THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not reportable
Case No: 144/2015

In the matter between:

FOXLAKE INVESTMENTS (PTY) LTD t/a FOXWAY DEVELOPMENTS (PTY) LTD **APPELLANT**

and

ULTIMATE RAFT FOUNDATION DESIGN SOLUTIONS CC t/a ULTIMATE RAFT DESIGN **FIRST RESPONDENT**

JT PIDGEON **SECOND RESPONDENT**

Neutral Citation: *Foxlake Investments v Ultimate Raft Foundation Design* (144/15) [2016] ZASCA 54 (01 April 2016)

Coram: Maya AP, Seriti, Pillay and Willis JJA and Victor AJA

Heard: 17 March 2016

Delivered: 01 April 2016

Summary: Civil Procedure and Practice – an order amending the incorrect description of a defendant in a summons does not amount to a substitution of the defendant where the summons was served at the offices and on the director shared by the incorrectly cited party and the true defendant who was clearly recognisable from the original summons – original summons complied with the

requirements of s 15(1) of the Prescription Act 68 of 1969 and service thereof interrupted running of prescription.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Strydom AJ sitting as court of first instance).

The appeal is dismissed with costs.

JUDGMENT

Seriti JA (Maya AP, Pillay and Willis JJA and Victor AJA concurring)

[1] The respondents (plaintiffs in the court a quo) instituted an action against the appellant (defendant in the court a quo) in the Gauteng Division, Pretoria, claiming, inter alia, a certain amount of money based on an alleged breach of contract alternatively unlawful competition and unauthorised use of the respondents' confidential proprietary information. **After a number of procedural skirmishes challenging the respondents' pleadings set out hereunder,** the respondents filed a notice to amend the citation of the appellant and the appellant opposed the proposed amendment. The application came before Strydom AJ and he granted the order sought by the respondents. It is to that order that the appeal to this Court is directed with leave of the court a quo.

[2] The main issues in this appeal are whether (a) the amendment to the citation of the appellant amounted to a substitution of a defendant or the correction of a misnomer and (b) the service of the original summons served to interrupt prescription. The respondents however took issue with the appealability of the order of the court a quo in light of *Zweni v Minister of Law and Order* [1993] 1 All SA 365 A at 365 (A) at 369-370…. Because of the view I take of the merits of this appeal, I will assume for purposes of this judgment, without making any decision, that the order is appealable.

[3] The factual background of the appeal is briefly as follows. Foxway Developments (Pty) Ltd (Foxway) and Foxlake Investments (Pty) Ltd (Foxlake) share the same registered address, principal place of business, contact details, receptionist and managing director, namely Mr R Henry. The respondents instituted the action against the appellant on 13 July 2012. In the particulars of claim the respondents cited the appellant as follows:

'4. Foxlake Investments (Pty) Ltd t/a Foxway Developments (Pty) Ltd, a company duly registered and incorporated in terms of the company laws of the Republic of South Africa under registration number 1970/012838/07 with its principal place of business. . . .'

The particulars of claim further alleges that Foxlake Investments (Pty) Ltd t/a Foxway Developments (Pty) Ltd entered into an agreement with the respondents in terms of which the appellant appointed the first respondent as a consulting engineer on the Boitekong project.

[4] The copy of the agreement between the parties was attached to the particulars of claim. The agreement indicates that the first respondent entered into an agreement with Foxway. The street address, fax number and name of the managing director of Foxway are indicated on the agreement.

[5] On 31 August 2012, the appellant raised an exception to the particulars of claim. The notice of exception the relevant part of which reads as follows:

'2. Ex facie the contents of the agreement, attached to the plaintiff's particulars of claim . . . the first defendant is not a party to the agreement as alleged.

3. Accordingly, no cause of action lies against the first defendant in that:

3.1 the contracting parties are reflected as the first plaintiff and Foxway Developments (Pty) Ltd;

3.2 Foxlake Investments (Pty) Ltd with registration number 1970/012838/07 is a separate legal entity that does not trade as Foxway Developments (Pty) Ltd.

3.3 Foxway Developments (Pty) Ltd with registration number 1968/006089/07 is a separate legal entity and is not a trading Division of Foxlake Investments (Pty) Ltd.'

[6] Upon receipt of the notice of exception the respondents elected to amend the citation of the appellant as reflected in paragraph 4 of the particulars of claim by substituting the word 'trading as' with the word 'alternatively' and by deleting the words 'under registration number 1970/012838/07.' Once this was effected paragraph 4 of the particulars of claim would have read as follows:

'The first defendant is Foxlake Investments (Pty) Ltd alternatively Foxway Developments (Pty) Ltd a company duly registered and incorporated in terms of the company laws of the Republic of South Africa with its principal place of business. . . .'

[7] After the amended pages were served on the appellants, they filed another notice of exception which reads in relevant part as follows:

'7. The plaintiffs alleged in their particulars of claim that the first defendant ie, Foxlake Investments (Pty) Ltd alternatively Foxway Developments (Pty) Ltd entered into an agreement with the first plaintiff in terms of which the first defendant has appointed the first plaintiff as consulting engineer on their Boitekong Project. . . .

8. Ex facie the contents of the agreement attached to the plaintiffs' particulars of claim. . . Foxlake Investments (Pty) Ltd is not a party to the agreement.'

[8] On 20 August 2013 the respondents filed a notice of amendment seeking to amend paragraph 4 of their particulars of claim which, at that stage, cited the first defendant as Foxlake alternatively Foxway. The amendments sought by the respondents were directed at the deletion of the words 'Foxlake Investments (Pty) Ltd alternatively' from their particulars of claim thereby citing Foxway as the first defendant. The appellants did not oppose the proposed amendment.

[9] In argument before us the appellant's counsel submitted that the amendment which the respondents sought in the court below was directed at the deletion of the words 'Foxlake Investments (Pty) Ltd alternatively' from the summons and the particulars of claim, that it sought to introduce Foxway – a separate legal entity – as the first defendant and that the summons were never served on Foxway. He further submitted that the proposed amendment sought to introduce Foxway as a party to the action in circumstances where the alleged claim against Foxway had, in terms of s 15 of the Prescription Act 68 of 1969 (the Act) prescribed.

[10] On the other hand, the respondents' counsel in this court submitted that Foxway appeared on the initial summons and particulars of claim, and that the amendment only sought the deletion of Foxlake so as to leave Foxway as the sole first defendant. He further argued that the proposed amendment did not seek to introduce a new legal entity and that the amendment was in the nature of correcting a misnomer rather than a substitution.

[11] In *Blaauwberg Meat Wholesalers CC v Anglo Dutch Meats (Exports) Ltd* [2003] ZASCA 144; 2004 (3) SA 160 (SCA) para 12. Heher JA said:

'Amendments are regulated by a wide and generous discretion which leans towards the proper ventilation of disputes and are granted according to a body of rules developed in that context.'

In *Affordable Medicines Trust & others v Minister of Health & another* [2005] ZACC 3; 2006 (3) SA 247 (CC) para 9, Ngcobo J said:

'The principles governing the granting or a refusal of an amendment have been set out in a number of cases. There is a useful collection of these cases and the governing principles in *Commercial Union Assurance Co Ltd v Waymark NO* [1995 (2) SA 73 (Tk) at 76D-I]. The practical rule that emerges from these cases is that amendments will always be allowed unless the amendment is *mala fide* (made in bad faith) or unless the amendment will cause an injustice to the other side which cannot be cured by an appropriate order for cost, or "unless the parties cannot be put back for the purposes of justice in the same position as they were when the pleading which it is sought to amend was filed."' (Footnotes omitted.)

[12] The appellants have not alleged that the amendment sought, is made in bad faith although they allege that they will suffer prejudice if the amendment is granted because there was no compliance with the provisions of s 15(1) of the Act as payment of the debt was not claimed from the debtor Foxway. Section 15(1) of the Act provides that for the interruption of prescription there must be a process, the process must be served on the debtor and the creditor must claim payment of the debt.

[13] In *Blaauwberg* para 18, while dealing with s 15(1) of the Act, Heher JA said:

'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.'

[14] As stated earlier, Foxway and Foxlake share the same registered address, receptionist and managing director. The copy of the agreement on which the claim is based was attached to the original summons. In my view when the summons was served on the registered address of both Foxway and Foxlake, Foxway recognised its connection with the claim notwithstanding the error in its description. The amendment sought by the respondents in the court a quo did not seek to introduce a new legal entity as the first defendant. It merely sought to correct the incorrect description of the defendant and encourage the proper ventilation of the real disputes between the creditor (the respondents) and the debtor (appellant). The question of prejudice to the appellants does not arise. The summons was served on the true debtor in which summons the creditor was claiming payment of the debt from the debtor. It is clear that the provisions of s 15(1) mentioned above were complied with.

[15] In the result:
The appeal is dismissed with costs.

W L Seriti
Judge of Appeal

APPEARANCES:

For Appellant:	HJ Smith
	Instructed by: Cliffe Dekker Hofmeyr Inc., Johannesburg Webbers Attorneys, Bloemfontein
For Respondent:	Y Alli
	Instructed by: DM Kisch Inc., Pretoria Phatshoane Henney Inc., Bloemfontein