REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NUMBER: 4532/2010

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

18 August 2015
DATE SIGNATURE

In the matter between:

SIMBONILE DLAKANA **PLAINTIFF / APPLICANT**

AND

PASSENGER RAIL AGENCY OF SOUTH AFRICA (PRASA)

FORMERLY CITED AS TRANSNET LIMITED t/a METRORAIL

DEFENDANT / RESPONDENT

REASONS FOR REFUSAL TO RULE ON INTERMEDIATE ISSUE AND FOR REFERRAL TO PRE-TRIAL CONFERENCING IN TERMS OF RULE 37(8)(a)

OF THE UNIFORM RULES REGULATING THE CONDUCT OF THE PROCEEDINGS OF THE SEVERAL PROVINCIAL AND LOCAL DIVISIONS OF THE SUPREME COURT OF SOUTH AFRICA

LAMPRECHT, AJ

Introduction

[1] Before a so-called 'amendment' was effected in terms of Rule 28, combined summons was issued against Transnet Ltd trading as Metrorail for personal injury as a result of an incident that allegedly took place on 13 February 2007 at the Dunswart Station where plaintiff boarded the train for Angelo, Johannesburg. It is further alleged that three unidentified men followed plaintiff onto the train from the platform, that they subsequently robbed him of his wallet and, when plaintiff attempted to retrieve his stolen wallet, one of the unidentified men pushed him off the moving train of which the door had not closed even though in motion and, as a result, plaintiff fell off the train onto the tracks and got injured.

[2] Original defendant pleaded to these allegations, *inter alia* by stating in paragraph 2 of the plea:

"2.1 Defendant admits that at the time of the incident Metrorail a division of Transnet Limited operated the Passenger Rail services at Dunswart Station.

2.2 As from December 2008 the Passenger Rail Agency of South Africa, a public company with limited liability assumed responsibility for the aforementioned rail services."

The rest of the pleadings are not important at this stage. Suffice it to say that liability of the defendant on the basis of duty of care as well as the factual basis for liability were denied and pertinently placed in issue.

[3] After roll-call on 17 August 2015, my Registrar informed me that the matter has been allocated to me for trial on the merits (not quantum), which trial has been set down for four days. Subsequently, however, when Counsel for the parties came to introduce themselves in Chambers, I was informed that the matter is not a 'cut-and-dried' trial on the merits as it seems, but that an amendment had been effected to the summons only last week, in that that defendant had been substituted by plaintiff for the Passenger Rail Agency of South Africa (PRASA); with a consequential amendment of plea by the defendant to a special plea of prescription with an extended plea on the merits should I not uphold the special plea. Counsel for plaintiff further indicated to me that he now has misgivings about the effected amendment and that I will be required to rule whether the trial should proceed on the papers as they are, including the amendment, which plaintiff was now prepared to abandon.

[4] In court, Mr De Klerk SC, for the plaintiff, addressed me with reference to case law applicable to the withdrawal of admissions in terms of Rule 28 amendment procedure and argued that, after proper consultation following the amended plea, he has now advised plaintiff's instructing attorneys that the effected amendment was not in order; and, that they have therefore decided to instruct him to abandon the amendment and continue on the papers that existed pre-amendment. He argued that they had simply made a mistake with the amendment because they have now established that PRASA and Transnet co-exist as two separate legal personae. Mr De Klerk further indicated that the prejudice that defendant might suffer in the circumstances can be remedied by costs, which they offer to the defendant, and, if necessary, a postponement of the trial. Mr Smit, for defendant argued that I do not have the power to grant plaintiff permission to abandon the amendment and that I should dismiss the 'application to abandon the amendment' with costs. Even though the legal team for defendant remained the same throughout, so he argued, a completely new defendant is now on record and if I allow the plaintiff to continue on the original papers, the defendant who had been substituted will be prejudiced because it has no knowledge that it is now again involved as a defendant. Therefore, so he argued, the matter cannot simply be remedied by the award of costs and a postponement of the matter. Both Counsel also addressed me on the history of the matter pertaining to amendments that were effected and the coming into being of the current defendant on the papers, PRASA.

The history

[5] Subsequent to having been informed in defendant's initial plea of the fact that PRASA had taken over responsibility from 'Metrorail a division of Transnet Ltd' for the passenger rail services at Dunswart station during December 2008, plaintiff decided to opt for the amendment by, not adding, but substituting the defendant for a totally new defendant. No attempt was made during pre-trial conferences to ascertain whether PRASA took over from Metrorail with all duties and responsibilities including liability *ex tunc*[1] or whether same only now exists for PRASA *ex nunc*.[2] Such an enquiry could have had the effect that the belated attempt at amending the pleadings barely a week before trial could have been rendered superfluous or attempted in another fashion.

[6] Probably due to the original paragraph 2.2 of defendant's plea quoted above,[3] during a pre-trial conference eventually held on 22 June 2015 (in circumstances where Counsel for the defendant had been 'absent and excused' and only the instructing attorneys were present) plaintiff posed the following question to defendant:

> "1.4 Does the Defendant admit the Defendant's citation."

[1] In other words, the situation as it was at the time of the incident the incident.
[2] The situation subsequent to PRASA's coming into existence.
[3] *Supra* para [2].

[7] The response recorded by the plaintiff in terms of Rule 37(6), (7)[4] on this question differs from the response recorded by the defendant. According to plaintiff, the answer was recorded thus:

> "Yes, admitted
>
> The Plaintiff is considering to do a Substitution in terms of Rule 15. Should Plaintiff do such a substitution it undertakes to substitute the Defendant, for PRASA-Passenger Rail Agency of South Africa."

Defendant however avers that the answer was recorded as follows:

> "The Defendant is not prepared to make this admission.
>
> The Plaintiff is considering to do a Substitution in terms of Rule 15. Should the Plaintiff do such a substitution it undertakes to substitute the Defendant, for PRASA- Passenger Rail Agency of South Africa. The Defendant will consider the plaintiff's substitution upon receipt."

[8] What followed reminds me of an Afrikaans adage often used by the erstwhile Principal of Justice College, Dr NJ Van der Merwe:

> "As jou uitgangspunt verkeerd is, gaan die waarheid altyd kom wraak neem."

[9] In an e-mail to Counsel,[5] attorney for the plaintiff dated 11 August 2015 at 11h25 AM[6] remarked:

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[4] Para 1.4 on p12-13 of the Bundle 'Index: Pre-Trials'.

[5] Although this would normally be confidential, the e-mailed requests and responses between the attorney and Counsel for plaintiff were eventually forwarded to the attorney for defendant and were handed in during argument by Mr Smit for the defendant.

"Here is the amended Pre trial Minute.

Please see what they have now done at the Locus standi for the Defendant.

I think we should draw an amendment for the citation of the Defendant to read PRASA. If you agree, please draw one for us."

Counsel's response which was e-mailed right back at 11h46AM is

"DONE!

YOUR COMMENTS, IF ANY. PLEASE REPLY."

[10] Subsequent to this communiqué, plaintiff's attorney e-mailed defendant's[7] attorney in the following terms at 12h02:

"Attached is the amendment for the name and citation of the Defendant.

Please indicate if there will be any objection thereto at the trial."

The response at 14h04 PM is:

"Please effect the amendment and serve the amended pages today."

This was followed by a note issued by plaintiff's attorney:

"Kindly find Amended Particulars of Claim and Amended Summons."

[11] The word 'amendment' that was repetitively used by the parties in their e-mailed correspondence appears to have caused all the confusion in this matter. According to the amended pages ostensibly[8] delivered by plaintiff to defendant in

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[6] Barely a week before the allocated trial date.
[7] NotablyTransnet t/a Metrorail, and, not PRASA. No notice has ever been served on PRASA.
[8] When one follows the language used in the e-mails and the procedure – even argument in court dealt with only the procedure in terms of Rule 28.

pursuance of Rule 28(7), the original Combined Summons is effectively amended in that, the erstwhile defendant has now been substituted for "**PASSENGER RAIL AGENCY OF SOUTH AFRICA** (hereinafter referred to as 'PRASA') formerly known as **TRANSNET, t/a METRORAIL**, a company with limited liability, registered in terms of the Companies Act ..."

In paragraph 2 of the amended Particulars of Claim, the 'new' citation is replicated where it is alleged:

> "The Defendant is the PASSENGER RAIL AGENCY OF SOUTH AFRICA (hereinafter referred to as 'PRASA') formerly known as TRANSNET, t/a METRORAIL, a company with limited liability, registered in terms of the Companies Act ..."

Some further amendments to the particulars of claim, which are not relevant for the current purposes, have also been included in the amended pages.

[12] The special plea subsequently (but eagerly) filed by defendant is as follows:

> "**SPECIAL PLEA OF PRESCRIPTION**
>
> a. The Plaintiff claims for a personal injury suffered by him on 13 February 2007.
> b. The Plaintiff by way of an amendment amended the citation of the Defendant to replace TRANSNET with the Passenger Rail Agency of South Africa as the Defendant.

c. In the circumstances action was instituted against the Passenger Rail Agency of South Africa on 11 August 2015.

d. In terms of section 11 of the Prescription Act a claim prescribes 3 years after the debt became due.

e. The debt became due on 13 February 2007.

f. In the premises the claim prescribed on the 12 February 2010."

After that, the defendant pleads[9] as follows on the amended paragraph 2 of the particulars of claim:

"a. The Defendant denies that the Passenger Rail Agency was formerly known as Transnet.

b. Transnet Ltd was established in terms of section 2 of the Legal Succession to the South African Transport Services Act No 9 of 1989 ('the Act') and came into existence on 23 March 1990.

c. The South African Rail Commuter Corporation Limited ('SARCC') was established in terms of section 22 of the Act and came into existence on the 23 March 1990.

d. The Passenger Rail Agency of South Africa was established in terms of section 22 of the Act, as amended, in 2008.

e. Transnet Ltd also known as Transnet SOC Ltd, registration number 90/00900/06, remains in existence and continues to trade.

[9] In para 3 of the 'Consequential Plea to Amended Particulars of Claim'.

f. In terms of section 25 of the Act ownership in and to the rail commuter assets of the South African Transport Services was transferred to SARCC in March 1990 and in 2008, pursuant to the amendment, to the Passenger Rail Agency of South Africa (the effect whereof was retrospective).

g. In terms of section 23 of the Act the object of the SARCC was the provision of rail commuter services to the public and upon the amendment to the Act, such services were vested in the Passenger Rail Agency of South Africa.

h. In terms of section 25A of the Act the transfer the of the long distance passenger railway and long distance bus service was transferred the Passenger Rail Agency of South Africa with effect from 31 March 2009.

i. Save for the aforegoing the contents of the paragraph under reply are denied."

The law pertaining to substitution and amendment

[13] What is apparent from the above is that, despite plaintiff's consideration during the pre-trial conference to 'substitute the defendant' in terms of Rule 15 and defendant's recognition of this possibility, both parties proceeded from the wrong premise by not using the procedure provided for in Rule 15(1), (2) or the common law to add or to substitute a party to the action; and, in terms of Rule 15(4) or the common law, to apply for setting aside or variation of the substitution

if required. Both parties ostensibly based their further process and arguments on the basis that the substitution of the defendant had to be done, and, was effected in terms of Rule 28 as an amendment to pleadings and documents. It appears as if both the legal teams for the plaintiff and the defendant during pre-trail process of playing cat-and-mouse and the typically lawyerly conduct of horse-trading became so engrossed in the formula provided for a 'normal' amendment in Rule 28, that they could no longer see the wood for the trees. The substitution of defendant for PRASA had to be done in terms of Rule 15 or the common law, not in terms of Rule 28, except in very special circumstances.

[14] As far as the amendment of pleadings and documents in terms of Rule 28 is concerned, one must always bear in mind the test laid down by the Appellate Division of the Supreme Court, as it then was, in *Sentrachem Ltd v Prinsloo*,[10] namely:

> "Die eintlike toets is om te bepaal of die eiser nog steeds dieselfde, of wesenlik dieselfde skuld probeer afdwing. Die skuld of vorderingsreg moet minstens uit die oorspronklike dagvaarding kenbaar wees, sodat 'n daaropvolgende wysiging eintlik sou neerkom op die opklaring van 'n gebrekkige of onvolkome pleitstuk waarin die vorderingsreg, waarop daar deurgaans gesteun is, uiteengesit word ... ***So 'n wysiging sal uiteraard nie*** 'n ander vorderingsreg naas die oorspronklike kan inbring nie, of 'n

[10] 1997 (2) SA 1 (A) at 15H-16C. See too *Associated Paint & Chemical Industries (Pty) Ltd t/a Albestra Paint and Lacquers v Smit* 2000 (2) SA 789 (SCA) at 794C-G; *Mazibuko v Singer* 1979 (3) SA 258 (W) at 265D-266C; *Tengwa v Metrorail* 2002 (1) SA 739(C) at 744I-745B; *Firstrand Bank Ltd v Nedbank (Swaziland) Ltd* 2004 (6) SA 317 (SCA) at 321A-C; and, *Mntambo v Road Accident Fund* 2008 (1) SA 313 (W) at 318B-C.

> vorderingsreg wat in die oorspronklike dagvaarding prematuur of voorbarig was [kan] red nie, of ... ***'n nuwe party tot die geding [kan] voeg nie***."[11]

[15] Thus, while the amendment procedure provided for in Rule 28 can be 'effected' in terms of Rule 28(7) when it is not objected to by the opposition (or, even when challenged by the opposition to do so immediately as has happened in this case according to the defendant's e-mail to plaintiff quoted above), can be used to amend documents or pleadings, even in broad terms, the procedure of Rule 28 is not available to institute a totally new cause of action as alleged by the defendant, which may or may not have prescribed. Moreover, a new party (especially a new defendant) may not be added (or substituted) in terms of this procedure, unless proper notice has in terms of Rule 28(1) been given to *all the affected parties*, including the erstwhile and the new defendants in the current matter,[12] and, unless the new defendant has consented to be added or substituted,[13] or, at least, has acknowledged his addition and indicated his intention to defend. How would the new party know of his or her inclusion in the action if summons is not properly served? This was not done in the current matter.

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[11] Emphasis added. Recognition is given to Farlam, Fichardt, Van Loggerenberg *Erasmus Superior Court Practice* (Loose-leaf Annotated ed) at B1-181 for the authorities cited as well as the quote and reasoning from *Sentrachem Ltd v Prinsloo*.
[12] *Holdenstedt Farming v Cederberg Organic Buch Growers (Pty) Ltd* 2008 (2) SA 177 (C) at 181B-D.
[13] *Greef v Janet* 1986 (1) SA 647 (T).

[16] Therefore, so I hold, the amended combined summons and subsequent 'consequential plea' in relation to the substitution of the defendant for someone else is bad in law and could never have been 'effected' as an amendment to the papers in terms of Rule 28.

[17] The arguments presented by Counsel for both parties, and the authorities that I have been referred to by Counsel for the plaintiff have not been very helpful in this regard. In fact, the professed 'abandonment of the effected amendment' cannot be equated to the 'withdrawal of an admission' as submitted by Counsel with reference to Harms[14] and various cases,[15] which can be allowed if it amounts to an amendment that "facilitates the proper ventilation of the dispute between the parties",[16] where the original neglect of the party seeking the amendment "is being mulcted in the wasted costs"; and, which "will be refused only if to allow it would cause prejudice to the other party, not remediable by an order for costs, and, where appropriate, a postponement ..."[17] To argue that an 'amendment' such as the current is akin to a 'withdrawal of an admission', is to compare apples with pears. The procedure followed by and arguments by Counsel for the defendant drew on the wrong approach by Counsel for plaintiff by also using the amendment procedure in Rule 28 for substitution that could (and should) instead have been done in terms of Rule 15 or the common law if

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[1414] Harms *Civil Practice in the Superior Courts* (Loose-leaf Annotated ed) B28.20 at p B – 191.
[15] *Bellairs v Hodnett and Another* 1978 (1) SA 1109 (A); *Trans-Drakensberg Bank Ltd (Under Judicial Management) v Combined Engineering (Pty) Ltd and Another* 1967 (3) SA 632 (D); *Barclays Bank International Ltd v African Diamond Exporters (Pty) Ltd (1)* 1971 (1) SA 93 (W); *Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft Für Schädlinsbekämpfung MBH* 1976 (3) SA 352 (A).
[16] *Rosenberg v Bitcom* 1935 WLD 115 at 118.
[17] Per Wessels JA in *Coopers supra* referring to Caney J's conclusion in *Trans-Drakensberg Bank Ltd supra*.

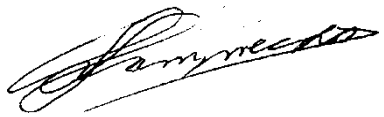
required; and, by immediately entering the special plea alluded to above, based on the legal argument that the 'amendment' amounted to a totally new cause of action against a new defendant and, therefore, that it had prescribed. However, had the defendant been substituted properly in terms of the rules, it is clear from defendant's amended plea[18] that the effect of the transfer from Transnet to SARCC in March 2009 and to PRASA in 2008 of the ownership in and to the rail commuter assets, together with all its assets and responsibilities, including liabilities was retrospective or *ex tunc*. In such a case the special plea of prescription could never have been legally begotten. I can also find no merit in Counsel's criticism of plaintiff's possible renewed attempt at amendment of pleadings, which can in terms of Rule 28(10) be effected at any stage before judgment, in that such procedure would also result in a valid claim to prescription because the current 'amendment' put an end to the proceedings that were initially instituted against Transnet.

[18] Lastly, even if I am wrong in holding that the so-called 'amendment' was 'effected' in terms of the wrong procedure and, therefore, to be regarded as *pro non scripto*, Counsel for plaintiff's argument that he is abandoning the 'amendment' is not a substantive application being brought in terms of a proper Notice of Motion[19] (or an interlocutory one for which proper notice had been given),[20] which is being opposed by defendant. Therefore, there is no

[18] At para 3 f. and g. of the 'Consequential Plea to Amended Particulars of Claim' quoted in para [12] *supra*. .
[19] Rule 6(1).
[20] Rule 6(11).

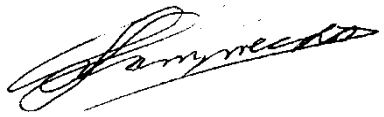
‘application’ before court which requires a ruling in favour of one of the parties and I pertinently refuse to accede to Counsel’s request on behalf of the defendant that the ‘application’ should be denied with costs.

[19] I do however rule that the so-called ‘amendment’ of the combined summons by substituting the defendant as cited is of no consequence for the current purposes. Therefore, plaintiff has the choice whether to proceed on the original papers, possibly at his own peril, or to follow the correct procedure in terms of Rule 15 or the common law to add or substitute a defendant before proceeding with the trial. Amendments to the pleadings in terms of Rule 28(10) are possible until final judgment. The latter would however of necessity occasion a request for postponement which will almost certainly be visited with an order for costs against him. The history of the matter as set out above suggests that the parties did not *bona fide* and properly confer during the pre-trail conference that was held in terms of Rule 37. This much appears to be clear from the different accounts of the parties as to what actually transpired when the question of *locus standi* was consulted on and I therefore deem it advisable that the parties hold or continue with a conference before a judge in chambers with a view to limit the issues before proceeding with the trial. The parties are called upon and directed to do so in terms of Rule 37(8)(a). Consequently, the matter is struck off the roll with costs to be determined in the main trial.



A A LAMPRECHT
ACTING JUDGE OF THE SOUTH GAUTENG HIGH COURT

POSTEA: Paragraph [15] on p 12 of the judgment above has been amended *mero motu* to include an omission as part of my reasons for judgment, which have not been read out on record. The relevant addition has been highlighted for the parties to take note thereof and no reporting of the judgment should be done without the amendment. The Registrar is directed to notify the parties of this amended judgment and to replace the copy of the judgment on file with this amended version.



A A LAMPRECHT
ACTING JUDGE OF THE SOUTH GAUTENG HIGH COURT

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