FORM A

FILING SHEET FOR EASTERN CAPE HIGH COURT, POR ELIZABETH JUDGMENT

PARTIES**:**

[a] Registrar:

[b] Magistrate:

[c] High Court: **EASTERN CAPE HIGH COURT, PORT ELIZABTH**

DATE HEARD: **14 MAY 2009**

DATE DELIVERED: **21 JULY 2009**

JUDGE(S): **DAMBUZA J**

LEGAL REPRESENTATIVES –

Appearances:

- for the Plaintiff(s)/Applicant(s)/ Appellant(s): **Adv J.D. Huisamen**

- for the Defendant(s)/Respondent(s): **Adv J. Nepgen (1st)**
  Adv P.W.A. SCOTT (2ND)

Instructing attorneys:

- Plaintiff(s)/ Applicant(s)/Appellant(s):

  GP VAN RHYN MINAAR & CO INC
  C/o UNGERER STRUWIG HATTINGH & PEO

- Defendant(s)/Respondent(s):

1st Respondent
LINDSAY KELLER & PARTNERS
C/O GOLDBERG & DE VILLIERS INC

2nd Respondent
DE VILLIERS & PARTNERS

CASE INFORMATION -

1 *Nature of proceedings* :

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE – PORT ELIZABETH)

Case No.: 3343/04
Date delivered: 21 July 2009

In the matter between:

JIMMY CECIL TIETIES Applicant

and

ABSA INSURANCE COMPANY (PTY) LTD First Respondent
(Defendant in the main action)

ABSA LIFE LTD Second Respondent

JUDGMENT ON APPLICATION TO AMMEND SUMMONS

DAMBUZA, J:

[1] On 12 October 2004 the applicant issued summons in this matter, citing the defendant is cited as:

> "ABSA VERSEKERINGSMAATSKAPPY BPK".

The description of the defendant in paragraph 2 of the particulars of claim appears as:

> "Die Verweerder is **ABSA VERSEKERINGSMAATSKAPPY BEPERK,** 'n maatskappy met beperkte aanspreeklikheid ingevolge die Wette van die Republiek van Suid-Afrika met geregistreerde kantore te 2de Verdieping Kruisstraat 21, Johannesburg en wie ook sake doen binne die jurisdiksiegebied van bogemelde Agbare Hof te First Bowring Huis, Ringweg, Greenacres, Port Elizabeth".

[2] According to the return of service the summons was served on Mrs B Plaatjies "'n verantwoordelike werknemer ouer as 16 jaar" at First Bowring House, Ring Road, Greenacres, on 12 October 2004. In the summons the applicant claims benefits which he alleges are due to him in terms of an insurance cover taken by the applicant with the "defendant". The written agreement is attached to the summons together with a letter dated 19 October 2001 in which his claim to the benefits was repudiated by the second respondent.

[3] The applicant now seeks to amend the citation of the defendant to:

> "ABSA LIFE LIMITED"

and its description in the particulars of claim to:

> "Die Verweerder is ABSA LEWENS Beperk (Reg. Nr 92/01738/06), 'n maatskappy met beperkte aanspreeklikheid ingevolge die wette van die Republiek van Suid-Afrika met geregistreerde kantore te 3de Vloer, ABSA Towers (East), Mainstraat 170, Johannesburg, en wie ook sake doen binne die jurisdikse gebied van bovermelde Agbare Hof te First Bowring Huis, Ringweg, Greenacres, Port Elizabeth."

[4] It is common cause that ABSA INSURANCE COMPANY (PTY) LTD and ABSA LIFE LIMITED are separate legal entities, both being registered companies and both being wholly subsidiaries of ABSA FINACIAL SERVICES LIMITED which is, in turn, a wholly owned subsidiary of ABSA GROUP LIMITED.

[5] The application is opposed by ABSA INSURANCE COMPANY (PTY) LTD (the defendant/first respondent) and ABSA LIFE LIMITED (the second respondent). The basis for the objection to the proposed amendment is, in the main, that, in reality what the applicant seeks is substitution of the second respondent in the place of the first respondent rather than a mere correction of a misnomer. The respondents argue that the proposed amendment is a device by the applicant to circumvent the issue of his claim against the second respondent having prescribed. They also contend that the delay in bringing the application is an indication of the applicant's bad faith. It appears that the applicant was first alerted to the fact that he has sued the wrong defendant by the first respondent's attorneys in a letter dated 26 October 2004. The applicant's notice of intention to amend is dated 4 May 2006. It is common cause that the applicant's claim against the second respondent prescribed in October 2004.

[6] In its plea filed on 6 December 2004, the first respondent denies liability for the applicant's claim; it pleads that the correct defendant is in fact ABSA LIFE LIMITED and that it (the defendant/first respondent) never concluded an agreement with the plaintiff.

[7] It is trite law that a court hearing an application for an amendment has a wide discretion whether or not to grant the application; such discretion must be exercised judicially.[1]The primary object of allowing amendments

[1] **Embling and Another v Two Oceans Aquarium CC** 2000 (3) SA 691 (C) at 694 H and the authorities quoted therein.

is to obtain proper determination and ventilation of the real issues between the parties. Considerations applicable in applications for amendments have been stated numerous cases. An amendment will not be allowed in circumstances where it will cause the other party such prejudice as cannot be cured by an order of costs and where appropriate, a postponement.[2] Formal amendments are generally allowed unless precluded by some rule of court. It is in this context that amendments have been allowed to rectify misdescriptions of parties.[3] The courts have, by way of amendments under Rule 28(4) of the Rules of this Court, allowed the substitution of one entity as plaintiff by another entity in order to ensure that the true plaintiff is before the court.[4] The test to be applied in such cases is whether the applicant is *bona fide* and whether any prejudice may be occasioned to the defendant as a result of the amendment.[5] An amendment which introduces a new claim will not be allowed if it would resuscitate a prescribed claim or defeat a statutory limitation as to time.[6]

[8] *Mr Scott* who appeared on behalf of the first respondent submitted that although the citation of the first respondent was an error as contended by the applicant, it did not result in a misdescription or a misnomer of the

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[2] **Trans-Drakensberg Bank Ltd v Combined Engineering (Pty) Ltd** 1967 (3) SA 632 (D) at 638H – 639C.

[3] **Samente v Minister of Police** 1978 (4) SA 632 (E); **Golden Harvest (Pty) Ltd v Zen- Don CC** 2002 (2) SA 653 (O); **Yukwam v President Insurance Company Limited** 1963 (1) SA 66 (T).

[4] **Luxavia (Pty) Ltd v Gray Security Services (Pty) Ltd** 2001 (4) SA 211 (W); **Golden Harvest (Pty) Ltd v Zen-Don CC** 2002 (2) SA 653 (O)

[5] **Air-Conditioning & Design & Development (Pty) Ltd v Minister of Public Works**, **Gauteng** 2005 (4) SA 740 (C) at 744 I-J, 745H-I

[6] **Sentrachem Ltd v Prinsloo** 1997 (2) SA 1 (A) at 15B – 16C.

defendant as the applicant made it out to be; it resulted in the wrong (existing) defendant being cited. That, so it was submitted, can only be properly cured by substitution of the wrong defendant by the correct one rather than by an amendment of the summons. *Mr Nepgen* submitted, on behalf of the second respondent that the distinguishing factor between this and cases in which an amendment was allowed to substitute a party, is that in this case the applicant cited an existing party whereas in the comparative cases, the wrong party was non existent.[7] Further, so the argument on behalf of the second respondent went, in the comparative cases, the summons was served on the correct defendant who responded to the summons; in this case the correct defendant never responded to the summons.

[9] I do not agree that the factual differences referred by the respondents justify a refusal of the amendment sought. In the *Embling* case *(supra)* the plaintiffs had described the defendant as "Two Oceans Aquarium, a close corporation…..having its place of business at Dock Road, Waterfront, Cape Town". The return of service pointed out that the defendant business was not trading as a close corporation. A Notice of Intention to Defend was filed by the "Two Oceans Aquarium Trust". In its plea the defendant denied that it was the Two Oceans Aquarium CC and pleaded that it was the Two Oceans Aquarium Trust and that any claim the applicants might have had against the trust had prescribed. The applicants then sought to amend their summons and particulars of claim by substituting the Two Oceans

[7] See for example the **Embling** and **Air-Conditioning Design** cases (*supra)*

Aquarium Trust in the place of the original defendant. The court held that the correct inquiry is whether the plaintiff's case against the defendant has in fact prescribed or whether the running of prescription has been interrupted in terms of section 15 (1) of the Prescription Act[8]; that in considering whether the relevant provisions of the Prescription Act have been complied with, it is the substance rather than merely the form of a process which has to be examined and that if the defendant described in the amended summons was clearly recognizable from the original summons, the amendment sought by the applicant was only a "clarification of a defective pleading". Van Heerden J, as she then was, found in **Embling's** case that the entity sought to be held liable was the legal entity owning or controlling or administering the Two Oceans Aquarium at Dock Road, Waterfront, Cape Town. The Learned Judge held further that as the trust or its representatives had known from the time of service that the summons had been intended for it and that it was the true defendant, the argument founded on prescription could not succeed.

[10] In **Associated Paint and Chemical Industries (Pty) Ltd t/a Albestra Paint and Lacquers v Smit**[9] an amendment was refused where it was sought to substitute the name of the correct company for an existing (but wrong) plaintiff company and the claim had become prescribed. The court held that the service of summons on the defendant had not interrupted prescription as there had never been a debtor-creditor relationship

[8] Act 69 of 1969.
[9] 2000 (2) SA 789 (SCA)

between the original plaintiff and the defendant as required by the prescription act.

[11]In this case it is not in dispute that the summons was served at the address occupied by the second respondent. The first respondent did not conduct business at this address at the time. It is also not in dispute that both respondents share the same legal department; the record reveals that the standing instruction to any branch of any ABSA entity, is that when a summons is served on it, the summons is to be relayed to the ABSA Group Legal Department in Johannesburg who will then ensure that the summons is forwarded to the company sued in the summons. It is not in dispute that the same procedure must have been followed in this case. It seems to me that on receipt of summons the personnel in the respondents' (or ABSA GROUP) legal department must have realized that the second respondent was the intended defendant. The following appears in the particulars of claim:

> "Gedurende Augustus 1998 en te Uitenhage binne die jurisdiksiegebied van die bogemelde Agbare Hof het die Eiser persoonlik en die Verweerder verteenwoording deur behoorlik gevolmagtige persone 'n oorenkoms van versekering gesluit (hierna die polis genoem) in terme waarvan die Verweerder onderneem het om die Eiser te verseker teen onder andere die volgende gebeure….".

[12]As I have stated the insurance agreement and the letter of repudiation form part of the summons. It is clear from the annexures to the summons that the agreement was concluded with the second respondent. Contrary to the submission on behalf of the respondents, whoever dealt with the

summons at the respondents' legal department must have perused the summons in its entirety, including the annexures thereto, in order to properly consider what the appropriate response would be. In the circumstances I can only conclude that, as *Mr Huisamen* submitted on behalf of the applicant, the second respondent chose to exploit the situation caused by the incorrect citation by ignoring the summons by refraining from defending the matter, although it was aware that it was the intended defendant.

[13]This matter is, in my view distinguishable from the **Associated Paint** case in that in this case when the summons was served a creditor – debtor relationship existed between the applicant and the second respondent. The summons in this case was issued by the "creditor" as required by section 15(1) of the Prescription Act. Consequently the running of prescription was, in my view, interrupted.

[14]My view is that it would be unfair, unjust and contrary to the Constitution of South Africa Act (Act 106 of 1996)[10] (the Constitution) to unsuit the applicant simply because the second respondent, despite having received the summons, and having realized that it is the intended defendant, chose not to "come to the party".[11] The fact that the wrong defendant happens to be an existing party is in my view irrelevant. It may even be coincidental that the wrong party sued happens to be an existing party. Where the

[10] Ss 34 and 39

[11] **O' Sullivan v Heads Model Agency CC** 1995 (4) SA 253 (W).

factors set out in **Embling** and other cases[12] have been established, i.e the *bona fides* of the applicant, prescription having been interrupted by service of the summons on the debtor, the intended defendant being determinable from the original summons (including the creditor – debtor relationship between the correct parties having been in existence when the summons was served) I find no reason why the amendment should not be allowed; even where the correct defendant, has, such as in this case, chosen not to respond to the summons.

[15] Van Heerden J, at 702 C-G, of her judgement in the *Embling* case*,* refers to the following dictum of Marais J in *Du Toit v Highway Carriers and Another* 1999 (4) SA 564 (W) at 569J-570D:

> "The point that a wrong defendant has been cited not infrequently rears its head when the defendant pleads, often after prescription has run. It is often the case that the intention of the plaintiff is to cite an 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 cases 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 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 accurately described was the party whom the plaintiff intended to sue, even thought the defendant had only a vague or fuzzy 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*."

These remarks are particularly relevant in the present case.

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[12] For example **Associated Paint** and **Chemical Industries** *(supra)*

[16]Much was made in the papers, the Heads of Argument and during argument, of the fact that the applicant does not explain how the error occurred. In all fairness it is the responsibility of the applicant who seeks indulgence to explain to the court how the error occurred and to explain the cause for the delay in bringing the application. But in this case I am satisfied from the papers that that a *bona fide* mistake occurred due to carelessness on the part of the applicant or his attorneys. It is common cause that the respondents both conduct business as insurers; the first respondent in short term insurance and the second respondent in long term insurance. I have already explained the further relationship between them. Nowhere in the citation and description of the defendant is the registration number of the first respondent quoted. If careful consideration had been given to the citation of the defendant a registration number, being part of the description of both respondents, would also form part of the description of the defendant. The registration number of the second respondent, clearly appears on the first page of the agreement attached to the summons.

[17]But in the end I am persuaded that the application must succeed.

[18]On the question of costs I can find no justification for the opposition mounted by the first respondent. It stands to suffer no prejudice as a result of the amendment. The applicant has however, tendered the costs incurred by the first respondent in the action and in opposing the

application up to 17 May 2006 when the applicant filed its notice of intention to amend the summons. Regarding the second respondent, I cannot find that its opposition to the application was unjustified. The issues are not simple and I can only assume that the matter is of significant importance to it insofar as its consideration of similar matters in the future. And as I have stated, the error which necessitated the amendment can only be explained as carelessness on the part of the applicant.

[19]I accordingly make the following order:

[d] Leave is granted to the applicant to amend the citation of the defendant in its summons and particulars of claim in accordance with its notice dated 4 May 2006;

[e] The applicant is to pay the second respondent's costs of this application;

[f] The applicant is ordered to pay the first respondent's wasted costs incurred in the action, as well as in opposing the application to amend up to 17 May 2006;

[g] The first respondent is ordered to pay the applicant's costs incurred after 17 May 2006.

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N DAMBUZA
JUDGE OF THE HIGH COURT