

SOUTH AFRICA / JUDGMENT

Mamokhuthu Group Development CC v Cas Dry Attorneys and Others (919/2020) [2021] ZAMPMHC 40 (5 March 2021)

[2021] ZAMPMHC 40**COURT**

Middelburg High Court, Mpumalanga

BEFORE

Greyling-Coetzer

CASE / FILE NUMBER

919/2020

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Source record**IN THE HIGH COURT OF****SOUTH AFRICA****MPUMALANGA DIVISION,****MIDDELBURG (LOCAL SEAT)****CASE****NUMBER: 919/2020****(1)****REPORTABLE: YES / NO****(2)****OF INTEREST TO OTHER JUDGES: YES/NO****(3)****REVISED.****In the matter between:****MAMOKHUTHU GROUP****DEVELOPMENT CC****Applicant****and****CAS DRY ATTORNEYS****INC****First Respondent****BAREND MARITZ****DRY****Second Respondent****NAD****PROPERTY INCOME FUND (PTY) LTD****Third Respondent****BUSH****BUCK RIDGE LOCAL MUNICIPALITY**

Fourth Respondent
In
re: MAMOKHUTHU GROUP
DEVELOPMENT CC
Plaintiff
CAS DRY ATTORNEYS
INC
First Defendant
BAREND MARITZ
DRY
Second Defendant
NAD
PROPERTY INCOME FUND (PTY) LTD
Third Defendant
BUSH
BUCK RIDGE LOCAL MUNICIPALITY
Fourth Defendant

JUDGMENT

GREYLING-COETZER AJ

INTRODUCTION

- [1] In this application the applicant seeks leave to amend its particulars of claim and summons, pursuant to the first- and second respondents objecting to the proposed amendment. The respondents on the basis that the applicant, through its proposed amendment, will cause the particulars of claim to be excipiable for failing to disclose a cause of action.
- [2] Although the applicant's purported amendments envisages five amendments, the first- and second respondents only took issue with the amendment proposes in paragraphs 1 and 5 of the notice of intention to amend. Accordingly only these aspects are before court for consideration. The amendments are sought prior to the respondents filing a plea to the applicant's particulars of claim.
- [3] The applicant issued summons against the respondents, citing the first respondent as "Cas Dry Attorneys Inc, an attorneys' law firm bearing registration number 2017/221924/21, duly registered with the Legal Practice Council of South Africa, ..."
- [4] The applicant now seeks to amend the citation paragraph by changing the name "Cas" to "Caz", and adding the following: "The first defendant was operating under name and style of Caz Dry Attorneys before its incorporation and at the time of the conclusion of the deed of sale, particulars of which will be fully detailed later herein".
- [5] The applicant further wishes to amend its prayers by specifying payment in the sum of R6 521 135.03, which is claimed against the first- and second defendants jointly and severally.

- [6] The third respondent did not object to the applicant's notice of intention to amend, but filed a notice of intention to oppose the application to amend on the basis set out in Rule 6(5)(d). The grounds were set out to be that (a) the applicant's notice of intention to amend does not comply with Rule 28; (b) that the founding affidavit in support of the said application fails to address any grounds for the first- and second respondents' objections to the proposed amendment, therefore not laying a basis for the relief sought; and (c) the founding affidavit only addresses the amendment the applicant seeks, purporting typing- and spelling errors and to correct the citation of the first respondent, laying no basis for the remainder of the amendments sought.
- [7] The third respondent also filed a Rule 30A notice during July 2020. The third respondent however failed to make application as contemplated in Rule 30A(2). At the hearing the third respondent indicated that it would abide by the decision of the court.

THE AMENDMENTS SOUGHT

Amendment of citation of the first respondent

- [8] It was argued on behalf of the applicant that the amendments are justified in circumstances where it is clear from the deed of sale relied on by the applicant that the first respondent was practicing under the name and style of Caz Dry Attorneys at the conclusion of the deed of sale, and has since become incorporated and is now practicing under the name and style of Caz Dry Attorneys Inc.
- [9] The applicant submitted that the change in name of the first respondent does not affected the liability of the first respondent, but merely addresses the internal relations of the participants of the entity, such as shareholders, directors or members.
- [10] It was further argued that the entity which existed before the conversion continues to exist in another form and with the same or other directors. Therefore all assets, liabilities, rights and obligations of the entity vest in the converted entity. Placing reliance on the matter of *Minister of Defence, Namibia v Mwandingi*,^[1] it was contended that, in the interest of justice, the Namibian Minister of Defence was substituted with the South African Minister as defendant by the exercise of the court's inherent jurisdiction. On this basis, a mere misnomer or mis-description of a party, or to add or to substitute a party, ought to be allowed where no prejudice or injustice would be suffered by the opposing party.
- [11] In the present instance the first- and second respondents have not contended that the proposed amendment is mala fide or that they would suffer any prejudice.

- [12] It was argued on behalf of the first- and second respondents that it is apparent from the pleadings that the first respondent is a personal liability company, as appears more fully from the first respondent's name ending in the words "Inc", together with its registration number being 2017/221924/21.
- [13] Further that, the deed of sale relied on by the applicant is dated 2013, therefore the first respondent did not exist when the deed of sale was concluded, nor could the first respondent have operated under the name and style of Caz Dry Attorneys Inc prior to its incorporation and at the time of the conclusion of the deed of sale. It is therefore not liable for any liabilities that its current directors may have incurred prior to its incorporation and cannot be said to be liable, more particularly for purposes of these proceedings, jointly and severally liable with any of the respondents.

Joint and several liability of the first and second respondents

- [14] In respect of the objection relating to the joint and several pay-ability, it was submitted that it is trite that wherever

different defendants or respondents are joined together in an action or in motion proceedings, the plaintiff or applicant is entitled to seek payment from the defendants or respondents jointly and severally.

- [15] It was argued on behalf of the first- and second respondents that the amendment ought not to be allowed, as its introduction into the pleadings would render such pleadings excipiable. In this regard the court was referred to *Alpha (Pty) Ltd v Carltonville Readymix Concrete CC and Others*,^[2] where it was contended that the issue proposed to be introduced by the amendment must be a triable issue, and that a triable issue is
- (a) one which, if it can be proved by the evidence foreshadowed in the application for amendment, will be viable or relevant; or (b) which, as a matter of probability, will be proven by the evidence so foreshadowed.^[3]

DISCUSSION

- [16] What the proposed amendment seeks to do cannot be characterised as a substitution of parties. This is clear from the wording of the notice of intention to amend. The applicant does not seek to replace the first respondent with another party, but merely seeks to elaborate on the citation by including that quoted in paragraph 4 herein above. The first defendant remains to be Caz Dry Attorneys Inc, the amendment does not have the effect of substituting the aforesaid defendant with Caz Dry Attorneys, the former firm.
- [17] Even if it did a substitution of parties are not outright prohibited post institution of an action. ^[4]
- [18] On examining the objection raised by the first- and second respondents, it appears that the first- and second respondents'

true complaint has been somewhat mis-categorised. Although the complaint is labelled as one where an amendment will result in the

particulars of claim being excipiable this is not truly what the first- and second respondent bemoans.

[19] The first- and second respondents contend “If the plaintiff amends its particulars of claim as proposed, the particulars of claim will be excipiable for failing to disclose a cause of action, for the following reasons:

2.1...

2.5 It follows that as the first defendant was (on the plaintiff’s own version) only incorporated subsequently to the conclusion of the deed of sale that forms the basis of the plaintiff’s cause of action, the first defendant:

2.5.1 Did not exist when the deed of sale was concluded;

2.5.2 Could not have operated under the name and style of Caz Dry Attorneys before its incorporation and at the time of the conclusion

of the deed of sale;

2.5.3 Is not liable for the liabilities that its directors may have incurred prior to its incorporation.”

[20] Thus as the particulars of claim stand, no cause of action has been made out against the first respondent, and by including the proposed amendment, same would not be rectified, as the company cannot be liable for debts incurred by its directors prior to incorporation. It will thus not be a consequence of the amendment which will result in the particulars of claim being excipiable as per above it may very well already be.

[21] In respect of the proposed amendment to cause the first and second respondents to be jointly and severally liable into the prayers, it is contended on behalf of the first- and second respondents that in the absence of a basis justifying same “the amended particulars of claim will thus also be excipiable as it fails to disclose a cause of action.”

[22] Although it might be so that no basis would be evident from the particulars of claim justifying joint and several liability, it does not automatically follow that same is excipiable on the basis that no cause of action has been made out. In my view, the inclusion of the joint and severability in the prayers, constitute a plus petitio, and can therefore just be ignored.

[23] Consequentially the proposed amendments might cause the pleading to be less than perfect, but it cannot be concluded that same would cause excipiability as contended for by the first- and second respondents. It was held in *Whittaker v Roos and Another*[5] as follows:-

“The court has the greatest latitude in granting amendments, and it is very necessary that it should have. The object of the court is to do justice between the parties. It is not a game we are playing, in which, if some mistake is made, the forfeit is claimed. We are here for the purpose of seeing that we have a true account of what actually took place, and we are not going to give a decision upon what we know

to be wrong facts. It is presumed that when a defendant pleads to a declaration he knows what he is doing, and that, when there is a certain allegation in the declaration, he knows that he ought to deny it and that, if he does not do so, he is taken to admit it. But we all know, at the same time that mistakes are made in pleadings, and it would be a very grave injustice, if for a slip of the pen, or an error of judgment or the misreading of a paragraph in pleadings by counsel, litigants were to be mounded in heavy casts. That would be a gross scandal. Therefore the court will not look to technicalities, but will see what the real position is between the parties.”

CONCLUSION

[24] The proposed inclusion of the elaboration to the citation of the first respondent does not change the first respondent from an incorporated entity to a firm. The first respondent remains Caz Dry Attorneys Inc, and therefore enjoys all the remedies it would when it comes to pleading to the applicant's claim. The issues raised in the objection therefore remain triable during the action. The inclusion therefore will not cause the particulars of claim to be excipiable as it may well already be, nor would it cause any prejudice to the first respondent who has yet to plead.

[25] The proposed inclusion of the joint and severability similarly is of no moment.

ORDER

[26] Consequentially, the following order is made:-

1. The applicant is granted leave to amend its summons and particulars of claim as per the notice of amendment dated 9 June 2020.
2. No order as to cost.

DATE OF HEARING: 21 January 2021

DATE OF JUDGMENT: 05 March 2021

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FOR THE 1st & 2nd

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[1] 1992

(2) SA 355 (NMS) at 368 to 369

[2] 2003

(6) SA 289 (W) at 293I to J, placing reliance on the matter of Barnard v Barnard 2000 (3) SA 741 (C) at 754F

[3] Consol Ltd t/a Consol Glass v Twee Jonge Gezellen (Pty) Ltd and Another 2005 (6) SA 23 (C) at 36I to J

[4] O'Sullivan v Heads Model Agency CC 1995

(4) SA 253 (W)

[5] 1911 TPD 1092 at 1102

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