IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE, GRAHAMSTOWN) **Case No: 3248/10**

"REPORTABLE"

Date heard: 20 October 2011
Date delivered: 6 September 2012

In the matter between:

IVO HUISMAN	**First Applicant**
IVO HUISMAN & ASSOCIATES	**Second Applicant**

and

BRUCE RICHARD LAKIE	**First Respondent**
THE GRAAFF-REINET ADVERTISER (PTY) LTD	**Second Respondent**
GROUP EDITORS CO (PTY) LTD	**Third Respondent**

In re:

IVO HUISMAN	**First Plaintiff**
IVO UISMAN & ASSOCIATES	**Second Plaintiff**

and

BRUCE RICHARD LAKIE	**First Defendant**

THE GRAAF-REINET ADVERTISER & GROUP

EDITORS CO (PTY) LTD **Second Defendant**

CAXTONS & CTP PUBLISHERS & PRINTERS LTD **Third Defendant**

JUDGMENT

***Makaula J*:**

A. ***Introduction:***

[1] This is an interlocutory application in terms of **Rule 28 of the Uniform Rules of Court** wherein the applicants seek an amendment of the summons by substituting the second defendant with the second and third respondents (*the respondents)*. In the alternative, the applicants seek that the respondents be joined to the action as the second and third defendants respectively.

[2] The application is opposed by the respondents primarily on two grounds; (a) that such substitution would result in introducing two new separate entities in the place of a non-existent entity i.e. the second defendant; and (b) that the claim against the respondents has prescribed.

B. ***Factual Background:***

[3] On 21 December 2007 a letter written by the first defendant concerning the applicants was published in a newspaper titled *"Graaff-Reinett Advertiser"* circulating in the area of Graaff-Reneit, Aberdeen, Middleburg, Beaufort West, Colesberg and Jansenville. The applicants allege that the contents of the letter so published are wrongful and defamatory of them.

[4] On 9 November 2010 the applicants issued a letter of demand against the defendants. Pursuant to the letter of demand, the defendant's attorneys who are also respondents' attorneys, penned a letter dated 15 December 2010 headed "I HUISMAN en I HUISMAN & ASSOCIATS / B R LAKIE, THE GRAAFF-REINET ADVERTISER & GROUP EDITORS CO (PTY) LTD en CAXTONS AND CTP PUBLISHERS AND PRINTERS LIMITED" (my underlining), denying liability and requesting that in the event the summons are issued, they be served in their offices on behalf of the defendants.

[5] Indeed, on 7 December 2010 the applicants issued summons which was served on the defendants' attorneys on 15 December 2010 as arranged. That was six days before prescription intervened. The defendants filed their notice of intention to defend the action with the exception of the second defendant. In its plea the third defendant pleaded that the second defendant was non-existent and that the only existing entities were ***"The Graaff-Reinet Group (Pty) Ltd and Group Editors Co (Pty) Ltd"*** i.e. the second and third respondents respectively. Various correspondence was exchanged between the parties. In a letter dated 1 March 2011

to the applicants, the defendants stated that the second respondent was the actual owner, publisher and distributor of the newspaper duly assisted by the third respondent in its distribution.

[6] For reasons to follow, it is worth noting that below the banner heading of the newspaper the following information, which the applicants contend constitutes a misrepresentation, appears:

> "Gedruk en uitgegee deur die eienaars Graaff-Reinet Advertiser en Group Editors Co (Pty) Ltd. Ringweg George – geregistreer by die hoofkantoor as 'n nuusblad. Uitgegee of Vrydae."
>
> "Printed and published by the proprietors Graaff-Reinet Advertiser & Group Editors Co (Pty) Ltd. Registered at the GPO as a Newspaper – Published on Fridays."

C. *Applicants' case*:

[7] It is the contention of the applicants that what appears below the banner heading referred to in paragraph 6 above is a misrepresentation to them and to the world at large that only the second defendant is the proprietor, publisher and distributor of the newspaper and it is as a result of such misrepresentation that the respondents were cited as one company instead of two companies which they actually are. The applicants further contend that any reasonable reader of the newspapers or member of the public, based on the misrepresentation, could justifiably conclude that only one company is involved. The problem, so submit the applicants, is compounded by the acceptance of summons by the respondents' attorneys on behalf of such an entity. The applicants therefore argue that because of

such a misrepresentation and conduct the respondents are estopped from raising the objection to the amendment.

[8] The applicants admit that the company they cited as the second defendant does not exist. Even though that is the position, the second defendant is an amalgam of the names of the second and third respondents which arose directly as a consequence of the misrepresentation. The applicants argue that the amendment they seek does not create an action against or introduce two new legal entities. The amendment does no more than to correct an erroneous citation (brought about by the misrepresentation) of a single party by introducing the correct citation, so submit the applicants.

[9] Relying on the decisions in ***Blaauwberg Meat Wholesalers v Anglo Dutch Meats (Exports) Ltd***[1] and ***Embling & Another v Two Oceans Aquarium CC***[2], the applicants argue that (a) summons was served on the attorney representing the respondents before prescription intervened; (b) the second respondent, as the owner, publisher and distributor of the Graaff-Reinet Advertiser fully appreciated that it was the target of the action which the applicants had instituted; (c) that the third respondent as also the distributor of the newspaper could have been under no misapprehension that it was the target of the action; (d) that the service of summons as required by **Section 15 (1) of the Prescription Act 68 of 1969** was on the true debtors albeit that they were not the named defendants in the particulars of claim, which succinctly spelt out the debt claimed with the requisite particularity, and the

[1] 2004 1 ALL SA 129 (SCA)
[2] 2000 (3) SA 691 (C)

defendants would thus have been able to recognise their connection with the claim notwithstanding the error and citation thereof.

[10] The applicants contend that the respondents have failed to establish prejudice or injustice that could occur to them if the amendment is allowed.

[11] In the alternative the respondents seek leave to join either one or both of the second and third respondents as defendants.

***D. Respondents' case*:**

[12] The respondents emphatically deny that they made any misrepresentation. In amplification, the respondents argue that any reasonable reader of the newspaper would not have concluded that only one company is shown to be the owner, proprietor and distributor of it because the banner heading refers to, in plural, owners publishers and distributors. The applicant therefore, so contends the respondents, should have made enquiries about the other owner(s), proprietor(s) and publisher(s) of the newspaper and not cite only one company. The respondents submit that the least the applicants should have done was to conduct a company search to determine the correct entities to sue. The respondents contend that the fact that the applicants did not check who the other owners, proprietors and distributors are makes the defence of estoppel not available to them.

[13] The respondents submit that the reason why its attorneys wrote to the applicants the letter dated 15 December 2010, referred to in paragraph 4 above

indicating that it would defend the action is because the letter of demand was addressed to *"Graaff-Reinet Advertiser & Group Editors Co (Pty) Ltd",* its client. By then, it had not received the summons and did not know who the true defendants were and therefore could not have made any representations. The defendants contend that they indicated in their response dated 10 November 2010 to the letter of demand the difference between the second defendant and the Group Editors Co (Pty) Ltd i.e. third respondent. The respondents aver that the difference in the two companies was not brought to the applicants' attention because the respondents were not aware that a wrong party had been cited. They only became aware when they were preparing their plea hence their letter dated 1 March 2011 notifying the applicants of the fact that a wrong party had been cited in the name of the second defendant.

[14] The respondents further aver that by the time the notice of intention to defend was filed, the claim had lapsed and therefore, no other action could have been taken by them or their attorneys which could have prevented prescription. In the circumstances, so argue the respondents, they cannot be joined as defendants because the claim has prescribed.

[15] The respondents argue that the citation of the second defendant cannot be a misnomer because it would not be open to the applicants to argue that the misnomer was, in actual fact, meant to be the citation of two separate legal entities. In conclusion the respondents argue that this court has no discretion, wide or otherwise, to allow an amendment by means of which two legal entities, which had

not been cited before, are introduced to an action by way of an amendment under circumstances where a claim against them has already become prescribed.

E. Legal principles applicable:

[16] The granting of an amendment is discretionary to the court. The discretion of the courts is of the very widest, both in regard to the scope of the amendment and in the time for allowing it to be applied for and granted; this discretion, however, is exercised in both regards, on the same principle, namely whether the amendment, in respect either of its scope or of the time at which it is applied for, is likely to prejudice the opposite party or not. If the consequence of allowing the amendment will be to cause prejudice which cannot be cured by an appropriate order as to postponement or costs or both then it cannot be allowed; if on the contrary there can be no such prejudice the amendment will almost invariably be granted.[3]

[17] The same principle was confirmed in ***Embling & Another v Two Oceans Aquarium CC***[4] where **Van Heerden J** held as follows;

> "The general approach of the South African Courts, which has been confirmed in numerous cases, is that an amendment of a pleading should always be allowed unless the application to amend is *male fide* or unless the amendment would cause such injustice or prejudice to the other side as cannot be compensated by an order for costs and, where appropriate a postponement; . . . The primary object of allowing an amendment is to obtain a proper ventilation of the dispute between the parties, to determine the real issues between them, so that justice may be done. . . . The power of the Court to allow even material amendments is therefore, it would seem, limited only by considerations of prejudice or injustice to the other side."

---

[3] *Beck's Theory and Principles of Pleading in Civil Actions 6th Ed pg 182*
[4] *Supra* at 694I - 695B

[18] These legal principles have become trite.[5]

[19] The courts have by way of amendment under Rule 28 of the Uniform Rules allowed the substitution of one party as plaintiff in order to ensure that the true plaintiff is before court.[6] It is further permissible for a court to allow an amendment if to do so serves to correct a misdescription of the name of an already existing defendant.[7]

[20] However our Courts have refused to amend pleadings in instances where to do so would have an effect of substituting a plaintiff by a new one, thus depriving defendants the right to raise the defence of prescription. By way of example, in ***Associated Paint & Chemical Industries (Pty) Ltd v Smit***[8] **F H Grosskopt JA** refused the amendment sought because the effect would not be to correct the misdescription of the plaintiff but would be to introduce a new plaintiff in an instance where to do so would affect the raising of the defence of prescription in terms of Section 15 (1) of the Prescription Act. In dismissing the application, the court found that the plaintiff who issued the summons was not the actual creditor of the defendant and therefore the summons did not constitute a process whereby the creditor claimed payment of the debt thus the running of prescription in respect of the debt was not interrupted by the service of summons on the defendant by the wrong plaintiff.

---

[5] *Embling and Another supra* and *Commercial Union Assurance Co Ltd v Waymark NO* 1995 (2) SA 73 (TK) at 77 F-I
[6] *Jacobs & Others v Baumann NO & Others* 2009 (5) SA 432 (SCA) at 440B
[7] *Four Tower Investments (Pty) Ltd v Andre's Motors* 2005 (3) SA 39 (N) at 45E-G
[8] 2000 (2) SA 789 (SCA)

[21] The same principle was upheld in ***Blaauwberg Meat Wholesalers v Anglo-Dutch Meats (Exports).***[9] In ***Blaauwberg's*** case the facts in summary are that ***Anglo-Dutch Meats (UK) Ltd*** had sued the appellant for payment of the price of beef flanks. It transpired that the true creditor and therefore the plaintiff was Anglo-Dutch (Eports) Ltd, a wholly owned subsidiary of the plaintiff in the action. The court per **Heher JA** held that because the first company was not the correct plaintiff and because the second company, which was the correct plaintiff, had not served a summons on the appellant (defendant) an amendment could not be granted because the correct plaintiff had not served a summons as required in terms of Section 15 (1) of the Prescription Act in order to judicially interrupt the prescription period.

[22] Of importance to the present matter, is that **Heher JA** dealt with the distinction between citing an incorrect plaintiff from that of an incorrectly named defendant as follows:

> "Second, an incorrectly named debtor falls to be treated somewhat differently for the purposes of s 15(1). That that should be so is not surprising: the precise citation of the debtor is not, like the creditor's own name, a matter always within the knowledge of or available to the creditor. While the entitlement of the debtor to know it is the object of the process is clear, in its case the criterion fixed in s 15(1) is not the citation in the process but that there should be service on the true debtor (not necessarily the named defendant) of process in which the creditor claims payment of the debt. The section does not say '.. . claims payment of the debt *from the debtor'.* Presumably this is so because the true debtor will invariably recognise its own connection with a claim if details of the creditor and its claim are furnished to it, notwithstanding any error in its own citation. Proof of service on a person other than the one named in the process may thus be sufficient to interrupt prescription if it should afterwards appear that that person was the true debtor. This may explain the decision in *Embling (supra),* where the defendant was cited in the summons as the Aquarum Trust CC whereas the true debtors were the trustees of the Aquarium Trust. Service was

[9] (S*upra)* at para [18]

> effected at the place of business of the trust and came to the knowledge of the trustees. In the light of what I have said such service was relevant to prove that s 15(1) had been satisfied and was found to be so by Van Heerden J (at 700D, 701D).[10]" (My underlining)

[23] The respondents submit that the facts at hand are distinguishable to the service described in the **Blaauwberg** matter. The respondents argue that in the instant matter the applicants do not seek to correct a misnomer but seek to introduce two new entities which have not been cited before. **Mr Coetsee**, counsel for the respondents, further argues that to allow the introduction of new entities would lead to an absurd situation where courts would allow introduction of more than two new entities by way of amendments.

[24] I disagree with the submission by the respondents. To me, it is apparent that the name of the second defendant is an amalgam of the second and third respondents. Even if I am wrong in that regard, it is true that the summons were served on both the second and third respondents' attorneys at their instance. On receipt of a letter of demand which spelt out who the defendants were and the reason for the demand, the respondents appreciated even at that stage that they were the target of the demand. Further, what is of interest, is that in their response to the letter of demand as referred to in paragraph 4 above, the respondents' attorneys cited the second defendant in its heading and asked that summons be served on their offices.

[25] It has not been gainsaid that when the letter of demand and the summons were received by the respondents, they immediately appreciated their connection

[10] *Blaauwberg Meats Wholesalers supra* at para 18

with the claim notwithstanding that a non-existent party had been cited. Service of the summons was effected on the respondents' attorneys as per arrangement in circumstances explained above. Therefore, the summons was served on the true debtor. In light thereof, it cannot avail the respondents that prescription had not been interrupted when summons was served on them as true debtors. Furthermore, I cannot see how the respondents would be prejudiced by the amendment.

[26] In the light of the conclusion I have arrived at, I deem it unnecessary to deal with whether the respondents made a representation or not which would avail the applicants the defence of estoppel.

[27] The applicants came before court seeking an indulgence. I am of the view that they have to bear the costs of this application. It is apparent that the respondents did not oppose the application for no flimsy reasons. The circumstances of this matter are unique in that a non-existent party was cited. It would be unjust of me to saddle the respondents with costs.

Consequently, I make the following order:

1. **Leave is granted to the plaintiffs to amend their summons and particulars of claim in accordance with paragraph 1 of the notice of motion dated 27 July 2011 and issued on the same date;**

2. **The plaintiffs are to pay all the wasted costs occasioned by the amendment, including the costs occasioned by the defendants' opposition.**

_____

M MAKAULA

JUDGE OF THE HIGH COURT

Counsel for the Applicant:	Adv Rorke SC
Attorneys for the Applicant:	Rushmere Noach Inc c/o Netteltons Attorneys 118A High Street **GRAHAMSTOWN**
Counsel for the 2nd & 3rd Respondents:	Adv Coetsee
Attorneys for the 1st Respondent:	Cliffe Dekker Hofmeyer c/o Whitesides Attorneys 53 African Street **GRAHAMSTOWN**
Attorneys for the 2nd & 3rd Respondents:	J S Marais & Co c/o Neville Borman & Botha 22 Hill Street **GRAHAMSTOWN**