




**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

Case Number: 2016/95061

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
29/09/2021	
DATE	SIGNATURE 

In the matter between:

NATALIA DMITRIEVNA CHETTY

Plaintiff

and

GOVINDSAMY CHETTY

1st Defendant

GOVINDSAMY CHETTY N.O.

2nd Defendant

NATALIA DMITRIEVNA CHETTY

3rd Defendant

THE REGISTRAR OF DEEDS, PRETORIA

4th Defendant

JUDGMENT

PILLAY AJ:

1. This matter served before me as an interlocutory application brought by the First Defendant for leave to amend the First and Second Defendants' pleading in the action. I shall refer to the parties as in the main action.
2. The First Defendant's pleaded case is that he acted in his personal capacity, as well as in his official capacity as a trustee and representative of the Trust. At the commencement of the proceedings, the First Defendant's counsel admitted that there was no authority from the Trust. He therefore acted for the First Defendant. The First Defendant's conduct in initially purporting to act for the Trust, was improper. I will deal with this when dealing with costs.

THE FIRST DEFENDANT'S CASE

3. The Plaintiff and First Defendant were in a relationship. The First Defendant registered a Trust and identified a property he intended to buy and register in the name of the Trust. He says that he concluded an Offer to Purchase ("**OTP**") the property on behalf of the Trust. He left the country on business and authorised the Plaintiff to finalise the transaction on behalf of the Trust.



4. The First Defendant claims that the Plaintiff by means of stealth and fraud changed the OTP from the name of the Trust, inserting herself as the purchaser of the property. He paid the full purchase price for the property, not knowing that the OTP had been changed.
5. On discovering that the property was fraudulently registered in the name of the Plaintiff he attempted to have a mortgage bond registered over the property. These efforts failed.
6. An agreement was concluded with the Plaintiff to transfer the property to the Trust. It seems that she reneged on this agreement. She had an interdict issued, prohibiting the transfer of the property, pending the outcome of an action that she instituted.
7. The Plaintiff issued summons on 6 December 2016 seeking an order declaring her to be the rightful owner of the property and interdicting the First Defendant in his personal capacity and as a trustee, from interfering with her ownership of the property.
8. The First Defendant sought the Plaintiff's consent to amend the plea filed on his behalf and in his capacity as a trustee, and furthermore to incorporate a counterclaim against the Plaintiff.



9. The Plaintiff was also called upon in terms of Rule 28(1) to give consent to file a counterclaim as envisaged in Rule 24(1). Consent to file an amended plea and counterclaim was refused.
10. The First Defendant claims that the amendment is genuinely sought, merely clarifies the issues between the parties and seeks to ensure that whatever order is granted by the Court is not *brutum fulmen*. The real issue he claims relates to the true and lawful ownership of the property, a determination which the Court will have to pronounce on.
11. The First Defendant claims that the wording of the proposed Amended Plea and Counterclaim remain the same and are merely intended to build on the factual position already placed before the Court. It is also seeking to clarify and ensure that whatever order the Court makes in the trial, is rendered effective.
12. Insofar as the concern of prescription is raised, the Plaintiff refers to the *"date the Plaintiff seems to pick as the date on which prescription would have commenced to run"*. The First Defendant highlights that it has been pleaded that the Trust is entitled to transfer of the property, which awaits a determination. He goes further that in making that claim or whatever date the Plaintiff chooses, prescription has effectively been interrupted.



13. The First Defendant raises grounds on which the First and Second Defendants would claim that prescription does not apply.
14. The First Defendant seeks costs on an attorney and client scale against the Plaintiff, alleging that the opposition is demonstrably frivolous and vexatious.

THE PLAINTIFF'S CASE

15. The Plaintiff refers to the time frames when the OTP was made, in the context of when she had reconciled with the First Defendant. She says there was never any mention of purchasing the property in the name of the Trust. The intention was always that the property be registered in her name.
16. She says that the First Defendant was present when the OTP in the personal name of the Plaintiff, was concluded. She claims further that portion of the funds used to purchase the property was funds that belonged to her from the sale of a previous property.
17. She claims that the application to amend is based on new facts and *mala fide* in that the First Defendant is attempting to (i) cover up discrepancies and (ii) address fraudulent documents. In addition as a third leg she alleges that a counterclaim cannot be introduced in an amendment.



18. She relies on Rule 24(1) which states that the claim in reconvention must be filed with the plea, or otherwise with consent at a later stage. She does not consent. She will be prejudiced if the counterclaim is introduced. In addition, she alleges that the counterclaim has prescribed.
19. She says that the First Defendant has failed to furnish a reasonable and acceptable explanation for his lateness and has failed to show an entitlement to institute the claim in reconvention.
20. She says that any prejudice to her cannot be remedied by a costs order. In this regard she states that there are six costs orders and four writs of execution that have been obtained against the First Defendant, all of which remain unpaid.
21. She adds that there cannot be consequential relief granted to the First Defendant for making payment of the purchase price when factually he had agreed that the property would be purchased for her in her personal name. In any event part of the purchase price was her money. She highlights further that the counterclaim prescribed as the *"First Defendant's own version was that he gained knowledge of the property being transferred on 12 January 2015"*.
22. Her case is further that the essence of the counterclaim is for the First Defendant to have a claim against her if he loses the case.



ANALYSIS

23. The application was brought with the First Defendant as deponent. He purported to act on behalf of the Trust. At the hearing his representative admitted that he had no authority to act on behalf of the Trust. This being so, the First Defendant's conduct in purporting to launch the application on behalf of the Trust was disingenuous. The parties before me are the Plaintiff and First Defendant.
24. The Plaintiff's case is that the First Defendant attempts to withdraw admissions and introduce a counterclaim which has prescribed. She highlights allegations made in the plea which the First Defendant now seeks to withdraw through the amendment.
25. As an example, the First Defendant initially pleaded that the Plaintiff was a Trustee and had signed the OTP on behalf of the Trust. In the proposed amendment the Plaintiff is alleged to never have been a Trustee, but only a settler and donor of the Trust.
26. In addition, there are allegations of documents being manipulated/fraudulent.

Prescription and Prejudice



27. The Court in ***Stroub v Steel Engineering Co Ltd & Another 1996 (4) SA 1139 (W)*** dealt with the issue of prescription by way of a Counterclaim. The Court said it would normally not allow an amendment where there is no possibility of advancing the situation of a litigant, and the amendment can at best serve as a basis for the need to hear evidence which leads nowhere. The Court said that it would make no sense to pivot a claim which is known to have prescribed.
28. However, if the supervening prescription is not common cause, the application for amendment is normally not the proper place to attempt to have that issue decided. Technically speaking, prescription is not an issue until it has been pleaded.
29. The Court goes on that except in special situations, once prescription is not common cause, the Plaintiff should not be deprived of the chance to put his claim before the Court because of apparent probabilities at the time when the amendment is considered.
30. The Court went on, that the other parties ought to raise its proposed defence of a prescription in the same way that it would raise any other defence which becomes appropriate after an amendment is granted.



31. Similarly, *in Union Finance Holdings (Pty) Ltd v Bonugli & Another NNO 2013 (2) SA 449 (GSJ)* the Court determined that prescription could be introduced in interlocutory proceedings. Prescription can be raised, either if it is common cause or in situations where the claim or right to claim were known to have prescribed.
32. *In casu* the parties are not common cause on whether the claim as raised by the First Defendant has prescribed or is known to have prescribed. This is an issue for determination that can be raised by way of a special plea to the First Defendant's claim.
33. For this reason, I cannot find that any claim has prescribed. I cannot deny the First Defendant the right to include a Counterclaim because the Counterclaim may have prescribed. The Plaintiff can address this when she pleads to any Counterclaim.
34. It similarly is clear that if the Counterclaim has prescribed, the Plaintiff would be prejudiced in that she would incur the costs of defending a Counterclaim that was stillborn.
35. In my view the costs order would go some way in limiting prejudice the Plaintiff. The Plaintiff has indicated that the First Defendant has on numerous occasions failed to satisfy costs orders against him. The Plaintiff is aware that she has route of Rule 47 to address these



issues. In the circumstances the concern of costs alone, are not sufficient to warrant me relying on this as a ground to successfully deny the First Defendant the right to amend his claim so as to include a Counterclaim.

The Delay

36. The First Defendant attempts to explain the delay in filing his Intention to Amend. He says that he attempted to register a mortgage bond over the property. He further claims that there was a subsequent agreement with the Plaintiff to transfer the property to the Trust. The Plaintiff denies this.
37. The rule *nisi* on the interdict is dated 3 February 2016. The First Defendant fails to provide any detail on the alleged agreement in terms of which the Plaintiff is alleged to have "*subsequently agreed with the Plaintiff to transfer the property to the Trust but she later turned around and refused.*"
38. Despite the Plaintiff's denial of the allegations, the First Defendant says nothing serious in reply.

DISCRETION



39. The decision on whether to allow an amendment is a matter of judicial discretion. While the First Defendant fails to provide an adequate reason for his delay, there are other issues to be considered.
40. The allegations in the Counterclaim are related to the Plaintiff's Claim. The Plaintiff will plead to the Counterclaim and address her concerns in the plea. She will in evidence be able to address the alleged fraud by the First Defendant. This would in any event be dealt with during the trial on her Claim.
41. In the circumstances I am inclined to apply my discretion to allow the amendment.

COSTS

42. The First Defendant's conduct leaves much to be desired. He first purported to act where he was not authorised to do so. It was only at the hearing that his counsel confirmed who he truly acted for.
43. The First Defendant pleaded poorly, barely dealing with the delay in attempting to institute the Counterclaim. The exercise of a judicial discretion has aided him. The Notice of Motion was not framed in terms of the Rules.



44. The Plaintiff is prejudiced by the First Defendant's conduct. The only manner to address this prejudice is a costs order. In this matter an attorney and client costs order is suitable.

ORDER

1. The First Defendant's application leave to amend his Plea is granted.
2. Leave is granted to the First Defendant to amend his Plea as filed on 6 March 2017 and to incorporate a Counterclaim as per the Notice of Intention to Amend filed in terms of Rule 28(1) on 27 June 2019.
3. The Second Defendant is not granted leave to amend the Plea and/or incorporate a Counterclaim.
4. The First Defendant is granted leave to file his Amended Plea and Counterclaim within ten court days of this order.
5. The First Defendant is directed to pay the costs of the Plaintiff on an Attorney and Client scale.




L PILLAY

ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION OF THE HIGH COURT, JOHANNESBURG

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 30 September 2021.

Date of hearing: 15 April 2021

Date of judgment: 29 September 2021

Appearances:

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