IN THE HIGH COURT OF SOUTH AFRICA /bh
(TRANSVAAL PROVINCIAL DIVISION)

NOT REPORTABLE
CASE NO: 35719/99
JUDGMENT DELIVERED: 14 SEPTEMBER 2007

In the matter between:

CHARTER HI (PTY) LIMITED	FIRST PLAINTIFF
HAW & INGLIS (PTY) LIMITED	SECOND PLAINTIFF
HAW & INGLIS	THIRD PLAINTIFF
AND	
THE MINISTER OF TRANSPORT	DEFENDANT

JUDGMENT

Van der Merwe, J

During December 1999 the plaintiffs issued summons in which damages are claimed from the defendant, allegedly suffered by the first, alternatively, the second, alternatively the third plaintiff, resulting from an incident (the incident) that occurred on 13 December 1996 in which a certain Beechcraft King Air C90 aircraft (the aircraft) was destroyed.

The matter was enrolled for trial on 16 August 2007. On 17 August 2007 the plaintiffs filed a notice of amendment in terms of which they gave notice of their intention to amend their particulars of claim by the deletion of the

names “Haw & Inglis” in paragraph 1.3 thereof and the replacement thereof with the name “C 90 Partnership”.

The application for the amendment is opposed by the defendant. At the time when the opposed application for the amendment was heard, it was common cause between the parties that the trial could not proceed and that it had to be postponed. It was therefore postponed. The party or parties responsible for wasted costs occasioned by the postponement will depend on the outcome of the application for the amendment.

In order to put the application for the amendment in proper perspective, it is necessary to refer to the sequence of events regarding the incident as it appears from the affidavits contained in the application for the amendment as well as the answering affidavit thereto. It will also be necessary to refer to the pleadings in this matter.

On a date unknown, but on all probability during mid-1996, an agency agreement was entered into between Investec Bank Limited (“Investec”) on the one hand and Haw & Inglis (Pty) Ltd, Peter Douglas Inglis and Charles Richard Haw, collectively described as the customer, on the other hand. In essence it appears that it was agreed that the

customer would, as agents, acquire the aircraft on behalf of Investec which would ultimately act as the seller of the aircraft.

On 22 July 1996 Investec sold the aircraft to the C 90 partnership ("the partnership") in terms of an instalment sale agreement signed by Haw on behalf of the partnership. A term and condition of this agreement was that suretyships be provided by Haw & Inglis (Pty) Ltd, C R Haw and P D Inglis. Also on 22 July 1996 an addendum to the instalment sale agreement was entered into between Investec and the partnership.

On 2 August 1996 a loan agreement was entered into between Investec and the partnership. Again Haw signed on behalf of the partnership.

As stated earlier the incident happened on 13 December 1996.

On 14 January 1998 Mr Le Roux of the plaintiff's

erstwhile attorneys received instructions to institute an action against the defendant for the recovery of the damages suffered as a result of the destruction of the aircraft. The letter containing the instruction is annexed as annexure "A" to Le Roux's affidavit to the application for leave to amend. The letter contains no details as to the prospective plaintiff or owner of the aircraft. A letter of demand was written on 18 March 1998. It also does not refer to a claimant but merely refers to "Aircraft accident on 13 December 1996. Aircraft registration ZS-MXY." The letter further states that the letter is written on the instructions "of the Hull and Liability Underwriters ("our clients") who "have paid the owners of the aircraft" a some of money. The owners were not identified. As no payment was forthcoming from the defendant, counsel were instructed in late November 1999 on behalf of Charter Hi (Pty) Limited (the first plaintiff) as consultant to prepare particulars of claim in respect of "Beechcraft King Air C 90 – accident on 13.12.96."

According to Le Roux junior counsel on 1 December 1999 required clarity as to who the plaintiff(s) were. On the same day Le Roux directed the necessary inquiries to his correspondent in London. On 2 December 1999 the London attorneys replied as follows:

"I am instructed the aircraft was owned by a partnership which consisted of:-

C R Haw	-	12 ½ %
P D Inglis	-	12 ½ %
Haw & Inglis (Pty) Ltd	-	75%

However, operation of the aircraft was vested in Charter-Hi (Pty) Ltd. It is my understanding that Haw & Inglis (Pty) Ltd was a shareholder in Charter-Hi (Pty) Ltd. The latter were responsible for sourcing charter work and apparently entrusted with the day to day servicing, maintenance and control of the aircraft. This included defraying operating costs, including fuel, hangarage, insurance, landing fees etc.

By way of further clarification, the pilot-in-command of the accident flight, Mr Jonathan Grant, possessed a valid commercial pilot's licence. The purpose of the flight was to renew his instrument rating which was due to expire on 11 January 1997. I am instructed that Mr Grant was also a director of Charter-Hi (Pty) Ltd and responsible in effect for day-to-day management of the company. Is it necessary to obtain company searches to reveal the identity of the above with greater precision? Please advise?

Just to complicate matters further the aircraft was subject to a lien as reflected in the attached hull release in favour of Investec Bank. Please let me know if you require anything further at this stage?"

A form of release was attached to this letter which shows that it was signed by Inglis, Investec, Haw & Inglis (Pty) Limited, Charter Hi (Pty) Ltd and Haw, all being insured individuals and entities.

Le Roux also states in his affidavit that he had discussed the plaintiff's *locus standi* with senior counsel

who advised that he had decided to sue in the names of the plaintiffs in the alternative. Le Roux says that he cannot recall what he told counsel in the relation to the identity of any of the plaintiffs. He, however, states that it is clear that he was aware that the aircraft was owned by a partnership and that the identity of the partners were known as appears from what is stated herein before. Le Roux then concludes that on reflection the partnership, i.e. the third plaintiff, was incorrectly described. In his plea the defendant states that it has no knowledge of the allegations in respect of the plaintiffs and states in particular that to the best of his knowledge the registered owner of the aircraft was a partnership known as “C 90 partnership”. On the pleadings the *locus standi* of the plaintiffs therefore remained in dispute and in particular the identity of the owner of the aircraft. That has been the position all along.

When the plaintiffs’ present attorneys came on

record and the plaintiffs *locus standi* was still in dispute, the agency agreement, the instalment sale agreement, the loan agreement and other documents were obtained. The information obtained from these documents resulted in the proposed amendment.

The plaintiffs' contentions are that:

1. The description of the third plaintiff as "Haw & Inglis, a partnership" is a mis-description of the partnership's name which is in fact "C 90 partnership".

2. The entity that owned the aircraft was a partnership consisting of three partners, viz Haw & Inglis (Pty) Ltd, CR Haw and PD Inglis.

3. Although the names of the partners were known, the correct name of the partnership was not known at the time summons was issued in spite of attempts to determine the name

thereof.

4. As no partnership name was known to counsel at the time of drafting the particulars of claim but only the names of the partners, the partnership was incorrectly described as Haw & Inglis.

5. At no stage was it ever suggested that the incorrectly described entity, viz the “Haw and Inglis partnership”, was at any stage an existing entity.

6. There is no suggestion that the amendment sought is anything other than *bona fide.*

The defendant’s contentions can be summarised as follows:

(1) The plaintiffs are in substance seeking to substitute a new party for one of the existing parties to the action as a plaintiff.

(2) Such a substitution is not competent as the claim has prescribed.

(3) The alleged debt which would have been interrupted by the service of summons is not the same debt which now forms the lis between the parties because the creditor (third plaintiff) is not the same creditor the plaintiffs now want to substitute as the third plaintiff.

(4) The plaintiffs do not allege and therefore do not prove that a partnership known as Haw & Inglis (the third plaintiff) does not exist, which was an essential and

necessary fact to prove in order to succeed with the application for amendment.

(5) It can therefore not be found that “Haw & Inglis a partnership” is merely an incorrect naming of the owner of the aircraft, “C 90 partnership”.

Counsel for the parties are in agreement as to the legal principles applicable to a matter such as the present. In particular they are in agreement that if the amendment amounts to the introduction of a new party, the amendment should not be granted whereas the amendment should be granted if the amendment merely amounts to the rectification of a mis-description of a party (i.e. the third plaintiff). Mr Puckrin for the defendant, however, emphasised that the provisions of section 15(1) of the Prescription Act, 68 of 1969 (“the act”) are of the utmost importance in matters like the

present. I agree with this submission as will appear from the judgments that will be referred to later herein.

Section 15(1) of the act reads as follows:

> "Running of prescription shall, subject to the provisions of sub-section (2), be interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt."

Sub-section (2) of section 15 is for present purposes of no importance.

Mr Puckrin in his argument made extensive reference to the judgment in *Blaauwberg Meat Wholesalers CC v Anglo Dutch Meats (Export) Ltd*, 2004 (3) SA 160 SCA where the provisions of section 15(1) of the act was pertinently dealt with. In that matter leave was granted by a court to amend the citation of a plaintiff from *Anglo Dutch Meats* (UK) *Ltd* to *Anglo Dutch Meats (Export) Ltd*. The court in granting leave to amend the citation of the plaintiff said the prescription "will not be a consideration if the amendment is granted on

the basis that the plaintiff was incorrectly described or that the description of the plaintiff amounted to a misnomer, for in such event the service of the summons on the defendant will have interrupted prescription." See *Blaauwberg* case *supra,* at 162J-163A.

At the end of the trial before another court, a special plea of prescription was upheld in the *Blaauwberg* case, *supra*, on the basis that the initial description of the plaintiff did not amount to a misnomer or an incorrect description of the plaintiff and that the leave to amend was therefore wrongly granted.

This latter judgment was taken on appeal to a full court which upheld the appeal. The full court judgment was then set aside on appeal to the Supreme Court of Appeal.

In the course of his judgment in the *Blaauwberg* case *supra*, Heher JA states the following at 165E-166C (para 12 and 13):

"[12] The approach adopted by the Court *a quo* reveals confusion. There seems to have been no consideration of whether a difference in approach is called for between applications for amendment of pleadings and the determination of whether there is compliance with a statutory provision such as section 15(1). The cases referred to in para [8], which related to the first problem, where applied willy-nilly to the second. It is clear that there are fundamental differences between the two situations. Amendments are regulated by a wide and generous discretion which leans towards the proper ventilation of disputes and are granted according to a body of rules developed in that context. Whether there has been compliance with a statutory injunction depends upon the application of principles wholly unrelated to the rules just mentioned and without the exercise of a discretion, principles which were expressed by V

an Winsten AJA in the well-known passage from *Maharaj and Others v Rampersad* 1964 (4) SA 638 (A) at 646C-E as follows:

> 'The enquiry, I suggest, is not so much whether there has been "exact" or "substantial" compliance with this injunction but rather whether there has been compliance therewith. This enquiry postulates an application of the injunction to the facts and the resultant comparison between what the position is, and what according to the requirement of the injunction it ought to be. It is quite conceivable that a court might hold that, even though the position as it is not identical with that which it ought to be, the injunction has nevertheless been complied with. In deciding whether there has been compliance with the injunction the object sought to be achieved by the injunction and the question of whether the object has been achieved are of importance. Cf *J E M Motors Ltd v Boutle and Another* 1961 (2) SA 321 (N) at 327-8.'

[13] For obvious practical reasons the Legislature ordained certainty about when and how the running of

prescription is interrupted. That certainty is of importance to both debtors and creditors. It chose an objective outward manifestation of the creditor's intentions as the criterion, *viz* the serviced on the debtor of process in which the creditor claims payment of the debt. That is not a standard which allows for reservations of mind or reliance on intentions which are not reasonable ascertainable from the process itself. Nor does it, as a general rule, let in, in a supplementation of an alleged compliance with section 15(1), the subjective knowledge of either party not derived from the process, such as, for example, the content of a letter of demand received by the debtor shortly before service of the process. Compare *Standard Bank of SA Ltd v Oneanate Investments (Pty) Ltd* 1995 (4) SA 510 (C) at 553E-G. The question whether this general rule allows for an exception where both parties have been *ad idem* at all times as to the true identity of the plaintiff does not arise on the facts of this case."

The last sentence in this quotation is also applicable to the present matter.

In the *Standard Bank case* (1995 (4) SA 510 (C)) referred to by the learned judge of appeal in the *Blaauwberg* case *supra,* Selikowitz J states the following at 553E-G:

> "In this matter, and for the purpose of determining the plea of prescription, the simple summons must be read together with the original declaration in order to identify the 'debt' in respect of which prescription was interrupted. Section 15(1) of the Prescription Act refers to 'any process whereby the creditor claims payment of the debt'. The test as to whether any given process interrupts prescription in respect of a particular debt must be an objective one. The process in question must be objectively considered. Knowledge which one or both of the parties may have *dehors* the process cannot affect its interpretation or its interruptive effect. More particularly, the fact that plaintiff may subjectively intend to claim a particular debt, and that defendant may, by virtue of extrinsic knowledge, appreciate that plaintiff has wrongly identified the debt in his

summons, cannot convert the summons into one which interrupts prescription in respect of any debt other than the one identified in the process. It is the process which interrupts prescription, not the plaintiff's subjective intention to sue."

The principle enunciated in the above quotation is applicable to the present matter as well in spite thereof that the *Standard Bank case* did not deal with the misnomer of a plaintiff or the introduction of a new party but the introduction of new causes of action.

In the *Blaauwberg* case *supra,* the learned judge of appeal refers to the court *a quo's* handling of the judgment in associated *Paint and Chemical Industries (Pty) trading as Albestra Paint and Lacquire v Smit* 2000 (3) SA 789 SCA in *inter alia,* para 8 of the judgment page 163E-G as follows:

"[8] The brief summary of the facts which I have provided suggest a strong similarity with those considered in *Associated Paint*

and Chemical Industries (Pty) Ltd t/a Albestra Paint and Lacquers v Smit 2000 (2) SA 789 (SCA). It was there decided that where an action was instituted on behalf of company A and it was proposed, after the onset of prescription, to substitute the plaintiff by company B, the amendment could not be granted as the claim of B had prescribed because B had not taken the steps contemplated by section 15(1) of the Prescription Act 68 of 1969 to claim payment within the prescriptive period. This precedent was relied on by the trial Judge and formed the cornerstone of the appellant's submissions on appeal. The full Court distinguished it on the ostensible ground that *Albestra* concerned the introduction of a new plaintiff whereas, so it found, the case before it was one of misnomer."

The distinction referred to eventually lead to the remarks of the learned judge of appeal in paragraph 12 of the judgement quoted earlier herein.

In the *Albestra* case *supra*, it was common cause that summons was issued in the name of one registered company and that the plaintiff applied for an amendment substituting another registered company in the stead of the one which issued the summons. In that judgment F H Grosskopf , JA states the following in paragraph 11 at page 793I:

> "[11] Counsel for the plaintiff submitted that the amendment sought was really only to correct a misdescription of the plaintiff but in my judgment this is not a case of mere misnomer. The effect of the amendment would be to introduce a new plaintiff."

See also para 16 at page 795 F-H of the *Albestra* judgement *supra*:

"[16] In our case the only real difference between the debt originally claimed and the debt claimed in the proposed amendment is the identify of the creditor who seeks to enforce payment of the debt. Even if I assume that the debt which the proposed new plaintiff now seeks to claim by means of the amendment is substantially the same debt which the plaintiff sought to enforce in the original summons (a questionable assertion), the problem still remains whether prescription in respect of the original debt had been duly interrupted. In this connection the plaintiff is faced with the difficulty whether the summons was issued by the 'creditor'.

After having discussed the provisions of section 15(1) of the Act the court in the *Albestra* case *supra* concludes as follows in paragraph [18] at page 796B-D:

"[18] In the present case a summons was served on the defendant whereby the plaintiff claimed payment of the debt. It subsequently transpired that the plaintiff was not the defendant's creditor. In an affidavit in support of the plaintiff's application for the amendment his Germiston attorney conceded that the wrong company had been cited as the plaintiff in the summons and that the defendant at no time concluded any contract or had any dealings with the plaintiff. It is common cause therefore that a debtor-creditor relationship between the defendant and the plaintiff never existed. Consequently the summons did not constitute a

process whereby the creditor claimed payment of the debt. The running of prescription in respect of the debt was accordingly not interrupted by service of the summons on the defendant."

With the aforegoing in mind the pleadings should be closer examined. For purposes of this exercise I shall refer to the plaintiff in the singular, as in the pleadings, but with specific reference to the third plaintiff.

In the particulars of claim it is alleged that:

1) The plaintiff is the owner, alternatively bore the risk in and to the aircraft which is properly identified and which is the aircraft that was destroyed in the incident.

2) A certain Grinstead was an official flight examiner employed by the defendant and was at all material times acting in the cause and scope of his employment.

3) On the day of the incident the aircraft was used for an instrument rating renewal test by a certain Grant under the control of Grinstead in his capacity as the official flight test examiner.

4) During the test flight the aircraft was destroyed when it crashed into the ground.

5) The crash was caused as a result of the negligence of the defendant, alternatively that of Grinstead, alternatively the negligence of both the defendant and Grinstead.

6) The necessary further allegations were made concerning damages and liability which I need not discuss in more detail.

The question now is whether there was “service on the debtor of any process whereby the creditor claims payment of the debt” as contemplated in section 51(1) of the act.

It is common cause that the correct debtor was cited in the summons. Payment of a debt is claimed. This debt is claimed by the owner of the identified aircraft which was destroyed on a specific date in a specific manner and under specific stated circumstances. The “owner” is given a name namely *inter alia* that of the third plaintiff.

I do not loose sight of the fact that reference to “plaintiff” and therefore also to “owner” is a reference to the plaintiffs in the alternative. The name given to the owner in the summons is Haw & Inglis, a partnership. It is now intended by means of the proposed amendment, to change the name of the “owner” to “C 90 partnership”. All the other particulars informing the debtor what is claimed from him and why it is claimed from him remain the same. In my judgment it is clear that before and after the amendment the debtor will know that the owner, though under different names, is claiming a debt from him arising out of the same set of facts.

Mr Puckrin strongly submitted that the onus was upon the plaintiffs to allege and prove that there was no partnership known as Haw & Inglis. In my judgment there is no merit in this argument. As stated, it was the owner, irrespective of a name, who was in fact and in law claiming payment of a debt.

That brings me to the question whether the proposed amendment will merely describe the third plaintiff in terms of its correct name or whether a new plaintiff will be substituted in the place of the third plaintiff.

As appears from the aforegoing, I am of the view that Haw & Inglis is merely an incorrect naming of the owner of the aircraft and not a substitution of parties.

In the result the amendment should be granted.

There remains the question of costs. It was conceded,

and rightly so, on behalf of the plaintiffs that in the event of the amendment being allowed, the plaintiffs will be responsible for any wasted costs occasioned by the postponement referred to earlier herein. It is also clear, and not disputed, that the opposition by the defendant to the amendment was reasonable. Therefore the plaintiffs will also be liable for the costs of the application for leave to amend the particulars of claim.

It is not disputed, and also correctly so, that the services of two counsel were warranted.

I therefore grant the following order:

1. Prayer 1 of the notice of amendment dated 17 August 2001 is granted.

2. The plaintiffs are ordered to pay the costs of the application for leave to amend.

3. The plaintiffs are ordered to pay the wasted costs occasioned by the postponement of the trial action.

4. The costs referred to in 2 and 3 above will include the costs occasioned by the employment of two counsel by the defendant.

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W J VAN DER MERWE
JUDGE OF THE HIGH COURT