

SOUTH AFRICA / JUDGMENT

Techmach Technology (Pty) Ltd v Grikwaland-Wes Korporatief Ltd (2950/2018) [2020] ZANCHC 55 (31 July 2020) [2020] ZANCHC 55

COURT

Northern Cape High Court, Kimberley

BEFORE

Phatshoane

CASE / FILE NUMBER

2950/2018

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IN THE HIGH COURT OF SOUTH AFRICA, NORTHERN CAPE DIVISION, KIMBERLEY

Not reportable

Case No: 2950/2018

In the matter between:

TECHMACH TECHNOLOGY (PTY) LTD

APPLICANT/ PLAINTIFF

and

GRIKWALAND-WES KORPORATIEF LTD

RESPONDENT/ DEFENDANT

Heard: 20 March 2020

Delivered: 31 July 2020

Judgment

Phatshoane J

- [1] Griekwaland-Wes Korporatief Limited, Registration No: 1997/022252/06, the respondent (GWK), conducts business in diverse industries which include agriculture, the trading in grain on South African Future Exchange (SAFEX), auctions, properties, fresh produce, food production, abattoirs and feedlots, to mention but a few. GWK also provides its members with financing to purchase farm implements, vehicles and establish crops. It has three divisions, namely: the GWK Agri Division, the GWK Trading Division, and the GWK Farm

Foods Division. As a holding company GWK provides managerial assistance to its divisions which includes legal services, human resources, IT, accounting, financial management and so forth.

- [2] The present application concerns an amendment to the summons and the particulars of claim in terms of Rule 28 of the Uniform Rules of Court by deleting the citation of the defendant, “Griekwaland-Wes Korporatief Ltd”, and replacing it with “GWK Farm Foods (Pty) Ltd”, a division of the defendant. For convenience Techmach Technology (Pty) Ltd, the applicant, and Griekwaland-Wes Korporatief Ltd, the respondent, are referred to as the plaintiff and defendant.
- [3] On 24 April 2019 the plaintiff served and filed a notice of intention to amend its summons and the particulars of claim by deleting and replacing the name of the defendant as set out above. On 13 May 2019, outside the time allowed in Rule 28, the defendant objected to the proposed amendment in terms of Rule 28(3) which protestation necessitated the filing of the present application.
- [4] In the main action the plaintiff’s cause of action is based on the non-payment of a contractual debt. The plaintiff alleges that during November and December 2013 it submitted a written quotation to Westra Industries (Pty) Ltd (“Westra”), a company registered and incorporated on 08 October 1954, to inter alia, design, manufacture, and supply pasta and cooking transfer systems at Westra Wheat Mill situated at Modderiver, near Kimberley. Westra appointed the plaintiff to execute the work around 2014.
- [5] A partly oral and partly written agreement between the plaintiff and Westra was allegedly to the effect that Westra would pay the plaintiff certain amounts in respect of services rendered. R4.4 Million (excl. VAT) for the design, manufacture and supply of a pasta and cooking transfer system; R2.8 Million (excl. VAT) to supply a finished product system; R450 000.00 (excl. VAT) to supply and install a filter system for a carousel packing machine and semi auto packing unit; and R741 040 (excl. VAT) to design, manufacture and supply a 500kg per hour pasta grinding system.
- [6] The parties agreed on how payment would be effected. More specifically: 25% of the total contract value with the order; 35% payment on shipping documentation; 20% on local factory completion of equipment; 10% on installation and 10% after signing off commissioning. Westra was entitled to vary the services from time to time by issuing instructions to the plaintiff detailing the variations. Upon receipt of the variations the plaintiff would deliver its proposals for the varied services and its costs to Westra which would indicate acceptance of the variation. Westra was obliged to pay the plaintiff for work executed and/or services rendered pursuant to the variation. Failure to pay timeously would attract interest on the outstanding amount at a rate of 2% above the prime overdraft rate charged by the plaintiff’s bank.

- [7] Annexures “A1” and to “A4” to the contract between Westra and the plaintiff, attached to the particulars of claim, constituted written proposals for work to be performed and were addressed to Westra. The plaintiff avers that it had complied with all its contractual obligations and completed its services towards Westra by December
2015. It submitted proposals pursuant to the variation orders totalling R633 381.77 (excl. VAT), as contained in Annexure “B1” to “B3” to the contract, attached to the particulars of claim, which amount was due and payable by Westra on or before 10 January 2016.
- [8] On 11 January 2016, unbeknown to the plaintiff, Westra changed its name to GWK Farm Foods (Pty) Ltd, a division of the defendant. The name change was effected after GWK, the defendant, had acquired shareholding in Westra.
- [9] Westra allegedly breached its contractual obligations in that, it is claimed, it failed to pay the sum of R633 381.77 (excl. VAT) which was due and immediately payable to the plaintiff. On 07 April 2017 the plaintiff dispatched a letter of demand to “Westra Nywerhede (Pty) Ltd c/o GWK Ltd” for the attention of Mr S Ross, the Head of GWK Farm Foods Grain. In reply Ross intimated that several aspects of the work had not been satisfactorily completed. Ross did not inform the plaintiff that the letter of demand was incorrectly marked c/o GWK Limited. Almost a year later, on 23 March 2018, the plaintiff caused the second letter of demand to be transmitted again to “Westra Nywerhede (Pty) Ltd c/o GWK Ltd” for the attention of Mr S Ross, the Head of GWK Farm Foods Grain. Pursuant to which further correspondence was exchange between Johan Van der Walt of the plaintiff and Mr Ross whose e-mail signature is recorded on the documents as:

‘GWK Innoveer Landbou

Shawn Ross

Head of: Farm Foods Grain

+27 71 680

ShawnR@gwk.....

GWK Beperk (Reg.Nr.No. 1997/022252/06)’

- [10] Mr Tsele Israel Moloi, the plaintiff’s attorney, trading under the name and style of MDA Construction & Technology Attorneys, deposed to the Rule 28 application for an amendment. He stated that the plaintiff was at all relevant times led to believe that Westra, GWK Limited, and GWK Farm Foods, were one and same entity whose names could be used interchangeably. Mr Moloi settled the summons and particulars of claim on 23 November 2018. He intimated that during this process it came to his attention that Westra had ceased to exist. He then changed the citation of “Westra Industries” to “Griekwaland-Wes Korporatief Limited”, the defendant. This was so because the full name of GWK Limited, which bore registration No: 1997/022252/06’, appeared on all emails exchanged between the plaintiff and Mr Ross. He was unaware that GWK Farm Foods was a separate legal entity. Therefore,

on 12 December 2018 the plaintiff instituted action fortuitously against Griekwaland-Wes Korporatief Ltd, the defendant, claiming the contractual debt mentioned.

- [11] Following the filing of the Notice of Intention to Defend on 23 January 2019 the plaintiff lodged an application for summary judgment on 13 February 2019. The defendant resisted the application for reason, inter alia, that the contract which formed the basis of the plaintiff's cause of action was entered into between the plaintiff and Westra

which changed its name to GWK Farm Foods; that GWK Farm Foods and the defendant were two separate legal entities with separate liabilities; that all annexures to the particulars of claim were correspondence between the plaintiff and Westra (now GWK Farm Foods) and had no bearing on the defendant; and that the defendant was not indebted to the plaintiff in any manner whatsoever.

- [12] Mr Moloi says that on receipt of the affidavit resisting summary judgment he realised that he had incorrectly described the defendant as Griekwaland-Wes Korporatief Limited, and that it ought to have been cited as (Griekwaland-Wes Korporatief Farm Foods (Pty) (Ltd) / GWK Farm Foods (Pty) (Ltd) and that leave to amend was sought mainly to correct the misdescription of the party with whom the plaintiff entered into the contract and not to substitute a party.

- [13] Ms Laughland, for plaintiff, contended that should the amendment be refused summons cannot be reissued citing GWK Farm Foods (Pty) Ltd as the defendant because the claim would have prescribed. She argued that the amendment merely amounts to a correction of a misnomer done in order to have proper ventilation of the issues between the parties and that there could be no prejudice because the amendment would not revive an already prescribed claim. She contended that the service of the unamended summons interrupted the running of prescription and to refuse the amendment would be an exercise in formalism which would enable GWK Farm Foods to escape liability and defeat the claims against it. Notwithstanding the mishap, on the citation of the defendant, the summons was served on GWK Farm Foods, the correct defendant, at De Villiers Street, Douglas, Northern Cape. In particular, service was effected on Mr JH Kotze, a director of GWK Farm Foods, counsel argued.

- [14] Mr Gilliland, for Griekwaland-Wes Korporatief Ltd, the defendant, took a point in limine, which somewhat conflates with the merits of the application. It is to the effect that GWK Farm Foods (Pty) Ltd, which plaintiff seeks to substitute for the new defendant, is a separate legal entity from Griekwaland-Wes Korporatief and not merely one of its divisions. To replace an entity that is cited as a party in litigation proceedings, he argued, amounts to impermissible substitution. Therefore, GWK Farm Foods as the prospective defendant ought to have been given notice of the proposed amendment and ought to have been joined as a party to the litigation. Consequently, it is being deprived of an opportunity to be heard. The amendment, he argued, does not amount to the correction of a misdescription of the intended defendant. There was a conscious decision to cite the present defendant, the

argument continued.

- [15] Mr Gilliland further argued that GWK Farm Foods stood to be prejudiced because, should the substitution succeed, it would have been deprived of raising a defence that the debt, the payment of which the plaintiff now claims, had prescribed in terms of s 15 of the Prescription Act, 1969. This form of prejudice cannot be cured by a postponement or an appropriate costs order, the argument went.
- [16] Reduced to its essence the issue that falls for determination is whether the amendment sought by the plaintiff amounts to a correction of a misdescription of a party or misnomer or whether it is an impermissible substitution of one party for another. Ancillary to this is whether the unamended summons and the particulars of claim interrupted the running of prescription.
- [17] A Court hearing an application for an amendment has a discretion whether or not to grant it, which must be exercised judicially. An amendment must raise a 'triable issue' or a matter of 'sufficient importance' to justify the inconveniences resulting from an amendment.[1] Ordinarily, an amendment would be allowed to determine the real issues or questions between the parties so that justice may be done.[2] in *Moolman v Estate Moolman*[3] it was held:

'(T)he practical rule adopted seems to be that amendments will always be allowed unless the application to amend is mala fide or unless such amendment would cause an injustice to the other side which cannot be compensated by costs, or in other words unless the parties cannot be put back for the purposes of justice in the same position as they were when the pleading which it is sought to amend was filed.'

- [18] Misdescription of parties has been rectified under Rule 28.[4] On this aspect the following dictum in *Du Toit v Highway Carriers and Another*[5] is apposite:

'It is often the case that the intention of the plaintiff is to cite the entity conducting a specific business at a specific address and the defendant served with the summons is in no doubt that it is indeed the intended defendant. In such a case courts should lean towards allowing amendments which would correct inadvertent incorrect descriptions and should not be astute to refuse such amendments involving the description of the defendant on pure semantic and legalistic grounds which ignore the realities of the situation as perceived by the parties themselves. By so refusing an amendment at the instance of the defendant the courts lend themselves to an exercise in formalism, the object of which is to enable a defendant to escape a summons which it knows is directed to it, and often to wholly defeat a claim which has by then prescribed. Courts should not formalistically ignore the fact, if such it be, that the party now sought to be accurately described was the party who the plaintiff intended to sue, even though the plaintiff had only a vague or fussy idea of the correct description of the defendant, and the defendant itself knew very well that the summons was directed to it when it was served.'

[19] The summons and the particulars of claim were served at the principal place of business of GWK Farm Foods, De Villiers Street, Douglas, Northern Cape. This happened to be also the registered address of Griekwaland-Wes Korporatief, the defendant. The processes were served on Mr Johannes Kotze (“Mr Kotze”) who accepted service. What can be gleaned from 103 pages of the Companies and Intellectual Property Commission (CIPC) document, appended to the papers, is that Mr Kotze is a company secretary for both Griekwaland-Wes Korporatief, the defendant, and GWK Farm Foods. There can be no question that a company secretary plays a very significant role within a governance structure of a company. The Companies Act, 71 of 2008, imposes certain duties on a company secretary[6] one of which is to make the directors aware of any law relevant to or affecting the company[7]. The company secretary must obtain appropriate responses and feedback to specific agenda items and matters arising from earlier meetings in board and board committee deliberations. The company secretary’s role should also be to raise matters that may warrant the attention of the board.[8]

[20] On mere perusal of the papers that were served on Mr Kotze, as both companies’ secretary, it was clear or it ought to have reasonably been clear to him that the documents were not intended for Griekwaland-Wes Korporatief but GWK Farm Foods, the successor in title of Westra. He had a duty to disclose this fact to the Board of directors of both companies. There is no evidence that he did not. It can therefore be safely accepted that GWK Farm Foods knew at all relevant times that it was potentially liable for the contractual claims made by the plaintiff against it. Ms Selome Jordaan, a deponent to the affidavit resisting the summary judgment and the answering affidavit in the present application, was able to tell from the onset, on the papers

as they stood, that the correct defendant was Westra, now GWK Farm Foods. It is also clear ex facie the summons and the particulars of claim that the plaintiff intended to sue the successor in title to Westra.

[21] The reference to Mr Ross as the Head of GWK Farm Foods on the correspondence exchanged between the parties should have set off alarm bells for Mr Moloi that thorough research on the correct successor in title of Westra was essential. The correspondence also showed the Registration number of Griekwaland-Wes Korporatief, the defendant, at the end of Mr Ross’s Signature. In my view, this was likely to cause some obfuscation on the identity of Westra’s successor. In light hereof it is understandable that Griekwaland-Wes Korporatief was incorrectly cited. The ineptitude or the carelessness of the plaintiff and/or its legal representatives should not preclude the granting of an amendment.[9] In this case leave to amend was sought soon upon the discovery of the mishap by the plaintiff’s attorneys. I am unpersuaded that there was any mala fides on the part of the plaintiff in bringing this application.

I am of the view that the citation of GWK as opposed to GWK Farm Foods was merely a misdescription. It does not amount to any substitution

of one legal person or entity for another.

[22] The residual issue of prescription need not be considered at any great length. In terms of s 15(1) of the Prescription Act, 68 of 1969, 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'. If an amendment is sought to change the name of a defendant, prescription will have been interrupted only if the facts show that the summons had been served on the party whose name is sought to be introduced in place of the existing name of the defendant.[10]

[23] In *Embling and Another v Two Oceans Aquarium CC*[11] it was held that provided the defendant as described in the amended summons is clearly recognisable from the original summons, the amendment sought by the plaintiffs amounts to no more than the 'clarification of a defective pleading' and not the

introduction

of a new legal entity as the defendant. The Court further held that the original unamended summons was a 'process' for the purposes of interrupting the running of prescription in respect of the plaintiffs' claim against the trust, that it was indeed served on the trust (the relevant 'debtor') and that the amendment should accordingly be allowed.[12] I have determined that the original summons was served on the company secretary of GWK Farm Foods and therefore on the correct defendant. In my view, that service interrupted the running of prescription.

[24] In view of my conclusion that GWK Farm Foods was aware of the impending action, since the date of service of the papers upon its secretary, it could therefore not have suffered any prejudice. Because the plaintiff's intention had always been directed at suing Westra, now GWK Farm Foods, a party it had a contractual relationship with, it can hardly be argued GWK Farm Foods is being prejudiced in that it would not be able to raise prescription as a defence. In any event, given my conclusion that there was a misdescription, that defence does not arise. GWK Farm Foods will be in the same position as it was prior to the amendment because the rectification merely seeks to correct a misnomer. The present defendant will also not suffer any prejudice because, on their version, they are not a party to the present litigation.

On the foregoing analysis the amendment is to be allowed.

[25] Insofar as the plaintiff seeks an indulgence, it ought to bear the costs of the application for the amendment. The defendant had been put through the trouble of defending the action. Although the defendant's opposition was not sustained, it was not unreasonable.

I make the following order.

Order:

1. Leave is granted to the Techmach Technology (Pty) Ltd, the plaintiff, to amend its summons and particulars of claim in accordance with its notice to amend in terms of Rule 28 served on Griekwaland-Wes Korporatief Ltd, the defendant, and filed with this Court on 24 April 2019.
2. The plaintiff is to pay the wasted costs occasioned by this amendment.
3. The plaintiff is to pay all the costs of this application for amendment, including the costs occasioned by the defendant's opposition.

MV Phatshoane J

APPEARANCES:

FOR THE PLAINTIFF/APPLICANT: Adv L.F Laughland

Instructed by Engelsman Incorporated

FOR THE DEFENDANT/RESPONDENT: Adv J.G Gilliland

Instructed by Van De Wall Incorporated

- [1] Caxton Ltd and Others v Reeve Forman (Pty) Ltd and Another [1990] ZASCA 47; 1990 (3) SA 547 (A) at 565G-566B.
- [2] Cross v Ferreira 1950 (3) SA 443 (C) at 447B; Embling and Another v Two Oceans Aquarium CC 2000 (3) SA 691 (C) at 695A.
- [3] 1927 CPD 27 at 29.
- [4] See for example, Boland Bank Ltd v Roup, Wacks, Kaminer & Kriger 1989 (3) SA 912 (C); Golden Harvest (Pty) Ltd v Zen-Don CC 2002 (2) SA 653 (O).
- [5] 1999 (4) SA 564 (W) at 570A-C.
- [6] See s88 of the Companies Act, 71 of 2008
- [7] Section 88(2)(b) of the Companies Act, 71 of 2008.
- [8] See Institute of Directors of South Africa, Kind Report on Governance for South Africa 2009, Chapter 2 Board and Directors page 44 at para 106.
- [9] Embling and Another v Two Oceans Aquarium CC (fn 2) at 695F and 696D-E.

[10] Erasmus Superior Court Practice, commentary under Rule 28- Jutastat e-publications-OS, 2015, D1-341.

[11] See Embling and Another v Two Oceans Aquarium (supra) at 698D.

[12] Embling and Another v Two Oceans Aquarium (supra) at 701D.

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