

SOUTH AFRICA / JUDGMENT

Consolidated Transport Rigging and Logistics (Pty) Ltd v Concord Cranes (Pty) Ltd (34646/20) [2023] ZAGPPHC 1984 (12 December 2023)

[2023] ZAGPPHC 1984

COURT

North Gauteng High Court, Pretoria

BEFORE

Ntlama-Makhanya

CASE / FILE NUMBER

34646/20

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REPUBLIC OF SOUTH

AFRICA

IN THE HIGH COURT OF

SOUTH AFRICA

GAUTENG DIVISION,

PRETORIA

CASE

NUMBER: 34646/20

(1)

REPORTABLE: YES

(2)

OF INTEREST TO OTHER JUDGES: YES

DATE:

12 December 2023

SIGNATURE:

In

the matter between:

CONSOLIDATED
TRANSPORT RIGGING
AND
LOGISTICS (PTY) LTD
PLAINTIFF
And
CONCORD
CRANES (PTY)
LTD
DEFENDANT

Delivery:	This judgment is issued by the Judge whose name appears herein and is submitted electronically to the parties /legal representatives by email. It is also uploaded on CaseLines and its date of delivery is deemed 12 December 2023.
Summary:	Incorrect citation-plaintiff. Amendment opposed. Main cause - uncontested. Uniform Rules of Court-28(4); Prescription Act 68/1969. Application – amendment-granted. Costs in the main cause.

JUDGMENT

NTLAMA-MAKHANYA AJ

- [1] The applicant applied for leave to amend the business name that was incorrectly cited as Consolidated Transport Rigging Logistics (PTY) LTD (Registration number (2014/1941/70/07) as it appears in the particulars of claim to be renamed to read as Consolidated Transport Logistics CC (Registration number 1994 /002874/23). The amendment is limited to the correction of the description of the plaintiff from that of the company into that of the close corporation. The cause of action in this matter remains the same.
- [2] The defendant opposed this application in that the amendment seeks to substitute the present plaintiff as a private company to that of a close corporation.
- [3] The plaintiff prays:
- [3.1] to be granted leave to amend its particulars of claims in terms of its notice dated 13 February 2023.
- [3.2] for the defendant to pay the costs of this application in the event that it is opposed; and
- [3.3] for any other alternative relief.
- [4] Therefore, this court called is upon to establish whether this application is purely an amendment for the correction of the identity of the plaintiff or the substitution of parties?
- [5] For that reason, I foreground the gist of this case with the facts that prompted this dispute.

Background

- [6] The plaintiff applied to amend its name as it appears in the particulars of claim. The plaintiff discovered that it was incorrectly cited as Consolidated Transport Rigging Logistics (PTY) LTD (Registration number (2014/1941/70/07) as opposed to Consolidated Transport Logistics CC (Registration number 1994 /002874/23). The plaintiff's original attorneys of record withdrew from the matter and then the plaintiff met with the newly appointed attorneys on 07 February 2023. It was at the latter meeting during the discussion of the matter with newly

appointed legal representatives that on perusing through the documents handled by previous representatives wherein a startling observation was found in that a close corporation has been incorrectly described as a company in the pleadings. Following this discovery, the plaintiff applied on 13 February 2023 to amend its name to reflect its identity. The history of the close corporation dates to 1994 and it was in the year 2014 when the plaintiff's auditors suggested that it be transferred to a company and proceeded to register it with

the same details (identical names). However, the process did not bear any fruit as it became impossible to change the close corporation

vendor details to all the regular customers. The plaintiff further submitted that there was no business concluded in the new company and the corporation was not aware that it was cited as a company as opposed to the close corporation. From the records of the previous

attorneys, it was also evident that the plaintiff had always conducted business as a close corporation as the file was also opened

in the name of the close corporation; bills for services rendered and the payment of such services were in fact paid for by the close corporation. Therefore, the incorrect description was a mere oversight wherein on discovery of the incorrect identity, an

application for an amendment which is limited to the misdescription of plaintiff's citation was submitted.

[7] The defendant opposed this application citing the distinct nature of the close corporation and the company as separate legal entities. The defendant alleged that the amendment would cause an irreparable harm in that the presently cited plaintiff claims against the defendant are based on a cause of action that arose on 17 October 2018. The amendment would have the effect of resuscitating a prescribed claim. The amendment was not bona fide and would cause prejudice to the defendant in that a period of three years had since lapsed from the time when the alleged breach and the delivery of the notice to amend the citation of the plaintiff substituting one plaintiff for another as separate legal entities being a close corporation with the registration number 1994 /002874/23 was made. The service by the present plaintiff and substitution for a new creditor does not interrupt section 15(1) of the Prescription Act 68 of 1969.

[8] As noted, the cardinal issue for this court is to establish whether the legal name or the legal party grounded and fitted the misdescription of the plaintiff for determination in this case?

Assessment

[9] It is common cause that the main action in this matter remains the same. This case is concerned with the amendment of the identity of the applicant and not the substance of the contract between the parties. The plaintiff is misidentified as a company instead of being a close corporation.

- [10] There is no denial of the cause of action which is not the subject of this application. The focus is limited to the misdescription of the plaintiff. The correction of the identity of any business entity, not only the plaintiff, involves establishing certain factors that will justify the quest for the needed amendment. The overall framework is to establish whether the defendant will not be prejudiced by the said amendment and the plaintiff is genuine and carries no mala fides that underlie the application for the amendment.
- [11] This application is of value for the determination of the main cause of the dispute between the parties. It touches on the need for the reflection of the identity of the plaintiff. It is acknowledged that the application for an amendment to consider the misdescription of the plaintiff should not simply be dismissed at face value with the resultant 'closing of the door' to the main cause of the case. It is common knowledge that the significance of the misdescription of the party to the proceedings considers the interests of justice wherein the other party need not be prejudiced by such an amendment. Moyo J of the Zimbabwean High Court in *Kaiso Nguwo vs Maria Peno HC 1220/16* held that 'technical objections to lawsuits that would otherwise lead to the court discerning what the real dispute is and therefore achieving justice between man and man, should not be easily upheld', (page 2).
- [12] I am influenced by Moyo J in *Nguwo* on his endorsement that objections to amendments, particularly the uncomplicated ones, should not be easily ratified by technicalities that limit the ventilation of the proper basis of the main application (page 3). Similarly, Mavangira JA of the Supreme Court of Zimbabwe in *Mapondera v Fred Rebecca Goldmine Holdings Limited SC 565/19* argued that 'the object of [correcting the misdescription] is to do simple justice ... without being shackled by legal technicalities and formalities pertaining to the [main cause of the application]', (page 7). In this case, the counsel for the applicant also referred this court to *Galgut DJP in Four Tower Investments (Pty) Ltd v Andre's Motors 2005 (3) SA 39 (NPD)* judgment which stated that 'rigidity on technical reliance should be slowly moved away from to ensure a proper ventilation of the issues in a case for the main focus on the crown that envelops not only justice being achieved but be seen to be done in contentious matters that come before the courts', (para 29).
- [13] The lessons from these cases are indicative of the fact that the incorrect identity of the plaintiff is not a bar to its amendment. In this matter, the amendment for the citation of the plaintiff became the focal point of this application and the reasons foregrounded by the defendant on its opposition to the amendment did not come any near the content of the dispute in this case. The reasons proffered were based on the fear of the claim being prescribed and not the merits of the claim itself.
- [14] With the above guidance, I express no view on the rationality of the claims as set out in the particulars of claim regarding the substance of the main cause of action. Thus, I limit myself and I also revert to the contention that is brought by the quest for an amendment of the plaintiff's name in this matter. This application sought to merely correct the identity of the plaintiff in terms of Rule 28(4) of the Uniform Rules of the Court and nothing more. The application was not for a substitution for a new party or introduction of a new cause of

action. Therefore, it is not the intention of this court to reduce the importance of this matter out of the corners of concrete judicial reasoning but for a balanced considered view on the implications it might likely have on the defendant.

- [15] The plaintiff has placed before this court the reason for the incorrect citation in that it was due to a bona fide mistake which followed the advice that became impossible to execute due to the large numbers of its vendors. This court acknowledges that human error is not fatal to this application without the consequent prejudice on the defendant. Misrepresentation and mala fides are the factors that serve as the determinant of the genuine application for the amendment of the incorrect citation of the plaintiff. The two factors may pose a great risk to the defendant. As was similarly stated by Mpati P in *Imperial Bank Limited v Hendrick Barnard* NO (349/12) [2013] ZASCA 42 and unequivocally held that:

an application for amendment will always be allowed ‘unless it is made mala fide or would cause prejudice to the other party which cannot be compensated for by an order for costs or by some other suitable order such as a postponement’. An amendment would cause prejudice if, for example, its effect would be to deprive the other party to the action of the opportunity to raise an otherwise good plea of prescription. Thus, a late amendment which has the effect of introducing a new cause of action or new parties would inevitably cause prejudice to the other party in the action, as it would defeat an otherwise good defence of prescription. However, a plaintiff is not precluded by prescription from amending his or her claim, ‘provided the debt which is claimed in the amendment is the same or substantially the same debt as originally claimed, and provided, of course, that prescription of the debt originally claimed has been duly interrupted’, (para 8, all footnotes omitted).

- [16] Accordingly, with lessons from Mpati P in *Imperial Bank Limited* judgment, it is evident that an application for an amendment will not be denied if there are no justifiable and existing grounds that will be prejudicial to the defendant. I am of the considered view that the plaintiff ‘did not step beyond’ the simple correction of the name and nothing has been placed before this court that created a suspicion on the way this application has been handled. The correction of a pure citation in which *Mlyambina J in Chambi and Others v Registrar General Cause 21 of 2020 High Court of the Republic of Tanzania* called it a ‘doctrine of finger litigation’ also held that ‘an error as to a name is nothing when there is certainty as to the person’, (page 16, my emphasis). *Mlyambi J* in the same judgment went on to state that the ‘doctrine of finger litigation’ involves the determination of the ‘missing names or the correction of names where either party is improperly named in the particulars of claim. The court is then required to consider in totality whether the document as a whole and in all the circumstances would conclude that the parties are in fact the parties in the litigation’, (page 17). In the context of this case, the totality of the evidence regarding the identity of the plaintiff was not clouded by the lack of comprehension by the defendant which would have made it impossible to identify the plaintiff. In essence, the plaintiff was easily identifiable by the defendant and there is no concrete and justifiable reason that could have planted a seed of doubt regarding the identity of the plaintiff.

- [17] Let me restate that the defendant objected to the proposed amendment in that it will interfere with the prescription period and the fact that it was brought more than three years after the conclusion of the contract. Of further contention was the plaintiff who sought to introduce a new party to the proceedings. The significance of the opposition was that it will be prejudiced should this court grant the amendment. The defendant's contention was that pure negligence on the part of the plaintiff does not constitute an amendment and could not be equated to an uncomplicated matter. The fault should be directed at the counsels who could not identify from the onset the incorrect misdescription of the plaintiff. With the opposition as juxtaposed by the defendant on the incorrect citation of the plaintiff the determinant for this court is the potential of the amendment to interrupt the prescription in the main cause of action.
- [18] The applicant in this case had acted throughout this process as the plaintiff and cited as such as a private company with limited liability duly incorporated and registered was an incorrect description of the business entity as noted above. The evidence in papers and argument was indicative of the plaintiff as the creditor in the main cause of action.
- [19] As stated above, this application is not fatal to the defendant cause in that it is human to err but making a mistake must be corrected without any prejudice that will defeat the purpose of achieving justice for the defendant. Simple stated by Marais AJ in *Essence Lading CC v Infiniti Insurance Ltd / Mediterranean Shipping Company (Pty) Ltd* [2023] ZAGPJHC 676 in that 'mistakes in pleadings are a common phenomenon and there is the obvious need for such mistakes to be rectified in an economical and practical manner, while at the same time complying with the need for fairness and justice' (para 30). In this case, there is no doubt about the identity of the plaintiff as a litigant and is distinct from other scenarios that might have, for example, entailed the amendment of a non-existent plaintiff. As noted above, there is no malice tabled before this court and it is in the interest of justice not to second-guess the genuine intention of the plaintiff to have the name corrected.
- [20] The defendant in this matter did not object to the pleadings with the incorrect name until an error was picked up and the plaintiff applied for the amendment of its citation. It was the plaintiff that identified the misdescription and for the transparency and without hiding its discovery, made it known by submitting this application for a well-informed position regarding the correct identity. The plaintiff also did not attempt to find some other reasons for the misdescription except laying bare before this court that it erred and pleaded for the discretion of this court to consider the mistake made. The defendant did not dispute that the citation was indeed not that of the plaintiff. Galgut DJP in *Four Towers* above, stated that 'if the citation of a party is nothing more than a misdescription, it should not matter whether the incorrect citation happens on the face of it to refer to a non-existing entity or indeed to an existing but uninvolved entity', (para 29). The facts of this case are the same with Galgut DJP reasoning in *Four Towers*, in that 'the plaintiff was a true creditor that instructed attorneys to issue summons on its behalf and was the same company which requires renaming to a close corporation in this case that has been involved in the litigation of this

matter', (para 30). The internal logistics regarding the prosecution of this case were never challenged by the defendant except for the name change. The 'head was stuck out of the sand' only when an application for its amendment that an opposition to the needed change was raised. I need not espouse any further that the contention for the introduction of a new party to the litigation is without substance as the basis for the application is purely on the citation and not the merits of the case.

- [21] The objection is also linked to the fear the defendant has over the prescription of the claim. It is imperative that I deal with such fears regarding the prescription of the claim as envisaged in section 15(1) of the Prescription Act. The defendant placed before this court that the amendment was instituted more than three years. In accordance with the said section, the 'running of prescription is interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt'. The Supreme Court of Appeal (SCA) in *Blaauwberg Meat Wholesalers CC v Anglo Dutch Meats (Export) Ltd* 2004
- (3) SA 160 (SCA) provided guidance on the test to be applied which must be assessed objectively in establishing the relevance of the prescription as envisaged in section 15(1) on the name change. *Heheer J* in *Blaauberg* considered that:

the existence of another entity which bears the same name as that wrongly attributed to a creditor in a process is irrelevant. That is not the creditor's concern or responsibility. Second, an incorrectly named debtor falls to be treated somewhat differently for the purposes of s 15(1). That should be so is not surprising: the precise citation of the debtor is not, like the creditor's own name, a matter always within the knowledge of or available to the creditor. While the entitlement of the debtor to know it is the object of the process is clear, in its case the criterion fixed in s 15(1) is not the citation in the process but that there should be service on the true debtor of process in which the creditor claims payment of the debt, (para 18, my emphasis).

- [22] It is no doubt prescription, as the contentious area of the law is replete with jurisprudence as evidenced by *Heheer J* in *Blaauberg* that relaxed the requirements for an amendment of a party's identity to the litigation. Prescription alone in the absence of any other factor such as *mala fides*, prejudice to the defendant is not a sufficient ground for the denial of the amendment. I must state that in the present matter the plaintiff had always been the creditor for prescription to be interrupted by service of summons to the defendant. The defendant's fear of prescription whilst the plaintiff had been on cause as the creditor claiming relief for the satisfaction of the debt from the defendant as a debtor is difficult to justify, (*Mpati P* in *Imperial Bank*, para 10).
- [23] It is difficult to find any *mala fides* on the name amendment by the plaintiff when all details regarding the subject of the dispute remained the same except for the name. The plaintiff did not carry-on business on an incorrect identity to mislead business partners, particularly the defendant. The defendant's objection to the amendment was a 'reactionary approach' without any relevance to its feared prescription of the claim as the plaintiff had been an original creditor of the claim as appeared in the papers and during argument. The plaintiff

genuinely believed that it was trading with a correct identity and on being made aware of the shortcoming, it immediately attempted, as it did in this case, to correct the misidentification. This is also not done to evade the merits of the cause of the main application. The correct identity of the plaintiff is fundamental to its status as a close corporation in future business dealings not only with the defendant but other businesses entities. I need to emphasise that the 'cringe' over the introduction of a new party or a new cause of action was also not justified, and this case is not about the separate identities or legal personalia but the correction of a misidentification whilst the cause of action remains the same.

[24] I am holding a considered view that the failure of the plaintiff to file a notice for an amendment three years after the conclusion of the contract did not amount to the introduction of a new party to the litigation or a new cause of action. The question of prescription which could have caused prejudice to the defendant is also misdirected. The opposition of the amendment by the defendant does not justify the denial for the granting of the order as envisaged in the application. I am therefore, not satisfied that the amendment of the identity of the plaintiff could have triggered prejudice against the defendant and the application must therefore be granted.

[25] In the result, the following order is made:

[25.1] The application for an amendment of the name of the applicant is granted.

[25.2] The costs of this application are the costs in the main cause of action.

N NTLAMA-MAKHANYA

ACTING JUDGE, THE HIGH COURT

Date Heard: 31 October 2023

Date Delivered: 12 December 2023

Appearances:

Applicant: Advocate JC Viljoen McKenzie van Der Merwe & Willemse Inc Attorneys 68 Dan Road
Ashton Manor Kempton Park Respondents: Advocate C Cremen Ramsay Webber Inc 54 Melville
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