IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~ / NO.

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.

(3) REVISED.

7/11/14

DATE SIGNATURE

7/11/2014

CASE NUMBER: 30800/2011

In the matter between:

BLASTING AND EXCAVATING (PTY) LTD **APPLICANT**

AND

JOHAN ADOLPH DINKELMANN **RESPONDENT**

JUDGMENT

LEPHOKO AJ

[1] This is an application for an amendment in terms of uniform rule 28 (4) after the respondent objected to the applicant's proposed amendment to its particulars of claim.

In this judgment the applicant and the respondent are respectively referred to as plaintiff and defendant as in the main action.

[2] On 22 June 2007 the plaintiff obtained judgment against Limpopo Blasting CC for payment of the amount of R187 419-18 together with interest and costs. Limpopo Blasting CC failed to pay the judgment debt and entered into an acknowledgement of debt agreement with the plaintiff during January 2008. During or about January 2008 the defendant bound himself, jointly and severally, as surety and co-principal debtor *in solidum,* in favour of the plaintiff for the repayment by Limpopo Blasting of the amount of R187 419-81 and any amounts that Limpopo Blasting could owe to the plaintiff "at any stage from whatever cause however arising".

[3] Limpopo Blasting subsequently failed to make payment in terms of the acknowledgement of debt. The plaintiff then issued summons in the present case against the respondent as surety claiming payment of the amount of R187 419-81 owed to it in terms of the judgment and the acknowledgment of debt. This claim appears in the plaintiff's particulars of claim as amended on 08 May 2012 (the amended particulars of claim). On 3 February 2014 the plaintiff delivered a notice of intention to amend (the proposed amendment), aimed at amending its amended particulars of claim. The defendant objected to the proposed amendment which prompted the plaintiff to bring the present application in terms of rule 28(4) for the court to grant the proposed amendment.

[4] According to the plaintiff the purpose of the amendment is to insert or add to certain paragraphs of the amended particulars certain extracts contained in the suretyship agreement merely to clarify the plaintiff's already existing cause of action as contained in its amended particulars. The suretyship agreement is attached to the amended particulars and the contents thereof are said to be incorporated as if specifically pleaded.

[5] The defendant narrowed down its grounds for the objection to the plaintiff's failure to comply with the provisions of the National Credit Act 34 of 2005 and prescription. The defendant also took a point *in limine* that the proposed amendment amounts to a withdrawal of an admission which should have been supported by an affidavit, and the plaintiff had failed to file such an affidavit.

POINT *IN LIMINE*

[6] It was argued on behalf of the defendant that the proposed amendment seeks to withdraw an admission that was made in an affidavit verifying the cause of action as true and correct in a prior application for summary judgment and must therefore be supported by an affidavit setting out the reasons for the amendment. It was submitted that the proposed amendment is far more comprehensive and goes beyond the mere supplementing of the original particulars of claim or correcting mistakes therein as it introduced extensive material alterations to the original particulars of claim. In my view, the point *in limine* is without any merit as the proposed amendment is purely cosmetic

and does not introduce any new matter not contained or referred to in the particulars of claim.

APPLICATION OF THE NATIONAL CREDIT ACT

[7] The defendant claims that in terms of section 4 of the National Credit Act 34 of 2005 (the NCA) read with section 8(4)(f) thereof the acknowledgement of debt constitute a credit agreement and as result the NCA applies to the plaintiff's claim and the plaintiff was therefore required to serve a notice in terms of section 129 of the NCA on the defendant before commencing with the action.

[8] It should suffice to say that for the acknowledgement of debt to constitute a credit agreement it must fall within the confines of section 8(4)(f) of the NCA. This section requires that it must be an agreement in terms of which payment of an amount owed by one person to another is deferred, and any charge, fee or interest is payable to the credit provider in respect of the agreement or the amount that has been deferred.

[9] This objection by the respondent presupposes that a notice in terms of section 129 of the NCA was not sent to the defendant. It was also argued by the defendant that the fact that the plaintiff pleads in its particulars of claim that the NCA is not applicable to the matter at hand implies that the plaintiff never sent such a notice to the defendant and it can therefore be accepted that the plaintiff has not complied with the requirements of section 129 of the NCA. The parties did not file any affidavits. The allegations made by the respondent regarding its assumptions concerning the service of

the section 129 notice can only be taken as speculative as they are not supported by any evidence.

[10] In the absence of any admissible evidence regarding the section 129 notice, the court will confine itself to the question whether the plaintiff is entitled to have its particulars of claim amended, an issue that can at this stage be disposed of without reference to the NCA. It will always be open to the respondent to deal with the section 129 issue by way of a special plea if the amendment was granted.

PRESCRIPTION

[11] The defendant argued that the amendment should not be allowed as the plaintiff's claim against the defendant can only be based on the acknowledgement of debt and the suretyship and the claim has prescribed as it arose on 16 February 2008 more than three years before the plaintiff instituted the action on or about 20 June 2011.

[12] Legally, the defendant's liability arises from the suretyship agreement. That agreement can be reasonably interpreted to mean that the defendant binds himself, jointly and severally, as surety and co-principal debtor *in solidum,* in favour of the plaintiff for the repayment by Limpopo Blasting of the following:

(a) All monies now or at any stage hereafter which may be owing by the said debtor (Limpopo Blasting) to the creditor (Plaintiff) from whatsoever cause however arising;

(b) the amount of R187 419-81 in respect of goods sold and delivered by the creditor to the debtor.

[13] In my view, the wording of paragraph (a) is wide enough to can be reasonably interpreted to include the amount of R187 419-81 referred to in paragraph (b) and/or the judgment even if this amount may not have arisen from the judgment. Whether the liability referred to in paragraph (b) relates to the acknowledgement of debt and by extension to the judgment is a matter that might be resolved by evidence at the trial should it remain in dispute or through rectification of the suretyship agreement should the need arise.

[14] The relevance of the plea of prescription in this matter is that if the court was to find that the suretyship was intended to be only in respect to goods sold and delivered, then the claim may have prescribed as the acknowledgement of debt is in respect to the hiring of equipment and services rendered.

[15] A court judgment is valid for a period of 30 years and can be enforced against the judgment debtor at any time during that period. In my view, if the court was to find that the surety has bound himself to discharge the obligations of the debtor concerning the judgment, it should follow that the suretysihip should remain valid and the grantor remain liable in respect thereof for as long as the judgment remains enforceable against the judgment debtor. See *Eley v Lynn and Marais Inc* 2008 (2) SA 151 (SCA).

[16] It is trite that prescription must be pleaded specifically and proved. See section 17 of the Prescription Act 68 of 1969. For this reason it would be appropriate for the defendant to deal with this point in his plea should he consider it necessary.

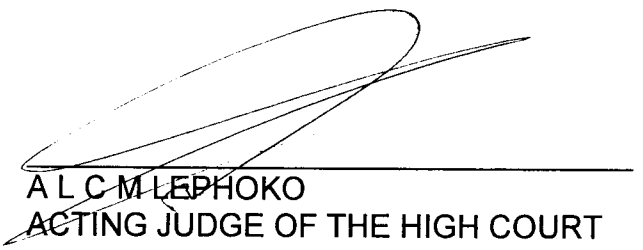
[17] Finally, the real issue to be decided is whether the plaintiff is entitled to have his particulars amended. In *Moolman v Estate Moolman* 1927 CPD at 29, the court stated the following about amendments: *"...the practical rule adopted seems to be that amendments will always be allowed unless the 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".* See also *Devonia Shipping Ltd v MV Luis (Yeoman Shipping Co Ltd Intervening)* 1994 (2) SA 363 (C) at 369G.

[18] I am of the view that the proposed amendment is not strictly necessary as the issues raised therein are purely cosmetic, having been dealt with in the particulars of claim already. It was also not necessary for the defendant to raise the objection, and in particular, for the purpose of raising issues that he could have effectively dealt with in his plea. For this reason I think neither party is entitled to recover its costs concerning the application.

In the premises it is ordered that:

1. The defendant's objection dated 6 February 2014 is dismissed.

2. The plaintiff is granted leave to amend its amended particulars of claim dated May 2012 in accordance with the terms set out in the plaintiff's notice of intention to amend dated 31 January 2014.
3. No order as to costs.



A L C M LEPHOKO
ACTING JUDGE OF THE HIGH COURT

Heard on: 11 August 2014.

Judgment delivered on: 07 November 2014.

For the Appellant: Adv A Van Niekerk.

Instructed by: Stegmanns Inc.

For the Respondent: Adv Z Schoeman.

Instructed by: Rontgen & Rontgen Inc.