REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED: YES

2023/06/09

DATE SIGNATURE

CASE NO: 2022/4024

In the matter between:

ESSENCE LADING CC **PLAINTIFF**

and

INFINITI INSURANCE LIMITED **FIRST DEFENDANT**

MEDITERRANEAN SHIPPING COMPANY

(PTY) LTD **SECOND DEFENDANT**

Neutral citation: *Essence Lading CC v Infiniti Insurance Ltd / Mediterranean Shipping Company (Pty) Ltd* (Case No: 2022/4024 [2023] ZAGPJHC 676 (9 June 2023)

JUDGMENT

Summons – citation of wrong defendant – if the plaintiff cited the wrong defendant, the plaintiff should in principle withdraw the action and start afresh against the correct defendant.

Method of correction of errors in citation of defendant – where in conflict, constitutional imperative of a fair and just hearing trumps the need for procedural pragmatism.

Citation of wrong defendant – withdrawal of action not the only outcome - applications for substitution or joinder of new party, on proper notice to the new party, coupled with appropriate amendment, permissible.

Citation of wrong defendant - test to be applied in substitution or joinder applications – test is substantially the same test which is applied to amendments – bona fide amendments will be granted unless it will result in prejudice or injustice that cannot be cured by an appropriate cost order or other order regulating future proceedings - notice to the party to be introduced essential to avoid injustice.

Citation of wrong defendant – appropriateness of the amendment procedure provided in Uniform Rule 28 – the application of rule 28 to situations where a new party, not currently represented before the court, is to be introduced, is generally inappropriate and will lead to incurable injustice. Suggestion in Holdenstedt Farming v Cederberg Organic Buchu Growers (Pty) Ltd *2008 (2) SA 177 (C) that substitution of a defendant can be effected through the application of Uniform Rule 28 not supported by authority relied on, and to be qualified.*

Appropriateness of Uniform Rule 28 in correction of wrong defendant – application of rule 28 will be appropriate if the correct defendant (i.e., the new party to be introduced) has entered an appearance to defend, made himself a party to the proceedings and is represented in the proceedings – no incurable injustice will result. The situation is like the situation where the correct defendant formally intervened in the action.

Appropriateness of rule 28 in correction of wrong defendant – application of rule 28 will be appropriate where, through some form of agency (such as the agency created by a partnership) the new party to be introduced is in law represented in the proceedings by an agent (such as a co-partner) so that the service of process on the existing party can be deemed to be service on the new party to be introduced – no incurable justice will result.

Distinction between misnomer and substitutions – law reports abound with fine distinctions between these concepts – niceties in drawing this distinction unhelpful in the determination of a fair and just process which will prevent incurable injustice – at best distinction a factor in determination of prejudice and no fixed rule attached to the difference between concepts.

Distinction between misnomer and substitutions – amplified emphasis on difference to be avoided in assessing applications for amendment – the distinction should be limited to the effect it has on the question of prejudice, which is the primary test.

Misnomer in citation of defendant – wrong defendant cited - even if error can be characterized as a misnomer, it does not detract from fact that a new party who is not before court needs to be introduced – dictates of fairness and justice requires that new party be joined or substituted by way of application served on new party.

Amendment introducing new party without notice to new party – such procedure unconstitutional and contrary to the basic tenets of our law – order will be a brutum fulmen.

Outcome of application for amendment in terms of Uniform Rule 28 where party to be introduced not given notice – application dismissed with costs.

D MARAIS AJ:

BACKGROUND AND CLAIMS SET OUT IN PARTICULARS OF CLAIM

[1] This is an application by the plaintiff in terms of Rule 28 for leave to effect an amendment, by changing the name of the second defendant from Mediterranean Shipping Company (Pty) Ltd ("MEDITERREANEAN") to MSC Logistics (Pty) Ltd ("MSC").

[2] The plaintiff issued summons against the defendants and made alternative claims against them.

[3] The claim against the first defendant was firstly based on the alleged repudiation of an insurance agreement flowing from the first defendant's rejection of an insurance claim lodged by the plaintiff in respect of damages to the plaintiff's truck, which was insured by the first defendant. In this regard the plaintiff claimed R400 000.00 from the first defendant, which was the insured amount.

[4] There is a second claim against the first defendant which has as its background the contractual relationship between the plaintiff and MSC. In terms of this contract the plaintiff was entitled to render transport services to MSC and receive remuneration in exchange. In terms of the

agreement the plaintiff was obliged towards MSC to keep its vehicles insured and to maintain goods-in-transit insurance.

[5] The plaintiff alleges that the first defendant cancelled the insurance agreement with the plaintiff by giving notice of cancellation on 15 January 2020, with cover terminating on 29 February 2020. The plaintiff states that it was advised to find alternative insurance from March 2020. The basis of the cancellation was that the first defendant no longer wished to insure the plaintiff for various reasons, including alleged misrepresentation by the plaintiff. The plaintiff alleged that this cancellation was a breach of the insurance agreement by the first defendant.

[6] It is then alleged that MSC cancelled the plaintiff's transport services agreement on 27 January 2020 due to the failure by the plaintiff to keep its vehicle insured. Based on the aforesaid allegation that the first defendant unlawfully cancelled the insurance agreement, the plaintiff seeks to place blame on the first defendant for the fact that MSC cancelled the transport agreement. The plaintiff allegedly suffered loss of income of approximately R2.4 million as a result and claims these alleged consequential damages from the first defendant.

[7] The plaintiff's alternative claim against the second defendant assumes that the first defendant did not breach the insurance agreement. The plaintiff then attempts to set out a cause of action against the second defendant along the following lines. It is alleged that the second

defendant owed the plaintiff certain duties, which in summary, obliged the second defendant to advise and assist the plaintiff in its dealings with the first defendant, to ensure that the plaintiff complied with the terms of the policy and to lodge a valid insurance claim. It is alleged that the second defendant breached these duties, resulting in the first defendant repudiating the claim. Therefore, the plaintiff claims R400 000.00 from the second defendant, being the insured amount.

[8] It also seems that the plaintiff's case is that the second defendant, in breach of a duty, did not properly consider the reasons for the termination of the insurance policy when it cancelled the plaintiff transport agreement due to a lack of insurance cover. Consequently, the latter termination was allegedly unlawful. Therefore, the plaintiff claimed the aforesaid loss of income from the second defendant in the alternative.

[9] I express no opinion on the sustainability of the claims set out in the particulars of claim, or whether the particulars of claim disclose a cause of action in all respects.

THE INCORRECT CITATION OF THE SECOND DEFENDANT

[10] As already indicated above, the plaintiff cited MEDITERRANEAN as the second defendant, instead of MSC.

[11] The transport services agreement relied upon by the plaintiff, which was annexed to the summons, is an agreement between the Plaintiff and MSC, and did not sustain a cause of action against MEDITERRANEAN.

[12] In the second defendant's citation, reference was made to the company's CIPC records, which was also attached to the summons. These records reflected the information relating to MSC. The company registration number mentioned in the citation was that of MSC.

[13] MCS's CIPS records indicate that the company's registered office is at an address in Durban. Neither the summons, nor the particulars of claim, refers to this address. In the agreement, MSC's *domicilium citandi* is recorded as the same address where its registered office is situated in Durban. In the summons the plaintiff alleged that MEDITERRANEAN's principal place of business was situated at 14 Rosherville Road, City Deep, Johannesburg. It was incorrectly alleged that this appears from the attached CIPC records (MSC's CIPC records). The CIPC records, of course, contain no reference to a principal place of business, only a reference to MSC's registered office. Puzzlingly, the plaintiff's attorney of record repeated the aforesaid incorrect allegation in the founding affidavit to the present application.

[14] There is no direct evidence before the court regarding MSC's principal place of business. However, the plaintiff argued that the place where the summons was served was also MSC's place of business. In support of this argument, counsel for the plaintiff referred to the fact that the when the plaintiff concluded the agreement with MSC, MSC was *inter alia* represented by a Mr M Barnardo, whilst the return of service of the summons indicates that service was effected on a Mr Barnardi. The contract also appeared to have been signed at City Deep on behalf of MSC by no less than four managers describing themselves as MSC's cartage manager, risk officer and regional cartage manager. This lead to the argument that the cited address is also MSC's place of business, and that the summons was served on MSC.

[15] There is some merit in the argument that, despite the slight variance in spelling between "Barnado" and "Barnardi", the summons was served at MSC's place of business.

[16] However, the sheriff stated in his return of service that Mr Barnardi was a responsible person over the age of 16 and in charge of Mediterranean Shipping Company (Pty) Ltd. One can only speculate whether the sheriff established the relationship between Mr Barnardi and MEDITERRANEAN, but it seems unlikely that he did, because it is highly improbable that Mr Barnardi (assuming that he was the same person as Mr Bernardo) was in charge of any of these companies, being a mere regional cartage manager. Consequently, the return of

service cannot be regarded as evidence that the service address was exclusively MEDITERRANEAN's place of business.

[17] Assuming that the service address is indeed also MSC's place of business it may be of importance that it is common cause that MSC did not react to the summons and did not enter an appearance to defend. Instead, the named defendant, MEDITERRANEAN, entered an appearance to defend and raised an exception that the particulars of claim do not disclose a cause of action against it.

[18] It is regrettable that the plaintiff failed to adduce evidence in these proceedings regarding the locality of MSC's place of business and left the issue open to conjecture and inferences from random pieces of information.

[19] However, based on what set out above, I shall assume that the summons was served on MSC.

THE PROPOSED AMENDMENT AND OBJECTIONS THERETO

[20] The second defendant, MEDITERRANEAN, raised an exception to the particulars of claim on the basis that they do not disclose a cause of action against it.

[21] Under circumstances where the exception was clearly justified, the plaintiff gave notice of its intention to amend the summons by deleting

the name of the second defendant and replacing it with “MSC Logistics (Pty) Ltd”.

[22] Importantly, this notice was only served on MEDITERRANEAN’s attorney of record.

[23] The second defendant objected to the proposed amendment, *inter alia,* on the following bases:

[23.1] The amendment constitutes a substitution of parties;

[23.2] The plaintiff cannot by way of a simple amendment remove the second defendant who was cited and introduce an entirely separate entity in its place;

[23.3] MSC is not a party to the proceedings and could not be made a party to the proceedings by way of an amendment served on MEDITERRANEAN;

[23.4] If the summons was amended, MSC would not even be aware of the amendment and that it became a party to the proceedings; and

[23.5] The proper course of action was for the plaintiff to withdraw the action against the second defendant and start afresh.

[24] As a result of the objections, the plaintiff brought an application for leave to amend in terms of Rule 28. This was also served on MEDITERANNEAN's attorneys of record, who are not acting for MSC.

LEGAL POSITION REGARDING THE CORRECTION OF AN ERROR IN THE CITATION OF THE DEFENDANT

[25] The point of departure is that everyone has in terms of section 34 of the Constitution the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court. Section 173 provides that the High Court has the inherent power to protect and regulate its own process, and to develop the common law, considering the interests of justice. I am, therefore, constitutionally enjoined to approach this matter on the basis that fairness and justice must be promoted.

[26] In my view, in the correction of a mistake in the citation of a defendant (whether this mistake be described as a misnomer or the correction thereof a substitution) the essential question is how this mistake can be corrected in a manner which complies with the constitutional imperative of a fair and just process.

[27] In terms of Rule 17 of the Uniform Rules of Court, a person wishing to institute a claim against another person must issue a summons through the office of the registrar, directing sheriff to inform the defendant that if he wishes to defend the matter, he must file a notice of intention to defendant and, thereafter a plea (with or without a counterclaim), and exception or application to strike out. This rule complies with the constitutional imperative of a fair hearing, by requiring service of a

summons on the defendant prior to any judicial determination of a dispute.

[28] An action commences with the issuing of a summons.[1] However, in the absence of formal service of the summons on the defendant, the mere fact that summons was issued, even to the knowledge of a defendant, does not oblige a defendant to take any action.[2]

[29] Formal notice activates the law of procedure against a defendant and has other important consequences, like interruption of prescription in terms of section 15 of the Prescription Act, 1969.

[30] Mistakes in pleadings are a common phenomenon and there is the obvious need for such mistakes to be rectified in an economical and practical manner, while at the same time complying with the need for fairness and justice. I think there would be no quarrel that where there is a conflict between the need for procedural pragmatism and the constitutional imperative of fairness and justice, the former is undoubtedly trumped by the latter.

[31] In the first edition of Herbstein & Van Winsen *The Civil Practice of the Superior Courts in South Africa*, published in 1954, the remark was made that the court may permit a summons to be amended by the addition or substitution of a new party where such a course of action

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[1] *Labuschagne v Labuschagne; Labuschagne v Minister van Justisie* 1967 (2) SA 575 (A)
[2] *First National Bank of SA Ltd v Ganyesa Bottle Store (Pty) Ltd; First National Bank of SA Ltd v Schweizer Drankwinkel (Pty) Ltd* 1998 (4) SA 565 (N) at 568B–C.

would involve no prejudice to the defendant.[3] Having regard to the cases referred to in support of this statement, it is evident that the authors were referring to the general possibility of an amendment introducing a new party, but did not discuss in detail the procedure whereby such amendment ought to be brought about. In support of the general statement, the authors relied on two judgments.

[32] The first was a reference to *Abromowitz v Jacquet*[4] where two defendants were cited in a provisional sentence summons as partners trading under the style and name of "Daytona Garage". An objection was taken that there was a third partner (the father of the two other partners) who was not joined. The third partner made an affidavit in support of the objection, confirming that he was a partner of the partnership that was cited as the defendant. In these circumstances, the plaintiff applied for the joinder of the third partner, having given notice of such application to him. This brought up the issue of whether a court has the power to amend the summons accordingly. The court granted the joinder of the partner as the third defendant, placing emphasis on the fact that the third partner in essence appeared in the action and stated in an affidavit which was filed in court that he was a partner in the partnership.

[3] At p 128.
[4] Abromowitz v Jacquet 1950 (2) SA 247 (W)

[33] I pause to emphasise that in this matter the amendment was brought about by way of an application for joinder which was served on the new party.

[34] The court In *Abromowitz* adopted the reasoning in the second case relied upon by *Herbstein & Van Winsen*, i.e., *Gihwala v Gihwala*[5] where the plaintiff cited the defendant in a provisional sentence summons as "M T Gihwala, a wholesale merchant trading as C B Gihwala". The summons was served personally on the defendant. The defendant filed an affidavit in which the point was taken that he was not solely the owner of the firm trading under the name C B Gihwala, but that his brother, I T Gihwala, was also a partner. The brother also deposed to an affidavit confirming this fact. The plaintiff applied for an amendment seeking the introduction of I T Gihwala as a second defendant in his capacity as partner. After the plaintiff filed a replying affidavit setting out why M T and I T Gihwala were liable, I T Gihwala filed another affidavit dealing with the issue of their joint liability. The court held that the individual partners are not separate entities from the partnership, that the summons was properly served on the one partner and the other partner was actively participating in the proceedings by filing affidavits in opposition. The court also held that the same principles applied which was applicable to an ordinary summons[6], i.e., that an amendment should be granted if the defendant would not be prejudiced. Holding that

[5] *Gihwala v Gihwala* 1946 CPD 486

[6] Following *Union Bank of South Africa Limited v Woolf* 1938 (Vol 2) WLD 222. In this case the general principle was stated, and the case did not relate to a substitution of parties.

I T Gihwala would not be prejudiced by the amendment, the amendment was granted.

[35] It must be observed that partners are joint and several creditors or joint and several debtors.[7] Where a summons is issued for a debt of the partnership, the plaintiff has the choice of using rule 14 (and issue summons against the partnership by citing the name under which the partnership trades) or cite the partners by their individual names, alleging that they are partners in a partnership trading under a certain name. An important principle is that individual partners are generally entitled to represent the partnership, agency being created by operation of law.[8] Against the background of these principles, where a summons purporting to be against the partnership (although one of the partners was omitted) was served on one of the partners and the "missing" partner evidently is aware of the action and is actively participating in opposing the claim, a joinder of the partner and the ancillary amendment of the summons should clearly be granted, as the party to be introduced will suffer no injustice that cannot be cured by an appropriate costs order or an order regulating future proceedings.

[36] In *Gihwala*, the court referred to *L. and G. Cantamessa v Reef Plumbers*[9] where the court held that the introduction of a new entity as a defendant at the conclusion of a trial by way of an amendment, constituted an irregularity, because the new defendant was not

[7] *Geldenhuys v East and West Investments (Pty) Ltd* 2005 (2) SA 74 (SCA)
[8] See Kerr *The Law of Agency* (3rd Ed) 111
[9] *L. and G. Cantamessa v Reef Plumbers* 1935 TPD 56

originally cited as a defendant. The court distinguished *Cantamessa* on the basis that in that judgment the irregularity was that a person, who has not been cited, was introduced in an action without its knowledge.[10]

[37] It is, therefore, evident that during the first half of the 20th century a practice was in existence in our courts whereby a party in legal proceedings could be substituted by a new party, provided that the process by which the substitution was effected did not result in incurable injustice. In some cases, the amendment went hand in hand with an application for the joinder of the new party and in others, where the court was satisfied that the new party had effectively been served (for example by service on a co-partner), by way of an amendment without a formal joinder. The most important consideration remained prejudice and, in this regard, the main consideration was whether the party who is to be introduced to the action was given proper notice of the proceedings against him. This practice continued thereafter.

[38] In *Curtiss-Setchell & McKie v Koeppen*[11] the court dealt with an application for the substitution of a plaintiff, and held that there were several cases in which the courts have granted applications for substitutions involving the introduction of a new *persona* on being satisfied that no prejudice would be caused to the opposite parties.[12] It must be pointed out that with the exception of the *Cantamessa*-case,

[10] Referring to *Goldberg v Tomaselli and Sons Ltd* 1940 TPD 413
[11] *Curtiss-Setchell & McKie v Koeppen* 1948 (3) SA 1017 (W)
[12] See 1021

the cases referred to in this judgment dealt with substitutions of the plaintiff.

[39] In *Mutsi v Santam Versekeringsmaatskappy BK en 'n ander*[13] the court granted an application for an amendment of the citation of the defendant, where the plaintiff intended to sue "Santam Versekeringsmaatskappy Beperk" but cited "Suid Afrikaanse Nasionale Trust en Assuransie Maatskappy Beperk". Both were registered companies, having the same address. The court held that the summons was in fact served on *Santam,* and that *Santam* knew from a reading of the summons that it was intended to be the defendant. As such, the court described the error as a mere misnomer, even though both companies were existing entities. Importantly, the court granted the amendment pursuant to an application that was brought against and served on *Santam*, who had a full opportunity to oppose the amendment, and did oppose it. The court also relied on the perceived *ratio* of the *Cantamessa* – case (i.e., that the amendment was refused in that case because the new party was neither cited nor served). The *ratio* of the *Mutsi* - judgment, in granting the amendment, in my view lies in the fact that the application for amendment was served on the new party, and in the circumstances of the case no injustice would have arisen if the amendment was granted.

[13] *Mutsi v Santam Versekeringsmaatskappy BK en 'n ander* 1963 (3) SA 11 (O)

[40] In *Greef v Janet*[14] the court held that a person cannot be substituted as a party to an existing action without such person's consent and co-operation. The court indicated that no direct authority was presented to the court in this regard and distinguished the *Mutsi* – case on the basis that in that case there was only the correction of a misnomer, and not a substitution of parties. The court analysed Van der Linden's *Judicieele Practycq* and concluded that according to Van der Linden, two procedures were known to introduce a new party to an action, i.e., joinder and intervention. Van der Linde did not describe any procedure whereby a *substitution* of a defendant can be effected on the initiative of the plaintiff, without the new party's consent. The court held that the cases relied upon by Herbstein & Van Winsen for the proposition that the court has the power to order a substitution was not cases of substitution, but joinder or intervention. In summary, the court held that there is no process whereby a defendant can be substituted without the content of the new party and that the appropriate mechanisms to effect a substitution would be a joinder or intervention.

[41] Subsequently, the Supreme Court of Appeal held that the High Court has the inherent jurisdiction to grant applications for the substitution of parties.[15] This power was not qualified with reference to a requirement that the new proposed defendant must grant consent.

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[14] *Greef v Janet* 1986 (1) SA 647 (T)

[15] *Putzier and Another v Union and South West Africa Insurance Co, Ltd* 1976 (4) SA 392 (A) 402 F and *Tecmed (Pty) Ltd and Others v Nissho Iwai Corporation and Another* 2011 (1) SA 35 (SCA) par 12

[42] *O'Sullivan v Heads Model Agency CC*[16] involved an application for the substitution of a third party (which was in the position of a defendant). The court overruled *Greef v Janet* on the requirement of consent to the substitution and held that it is not the absence of consent but care for the rule to also hear the other side which underlie a decision such as *Cantamessa v Reef Plumbers*. The court referred to the fact that *Greef v Janet* made allowance for the joinder of a new defendant without his consent. Where in this case the third party was properly served, made an appearance, and pleaded that it was not a firm as alleged in the third-party notice, but a close corporation, the court applied the general rule that the only limitation to an amendment (substitution of parties being in no special category) would be prejudice which cannot be removed by a cost order. Consequently, the court granted the substitution. It is important to note that the substitution was granted upon application by notice to the third party.

[43] In *Holdenstedt Farming v Cederberg Organic Buchu Growers (Pty) Ltd*[17] the court held that a substitution can be effected in terms of the rule 28 amendment process, stating that this procedure has already received the approval of the High Court. If taken as a general proposition that substitutions may be effected by way of the rule 28 amendment procedure, I must respectfully disagree with it. This statement must in my view be qualified.

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[16] *O'Sullivan v Heads Model Agency CC* 1995 (4) SA 253 (W)
[17] *Holdenstedt Farming v Cederberg Organic Buchu Growers (Pty) Ltd* 2008 (2) SA 177 (C) par 21.

[44] The court relied in this regard on *Kirsh Industries Ltd v Vosloo and Lindeque and Others*[18] 1982 (3) SA 479 (W). However, *Kirsh Industries* involved a situation where a partnership was cited, under circumstances where this partnership dissolved prior to the issuing of summons and a new partnership was formed with new partners. The summons made it clear that the intended partnership against whom the claim is made, was the first partnership (the partners of which remained liable despite the dissolution). The plaintiff made use of the provision of rule 28 to amend the defendant's citation, simply by adding that the partnership consisted of the partners listed in an annexure. As the identity of the correct defendant was already clear, the amendment simply sought to place the matter beyond any doubt. As such, there was no error in the citation of the plaintiff, nor was there a substitution of a party. Consequently, I respectfully disagree that *Kirsh Industries* provided authority for the general proposition that rule 28 is an appropriate mechanism to effect a substitution of a defendant.

[45] The court also relied on *Embling and Another v Two Oceans Aquarium CC*[19] where the defendant was cited as "Two Oceans Aquarium CC" instead of "Two Oceans Aquarium Trust". Upon service of the summons an "entity" called Two Oceans Aquarium Trust entered an appearance to defend and subsequently a special plea was filed in which the defendant denied that it was Two Oceans Aquarium CC, and alleged that it was Two Oceans Aquarium Trust, and alleged that any claim

[18] *Kirsh Industries Ltd v Vosloo and Lindeque and Others* 1982 (3) SA 479 (W)
[19] *Embling and Another v Two Oceans Aquarium CC* 2000 (3) SA 691 (C)

against the trust had prescribed. The circumstances of the case were that no close corporation by the name of *Two Oceans Aquarium CC* ever existed, and the correct defendant was clearly discernible from the summons. The summons was also served on the correct defendant. The plaintiff sought to amend the citation of the defendant to correct the aforesaid mistake through the application of rule 28. After a proposed amendment was objected to, on the basis that the claim allegedly became prescribed, the plaintiff brought an application for leave to amend. The court rejected the argument that the amendment amounted to a substitution, relying on the above considerations, and rejected the prescription point raised by the defendant. The amendment was, therefore, granted.

[46] Although the court in the *Two Oceans* – case granted the amendment pursuant to a process in terms of rule 28, the case is unique in that the correct defendant entered an appearance to defend after the summons was served on it and thereafter actively defended the action, assuming the role of a defendant, by even raising a plea that the claim against it prescribed. For all intents and purposes, the correct defendant became a party to the proceedings at the outset, knowing that it was the real defendant. This was like the situation where the correct defendant out of own accord intervened in the action. Under these circumstances, the use of rule 28 against the person who was already a party to the action was entirely in order. The process did not entail the introduction of a party who was not already before the court. Consequently, this

judgment was also no authority for the proposition that a substitution can generally be effected in terms of rule 28.

[47] *Holdenstedt Farming* concerned a summons in which a debt due by a partnership was claimed, but only one of two partners was cited as a defendant. The defendant's attorney of record was the defendant's wife, who was the daughter of the other partner. The plaintiff effected an amendment in terms of rule 28 whereby the defendant, in his individual capacity, was substituted by the partnership, on an unopposed basis, having served the relevant notice of intention to amend and amended summons on the original defendant's attorney. Subsequently, the partnership brought an application for an order declaring that the purported substitution was ineffectual against it, with ancillary relief. The court held that the amendment was effective against the partnership on the basis that the notice of intention to amend was served on at least one of the partners and specifically a partner who was representing the partnership. As such the representative of the partnership, which does not exist separately from the individual partners, received notice of the proposed amendment and did not object to it.

[48] This case was similar to the Gihwala – case referred to above, where the introduction of one of the partners of a partnership was granted by way of an amendment. The rationale behind these cases is that the partnership is not an entity separate from the partners and that a partner can represent the partnership. Under these circumstances the partnership is already represented before court, and the service of a

notice of proposed amendment on one partner is deemed to the notice to the other partners. Under these circumstances the use of rule 28 to effect the substitution did not result in unfairness or injustice to the party to be substituted and was appropriate.

[49] I shall continue to refer to further scenarios and discuss how a substitution of a defendant by way of an amendment to the summons in terms of rule 28 may or may not lead to incurable injustice.

[50] The first scenario, which really has been dealt with above, deals with the situation where there is an error in the citation of the defendant and the summons was served on the correct defendant, to whom it is clear from a reading of the summons that he was intended to be the defendant, and such person entered an appearance to defend, such person can clearly not complain about any prejudice or injustice if the summons is amended by way of a simple amendment in terms of rule 28. The same would apply if the summons was not served on the correct defendant, but the correct defendant intervened to protect his interests. The determining factor is whether the process in correcting the error was fair and did not result in an injustice. If the notice of intention to amend was duly served on the party who is already before court, the recipient of the notice had a fair opportunity to oppose the amendment, and there can be no objection to the process. It must be emphasized that this scenario inherently does not introduce a new party to the proceedings.

[51] The situation becomes more complicated when the summons, which cites the defendant incorrectly, was served on the correct defendant, but such defendant simply ignores the summons due to the error in the citation (e.g., the citation refers to a different name), as he would well be entitled to do. In a situation like this, it seems that the plaintiff would be unable to use the amendment procedure at the outset. If the plaintiff gives notice of intention to amend in the pending action, the proposed new defendant can also reason that he is not party to the action and legitimately refrain from doing anything pursuant to such notice. Any amendment that is effected pursuant to such notice of amendment would result in unfairness and injustice. The solution to the problem lies in the plaintiff either withdrawing the action, or applying for the joinder of the correct defendant, thereby indubitably and fairly making the correct defendant a party to the proceedings, coupled, or followed by an appropriate amendment. An application for a substitution, properly served on the proposed new defendant, would also be appropriate.

[52] A further scenario is where the summons containing the incorrect citation was not served on the correct defendant, but on the incorrectly cited defendant, who then enters an appearance to defend. Attempting to amend the summons through rule 28 in these circumstances seems to be a completely abortive process. A notice of intended amendment cannot be served on the correct defendant on whom the summons had not been served previously. There is no action pending against such a person. Neither can the notice of amendment be served on the incorrect

party on whom the summons was served or its legal representatives. Such a process will lead to an entire failure of fairness and justice, with the most basic of requirements for justice, being proper notice, being absent.

[53] Consequently, I hold that rule 28 may only be used to effect a substitution when no prejudice or injustice will result from such procedure. This will generally[20] only be the case where:

[53.1] through some form of agency, the party to be introduced is already represented in the action and service of the process on the agent is deemed to be service on the party to be introduced; and

[53.2] the correct defendant, despite the mistake in the citation, entered an appearance to defendant or intervened in the action.

[54] In *MEC for Safety and Security, Eastern Cape v Mtokwana*[21] the Supreme Court of Appeal held that the substitution of a defendant by way of an amendment of the summons, which was never served on the correct defendant, was a wholly inappropriate procedure. The process adopted by the plaintiff in that matter (which is identical to the process employed by the plaintiff *in casu)* was described by the court as a bizarre course of action. The plaintiff served the notice of intention to amend on the attorneys acting for the existing defendant, and when they did not object, the plaintiff effected the amendment which had the

[20] There may be other situations as well.
[21] *MEC for Safety and Security, Eastern Cape v Mtokwana* 2010 (4) SA 628 (SCA)

effect of substituting the defendant. Under the circumstances the Supreme Court of Appeal regarded this amendment as a nullity.

[55] The court held that in the circumstances of the case the plaintiff ought rightly to have withdrawn the action, issued a new summons and applied the proper procedures prescribed by the Rules.[22]

[56] The court also held that if it was intended to effect a joinder of the new defendant (which was not the case), the proper course of action would have been to bring a properly substantiated application for a joinder. The court remarked as follows[23]:

> "*The respondent ostensibly accepted that he had wrongly sued the MEC and intended an action against the Minister. Service on the Minister of any process to that effect was obligatory. That did not occur. If what was intended was a joinder of the Minister - although all the indications are to the contrary - there ought to have been a proper and substantiated application in terms of the rules of court served on the Minister. Had there been a proper application for joinder the Minister might very well have provided numerous grounds for resisting such an application.*"

[57] In *Tecmed (Pty) Ltd and Others v Nissho Iwai Corporation and Another*[24] it was also held that the court has the inherent power to grant a substitution of parties, and that such power is not derived from the

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[22] Par 14
[23] Par 18
[24] *Tecmed (Pty) Ltd and Others v Nissho Iwai Corporation and Another* 2011 (1) SA 35 (SCA) par 12

rules of court. The court also held[25] that the settled approach to matters of this kind follows the considerations in applications for amendments of pleadings. Broadly stated, it means that, in the absence of any prejudice to the other side, these applications are usually granted (see, for example, Devonia Shipping Ltd v MV Luis (Yeoman Shipping Co Ltd Intervening) (supra) at 369F - I; Rosner v Lydia Swanepoel Trust 1998 (2) SA 123 (W) at 127D - H). As is pointed out in Devonia Shipping at 369H, the risk of prejudice will usually be less in the case where the correct party has been incorrectly named and the amendment is sought to correct the misnomer, than in the case where it is sought to substitute a different party. But the criterion remains the same: will the substitution cause prejudice to the other side, which cannot be remedied by an order for costs or some other suitable order, such as a postponement?

[58] Therefore, subject to the exceptions referred to above, I hold that the appropriate process to substitute a defendant, which will prevent an incurable injustice, is for the plaintiff to bring an application for joinder or substitution on proper notice to the proposed new party. In my view, in these applications reasons should be given why it would be more appropriate for the new party to be introduced, instead of the action being withdrawn.

[59] Once the new defendant is properly joined or substituted, and becomes a party to the action, it would then be open to the plaintiff to appropriately amend the summons either based on the order granted by

[25] Par 14

the court, or in terms of rule 28. Indeed, it is customary in joinder applications for the court to grant leave to all parties to the action to appropriately amend their pleadings after the joinder.[26] The plaintiff can then also withdraw the action against the original defendant, if appropriate.

THE MISNOMER VERSUS SUBSTITUTION

[60] In matters like the present, one of the issues often canvassed is whether the amendment sought involves correction of a mere misnomer, or whether it constitutes a substitution of a party with another party.

[61] The concept of "misnomer" in the context of the amendment of the citation of parties are not used broadly (in the sense of a wrong name), but in a narrower sense, namely, to denote the misdescription of the correct party who is already before court.[27] Hence the frequent use of the term "mere misnomer". The narrower meaning inherently implies that the effect of the amendment is not the substitution of one party for another, but merely a correction of an inaccurate description.

[62] Litigants often seek to elevate this distinction to a rule. The approach by both parties in this matter to a degree reflects this phenomenon. The plaintiff urged the court to find that the error in this matter was a mere

[26] See for instance the order in *AA v BA* 2019 JDR 1245 (GJ)
[27] *Four Tower Investments (Pty) Ltd v André's Motors* 2005 (3) SA 39 (N) at 44G. This would particularly be the case if a party bearing the name cited (and to be amended does not exist.

misnomer, with the result that the amendment should be granted, as though this is conclusive. Some of the objections raised by the second defendant similarly seek a conclusive result based on the argument that the amendment seeks to substitute the defendant.

[63] There is no rule cast in stone in this regard. The applicable general question is whether the amendment will result in an injustice that cannot be cured, in which event the amendment will be refused.[28] The question whether the error is a mere misnomer, or the amendment is a substitution, plays a role in determining the possible prejudice. In *Tecmed (Pty) Ltd and Others v Nissho Iwai Corporation and Another*[29] it was pointed out that a substitution carries a larger risk of prejudice or injustice, than the correction of a mere misnomer.

[64] Matters involving the question of prescription often evolve around the misnomer / substitution distinction, where an error in citation was made. In these cases, the question is whether prescription was interrupted in terms of section 15 of the Prescription Act, by the service of legal process in which the creditor claimed the debt from the debtor. If there was an error in the citation of either the plaintiff or the defendant, the question then arises as to whether the correct creditor issued and

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[28] The principle is usually formulated positively, i.e., that the amendment will be granted, unless it will cause injustice that cannot be cured by an appropriate cost order or postponement. *Devonia Shipping Ltd v MV Luis (Yeoman Shipping Co Ltd Intervening)* 1994 (2) SA 363 (C) at 369F-I; *Rosner v Lydia Swanepoel Trust* 1998 (2) SA 123 (W); *Tecmed (Pty) Ltd and Others v Nissho Iwai Corporation and Another* 2011 (1) SA 35 (SCA) par 14.

[29] *Tecmed (Pty) Ltd and Others v Nissho Iwai Corporation and Another* 2011 (1) SA 35 (SCA) par 12

served summons on the correct debtor, claiming the debt in question. This process requires a definitive judgment on this question.[30]

[65] However, in an application for an amendment, no such definitive decision is required. In *Blaauwberg Meat Wholesalers CC v Anglo Dutch Meats (Exports) Ltd*[31] the Supreme Court of Appeal pointed out that there is a difference between the granting of amendments, which is regulated by a wide and generous discretion to grant amendments with the view on the full ventilation of the issues between the parties (applying the principles that have been developed), and the question whether prescription was interrupted in terms of section 15 of the Prescription Act by service on the debtor of process in which the creditor claims payment of the debt, which requires an objective approach, involving no discretion. The court held that this is not a standard which allows for reservations of mind or reliance on intentions which are not reasonably ascertainable from the process itself. Nor does it, generally, allow a supplementation of an alleged compliance with s 15(1), the subjective knowledge of either party not derived from the process.[32]

[66] The law reports abound with cases involving fine distinctions between misnomers and substitutions. With respect, the distinctions that were drawn were often rather artificial and incorrect, which is evidenced by

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[30] See in general *Imperial Bank Ltd v Barnard and Others NNO* 2013 (5) SA 612 (SCA)
[31] *Blaauwberg Meat Wholesalers CC v Anglo Dutch Meats (Exports) Ltd* 2004 (3) SA 160 (SCA) par 12 and 13
[32] This substiantially the same approach as that expressed by the English Court of appeal in *Davies v Elsbey Brothers Ltd* 1960 (1) All ER 672 (CA).

the frequency of judicial criticism regarding previous findings. This is coupled with controversy regarding the consequences of the distinction between these concepts.

[67] In relation to the interruption of prescription the Supreme Court of Appeal held in *Blaauwberg Meat Wholesalers*[33] held that it was apparent that the importance attached to a misnomer or misdescription by all three of the Courts which previously considered this matter was misplaced in relation to the interruption of prescription. The question is not whether there was a misnomer or a substitution, but whether the correct creditor claimed payment. In *Solenta Aviation (Pty) Ltd v Aviation @ Work (Pty) Ltd*[34] the Supreme Court of Appeal decided the issue of interruption of prescription (in a setting where previously the reasoning would be beset with niceties regarding the distinction between misnomers and substitutions) without a single reference to this distinction. The only reference to a misnomer was that the High Court in an interlocutory application granted an amendment on the basis that the mistake was a mere misnomer. On the facts of that case, applying the test for a misnomer, the mistake was indeed a misnomer (this is this court's conclusion, not that of the Supreme Court of Appeal), but that did not preclude the court from finding that the mistake resulted in the correct creditor having failed to commence legal proceedings for purposes of section 15(1) of the Prescription Act, and that the correction of that misnomer by way of the amendment, did not cure the failure.

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[33] (*Supra)* par 15
[34] *Solenta Aviation (Pty) Ltd v Aviation @ Work (Pty) Ltd* 2014 (2) SA 106 (SCA)

[68] It is, therefore, apparent that the importance of the misnomer / substitution distinction in prescription cases has diminished, if not fallen by the wayside entirely.

[69] I am of the view that the distinction between misnomers and substitutions also has limited value in applications for amendments. The present case illustrates this reality. Due to the niceties involved in the inquiry, there may be substantial disagreement about this, but I am of the view that in applying the usual test for misnomer, the mistake *in casu* can be described as a misnomer. A reasonable reader of the summons and particulars of claim can objectively discern that MSC is intended to be the real defendant. I also accept for purposes of argument that the summons was indeed served on MSC. Yet, a finding whether the amendment of the defendant's citation is just the correction of a misnomer is entirely unhelpful to determine whether the correction of the citation will procedurally be fair or just. The simple fact is that MSC was not mentioned in the citation, did not enter an appearance to defend, and is not before the court. Any correction of a wrong defendant, regardless of how the mistake is described, will entail that a new party is brought before court. That being the case the focus must be on ensuring that the process followed is fair and just, as required by the Constitution.

[70] Consequently, any amplified emphasis on the misnomer / substitution distinction, which was a feature of the argument by the parties herein, should be avoided in assessing applications for amendment. The

distinction should be limited to the effect it has on the question of prejudice, which is the primary test.

THE FATE OF THE AMENDMENT SOUGHT *IN CASU*

[71] The argument raised by the plaintiff in this matter is that it is evident from the particulars of claim and the annexures thereto that the plaintiff intended to sue MSC. It was common cause that this was indeed the case, and I must accept that a *bona fide* mistake was made in this regard. On this basis, the plaintiff implored the court to find that the mistake was a mere misnomer. The plaintiff may well be correct that this did amount to a misnomer, despite the existence of separate companies. I will assume that there was a mere misnomer.

[72] Furthermore, the plaintiff argued that the summons was in fact originally served on MSC, at its place of business. On the probabilities, this may well be correct, and I will assume for purposes of argument that the summons was served on MSC.

[73] The difficulty facing the plaintiff in this matter is that on the scant facts before the court, it appears that the summons was also served on MEDITERRANEAN, alternatively came to MEDITERRANEAN's knowledge. Thereupon MEDITERRANEAN, being named as the defendant, entered an appearance to defend, as it was entitled to do. Importantly, MSC did not enter an appearance to defend and is not represented in this action.

[74] Consequently, the circumstances in this case do not present an opportunity to make use of rule 28 to correct the mistake in the citation fairly. Where MSC is not represented in this court, a notice of intention to amend can obviously not be served on MEDITERREANEAN's attorneys. Such a procedure is simply inappropriate and will lead to gross injustice.

[75] Whilst the preferred outcome to this problem would usually be for the plaintiff to withdraw the action, I do not understand the judgment in *MEC for Safety and Security, Eastern Cape v Mtokwana* to imply that this will always be the case. In that case, allowance was made for the possibility of an application for a joinder of the proposed new defendant.

[76] Where in this matter the plaintiff's claim against the second defendant is intertwined with the claim against the first defendant, it is not the ideal scenario that the action must be withdrawn. It is preferable that the correct parties be brought before court, and the pleadings be amended appropriately, so that the issues between the parties can be ventilated properly.

[77] An appropriate procedure, which is compatible with the constitutional requirement of a fair hearing, and justice being done, and which will prevent an incurable injustice, would be for the plaintiff to either apply, on proper notice to MSC (by way of service by sheriff of the notice of motion), for the joinder or substitution of MSC, together with prayers for

ancillary relief which may include leave to effect the appropriate amendment, or to do so in future.

[78] If an application for joinder or substitution was brought against MSC, it would have been open to MSC to raise a variety of objections. As was tentatively indicated above, the plaintiff's claims as pleaded appear to be dubious and possibly excipiable. I am not called upon to decide these issues. However, due to the procedure adopted by the plaintiff, MSC was deprived of the opportunity to consider its position and to oppose the amendment, if so advised.

[79] In *SA Riding for* the *Disabled Association v Regional Land Claims Commissioner* the Constitutional Court stated in the context of applications by a party to intervene in proceedings:

> "*If the applicant shows that it has some right which is affected by the order issued, permission to intervene must be granted. For it is a basic principle of our law that no order should be granted against a party without affording such party a predecision hearing. This is so fundamental that an order is generally taken to be binding only on parties to the litigation."*

[80] Accordingly, to grant the amendment under the circumstances of this case will be contrary to the fundamental principles of our law and will result in gross injustice. As pointed out by the Constitutional Court, the granting of an order without notice to MSC will also result in a *brutum fulmen*.

[81] I am mindful of the fact that the dismissal of this application may have some influence on the question of prescription. However, in applying the judgments of the Supreme Court of Appeal on the interruption of prescription discussed above, it is evident that the correct debtor (MSC) was not cited as the defendant, with the result that the service of the summons, even assuming that it was served on MSC, did not interrupt prescription. Even if the rule 28 procedure was applicable, the notice of intention to amend and the application for leave to amend was not served on MSC. This also did not interrupt the prescription of the alleged debt. If I grant an order in these circumstances, such an order will be a *brutum fulmen* and will be ineffectual against MSC. The granting of the order will, therefore, also not result in the interruption of prescription. It would *prima facie* appear that this would be another reason not to grant the amendment. As the issue of prescription was not raised and argued before me, I make no definitive finding on this. However, the plaintiff and its attorneys would be well advised to take this issue into careful consideration in deciding on future steps.

CONCLUSION AND ORDER

[82] In the premises, I hold that the amendment sought in this application cannot be granted.

[83] There is no reason why costs should not follow the result.

[84] Consequently, the following order is made:

"The plaintiff's application for leave to amend dated 7 June 2022 is dismissed with costs."

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DAWID MARAIS
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG
9 June 2023

This judgment was handed down electronically by circulation to the parties' legal representatives by email and by being uploaded to CaseLines. The date of this judgment is deemed to be 9 June 2023.

Appearances:

Appearance for Plaintiff:	ADV E PROPHY
Instructed by:	TWALA ATTORNEYS
Appearance for Defendant:	ADV R BEKKER
Instructed by:	COX YEATS ATTORNEYS
Date of hearing:	9 May 2023
Date of Judgment:	9 June 2023