

THE COMMERCIAL BANK OF NAMIBIA LTD vs Z J GROBLER

Levy, AJ

2001/08/20

When a Court adjudicates, justice cannot be done unless all the facts are placed before it.

Where a plaintiff failed to file a replication in reply to a plea of prescription but defendant subsequently filed an amended plea, the plaintiff thereby became entitled to file a replication dealing with all the allegations in the amended plea and not only with the amendment.

Furthermore, where the replication included an allegation that a mortgage bond subsequently concluded by the parties interrupted prescription, the Court held that this was not a fresh cause of action.

Applications to strike down replication as irregular proceeding under Rule 30 dismissed.

Case No.: 1.1044/99

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE COMMERCIAL BANK OF NAMIBIA LTD

APPLICANT/PLAINTIFF

and

ZACHARIAS JOHANNES GROBLER

RESPONDENT/DEFENDANT

CORAM: LEVY, AJ

Heard on: 10^h August 2001

Delivered on: 20th August 2001

JUDGMENT

LEVY, AJ: The plaintiff is represented by Ms Vivier and the defendant acts in person.

This saga is of very many years duration. It is, however, unnecessary to trace the history of the litigation in any particular detail.

On or about 7th November 1996, plaintiff served a combined summons and particulars of claim on defendant and applied for summary judgment when defendant entered an appearance to defend. Defendant filed an affidavit opposing the application for summary judgment and on 24th February 1997 plaintiff withdrew its action and commencing afresh plaintiff served an amended Particulars of Claim on defendant. Whether or not this cured the defects in the original particulars of claim, of which defendant complained, is not in issue in the present proceedings.

In the instant case plaintiff claims from defendant:

1.3 Payment of the amount of NS643 929,78;

1.4 Interest on the amount of N\$643 929,78 to be calculated daily at the rate of 18.75% per annum from 27th October 1998 until date of payment;

1.5 Costs of suit.

Defendant responded to this claim on 25th April 2000 with a Special Plea of Prescription and pleaded over on the merits raising other defences.

Plaintiff did not file a replication to this Plea within 15 days as required by the Rules.

On 3 April 2001 defendant filed an amendment to his plea recasting the plea in part and adding a defence of waiver thereto.

On 27th April 2001 filed a replication in the following terms:

"1.1 Plaintiff pleads the last payment was made on this account in September 1995 and denies that the last payment was in December 1993.

1.2 Plaintiff pleads that prescription was interrupted by the following express alternatively tacit acknowledgements of his indebtedness to plaintiff:

- 1.6 Orally, in Windhoek on 24 July 1995;
- 1.7 In writing, in Windhoek on 1 August 1996.

- 1.8 In terms of section 14 of Act 68 of 1969 the running of prescription was interrupted by the acknowledgements.

- 1.9 In the premises plaintiff denies that its claim has become prescribed.

- 1.10 Plaintiff further pleads that it holds a second bond as security for defendant's indebtedness to it in the amount of N\$85,100.00 inclusive of disbursements, interest and costs and to this extent it's claim has in any event not become prescribed. A copy of the bond is attached marked 'Annexure E'."

On 18th May 2001 defendant brought an application in terms of Rule of Court 30 to strike this replication down and set it aside on the grounds that it is an irregular proceeding.

Plaintiff opposes the Rule 30 application and on 20 June 2001 filed a document which purports to be a "Conditional notice of amendment", to amend plaintiffs amended particulars of claim in the event of the replication "not being allowed". Defendant applies to strike this out as well on the grounds that it also is an irregular proceeding.

Plaintiff has applied for condonation for the late filing of the replication contending that it is only one day late. Plaintiff argues that because defendant filed an amendment to his plea on 3rd April 2001 plaintiff thereby became *ipso facto* and *ipso jure* entitled to file a replication within 15 days as provided for in Rule 25(1). In the affidavit supporting the application for condonation attorney Agenbach on behalf of plaintiff explains how it came about that the replication was a day late.

Both parties have filed heads of argument. In fact defendant has filed additional heads of argument and has submitted to the Court a list of the cases referred to in his heads. The Court is grateful to him for this.

Before dealing with the contentions of counsel, it is necessary to refer to some of the general principles in respect of pleadings and amendments and particularly the purpose thereof.

In *Skill v Milner* 1937 AD 103 at 105, De Villiers, JA said:

"The importance of pleadings should not be unduly magnified."

However, the learned judge then referred to the oft-quoted dictum from *Robinson v Randfontein Estates G. M. Co., Ltd* 1925 AD at 198 where Innes, CJ said:

"The object of pleading is to define the issues; and parties will be kept strictly to their pleas where any departure would cause prejudice or would prevent full enquiry. But within those limits the Court has a wide discretion. For pleadings are made for the Court, not the Court for the pleadings."

In *Trans-Drakensberg Bank Ltd (under judicial management) v Combined Engineering (Pty) Ltd & Another* 1967(3) SA 638 Cany, J comprehensively considered a large number of cases decided in various courts in South Africa and concluded that the primary object of allowing an amendment is "to obtain a proper ventilation of the dispute between the parties".

In *Macduff & Co (in liquidation) v Johannesburg Consolidated Investment Co., Ltd* 1923 TPD 309, the learned judge said:

"My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting *mala fide*, so that, by his blunder,

he has done some injury to his opponent which could not be compensated for by costs or otherwise."

The cases I have referred to and many others clearly indicate that justice cannot be done unless a court seized with a matter has before it all the relevant facts when it adjudicates. Consequently, Courts allow amendments to pleadings so that all the facts can be placed before the Court. However, the placing of such facts before the court must be done in accordance with the Rules of Court in respect of the time periods provided therein unless condonation for failure so to do is granted.

After a defendant has filed a plea it frequently happens that there is no necessity for the plaintiff to file a reply thereto as the plaintiff may have no additional matter to plead. If, however, the plaintiff does reply this reply is known as the replication. Where a replication is required it must comply with the rules and it must be delivered within fifteen days of the service upon the plaintiff of the defendant's plea.

Rule of Court 25(1).

No replication is required if it would merely serve the purpose of a joinder of issue or a bare denial of allegations in the plea.

Rule of Court 25(2).

In the instant case, defendant's plea referred to above was served and filed on 25th April 2000. Plaintiff had fifteen days to reply to the allegations made therein. As already pointed out defendant had filed a special plea of prescription and in pleading over included other defences. Plaintiff's failure to reply within 15 days meant that issue was joined and the pleadings were closed in terms of Rule of Court 29(b).

The aforesaid notwithstanding, in February 2001, although the pleadings were closed, defendant gave notice of his intention to amend his plea and on 3rd April 2001, almost one year after pleadings were closed, he filed an amended plea. The amended plea recast the original plea and included a defence of waiver.

The crisp question which now arises is whether or not the filing of the amended plea re-opened the

pleadings and whether plaintiff could now reply to the allegations of prescription made by defendant in its original plea or whether plaintiff was confined to replying only to those allegations specifically appertaining to waiver if plaintiff wanted to plead to such allegations.

In *SOS Kinderdorf International v Effie Lentin Architects* 1993(2) SA481 (Nm) at 491 D-E, a full bench of this Court held that:

"The Rules of Court constitute the procedural machinery of the Court and they are intended to expedite the business of the Courts. Consequently they will be interpreted and applied in a spirit that will facilitate the work of the Courts and enable litigants to resolve their differences in as speedy and inexpensive a manner as possible."

Against the backdrop of the aforesaid purpose of pleadings and the purpose of the rules of court in respect of pleadings and amendments I proceed to analyse relevant portions of Rule 28 which deal with amendments to pleadings and the consequences which arise from such amendments.

Rule 28(6) provides:

"When an amendment to a pleading has been delivered in terms of this rule, the other party shall be entitled to plead thereto or amend consequentially any pleading already filed by him or her within 15 days of the receipt of the amended pleading." (My emphasis)

Ms Vivier argues that by virtue of the said sub-rule the plaintiff was entitled to file a replication within 15 days of the amended plea being filed, dealing with the entire plea (including prescription); Mr Grobler argued that the plaintiff is restricted in its replication to dealing only with the amendment to the plea and has no right, certainly not an automatic one, to deal with the entire plea as amended.

Generally speaking an amendment to a plea does not necessarily introduce a new defence not previously pleaded. Frequently, the amendment of a plea enlarges on an existing defence or it may supply some essential element which is missing or it may remove in some way or other, some inadequacy drawn to the attention of the defendant by way of a request for further particulars or even by way of exception. If only the document containing such amendment or amendments must be replicated to, the replication would not comply with the requirement of Rule of Court 18 in respect of

pleadings and what they should contain. The replication in such circumstances could be meaningless. It would not be a self-contained pleading but would have to be read together with other documents such as a minor request for further particulars and perhaps the further particulars supplied. This could never have been contemplated by Rule 28(6).

Furthermore, that rule specifically provides that a party can "amend consequentially any pleading already filed" (my emphasis) and the party is given "15 days of the receipt of the amended pleading" (my emphasis) to do so. The Rule does not provide "on receipt of the amendment the plaintiff will have 15 days etc". It specifically provides on receipt of the amended pleadings that the plaintiff can amend any pleading.

The foregoing would relate to a plaintiff who has replicated but the Rule makes provision by necessary implication for the situation where the plaintiff has not filed a replication. The rule specifically provides:

"..... the other party shall be entitled to plead thereto or amend consequentially " (My emphasis)

This presupposes that the "other party" has as yet not pleaded (as in the instant case).

If the plaintiff is entitled to plead thereto, the plaintiff when pleading is obliged to comply with the Rules relating to all pleadings.

In the instant case when defendant filed his amended plea, which I have already said recast his original plea and added a plea of waiver as well, the plaintiff became entitled to replicate to the "amended pleading" and not only to replicate to part thereof.

Defendant argued that the pleadings had been closed and issue joined, but all his arguments overlooked the fact that he, himself had filed an amendment to his plea and that plaintiff could by virtue of Rule 28(6) reply thereto.

Defendant also objects in terms of Rule of Court 30, to paragraph 1.5 of the replication on the grounds

that this paragraph introduces a new cause of action. Defendant focuses his objection on the mortgage bond 5551, copy whereof is attached to the replication. He says its introduction at Uis stage is an irregular procedure.

In its particulars of claim as read with the further particulars supplied by plaintiff, plaintiff specifically alleged how its claim of N\$643,929.78 is calculated. The bond 5551 referred to in paragraph 1.5 of the replication, does not feature in the calculation of its claim. Furthermore, plaintiff has not made a separate claim based on this bond.

Defendant has pleaded prescription and the law provides that a plaintiff is entitled to plead that the prescriptive period alleged by the defendant was interrupted. The interruption of prescription can take various forms. Such interruption includes an act, a statement, an acknowledgment, oral or in writing, or a contract in terms whereof defendant acknowledges his indebtedness. In the present case plaintiff has pleaded that defendant interrupted prescription orally and in writing and it also pleads that by virtue of the bond 5551, which it holds as security, the debt is not prescribed. Whether the bond interrupts prescription as alleged, in part, or at all, is not for this Court to decide. That must be decided by the Trial Court. Contracts including bonds are interpreted in trials not in proceedings such as the present. I am, however, satisfied that paragraph 1.5 of the replication does not introduce a new cause of action.

The plaintiff was therefore entitled to file the replication but in so doing, plaintiff had to do so within 15 days. Plaintiff was in fact one day late.

Plaintiff has filed an application asking for condonation in respect of the late filing of the replication. The affidavit in support of the application is made by Attorney Agenbach.

Defendant opposes the application for condonation.

The main thrust of the opposition is the same as the grounds whereon defendant relied for his objection that the replication is an irregular proceeding. I have dealt with these grounds and I have set out my reasons why the replication subject to timely filing is not an irregular proceeding. It is not necessary

to repeat these.

The delay in filing the replication is but one day. In the light of the history of this matter, this is not an inordinate delay.

Furthermore, according to the affidavit of Mr Agenbach, defendant was previously aware that a replication was to be filed. A copy had been served on defendant but plaintiff withdrew that copy and served and filed the replication now in issue, one day late. The defendant has not been prejudiced by this late filing. There is also no *mala fides* in the late filing and plaintiff certainly had nothing to be gained by filing the replication one day late.

Superior Courts possess inherent jurisdiction to grant relief when insistence upon exact compliance with the Rules of Court would result in substantial injustice.

Herbstein & van Winsen, Superior Court Practiced ed. p.33

Ms Vivier argued this aspect of the law as well as the question of equities. In my view where a Rule of Court deals adequately with a particular situation, it is unnecessary for the Court to invoke its inherent powers.

The Order of this Court is:

- A. (1) Condonation is granted and the Replication filed on 27th April 2001 is permitted. (2) Costs to stand over for decision by the Trial Court.

- B. (1) The applications brought by defendant in terms of Rule of Court 30 to strike down and dismiss the replication on the grounds that it is an irregular proceeding, is dismissed.
- (2) Costs to stand over for decision by the Trial Court.

For the Plaintiff:

Advocate S Vivier

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