorporated with the company laws of the Republic of South Africa;*"

- [28.1.3] replacing paragraph 27 of the particulars of claim with the following paragraph: *“The twenty-seventh plaintiff is Capital PropFund (Pty) Ltd, a private company with registration number 2014/013211/07 and registered address situated at C[...] P[...], B[...] [...], C[...] C[...], Morning Side, Gauteng, 2196, duly registered and incorporated with the company laws of the Republic of South Africa;”*
- [28.1.4] replacing the description of the twenty-seventh plaintiff on page 2 of the combined summons to reflect the following: *“Mark Batchelor Investments CC REG NO C[...];”*
- [28.1.5] replacing the citation of the thirty-second plaintiff on page 14 of the combined summons to reflect the following description: *“Mark Batchelor Investments CC, a closed corporation with limited liability and situated at 6[...] H[...] Road Bryanston 2191, duly registered and incorporated with the company laws of the Republic of South Africa with registration number C[...];”*
- [28.1.6] replacing paragraph 32 of the particulars of claim with the following paragraph: *“The thirty-second plaintiff is Mark Batchelor Investments CC, a closed corporation with limited liability and situated at 6[...] H[...] Road, Bryanston, 2191, duly registered and incorporated with the company laws of the Republic of South Africa with registration number C[...];”*
- [28.1.7] inserting, a new row at the end of the table at paragraph 120 to reflect the following:

Lynnwood Erf 3[...]	Second Plaintiff	R247,984.75
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- [28.2] The respondent/fifth defendant shall pay the costs of the application, including costs of two counsel, where so employed, both counsel on scale C.

T E JOYINI
ACTING JUDGE OF THE HIGH COURT, PRETORIA

APPEARANCES:

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Date of Hearing: 24 January 2025

Date of Judgment: 12 February 2025

This Judgment has been delivered by uploading it to the Court online digital data base of the Gauteng Division, Pretoria and by e-mail to the Attorneys of record of the parties. The deemed date and time for the delivery is 12 February 2025 at 10h00.

