THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not reportable
Case No: 680/2020

In the matter between:

MACSTEEL TUBE AND PIPE, A DIVISION OF
MACSTEEL SERVICE CENTRES SA (PTY) LTD **APPELLANT**

and

VOWLES PROPERTIES (PTY) LTD **RESPONDENT**

Neutral Citation: *Macsteel Tube and Pipe, a division of Macsteel Service Centres SA (Pty) Ltd v Vowles Properties (Pty) Ltd* (680/2020) [2021] ZASCA 178 (17 December 2021)

Coram: MATHOPO, MOCUMIE and MOLEMELA JJA, and KGOELE, and MOLEFE AJJA

Heard: 4 November 2021

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down is deemed to be 10h00 on 17 December 2021

Summary: Civil Procedure and Practice – an order amending the quantification of the claim in a summons did not amount to a new cause of action

and did not constitute a final determination on the issue of the court's jurisdiction to adjudicate the action – an order amending the description of a defendant in a summons does not amount to a substitution of the defendant in circumstances where the description of the defendant was the same as in the lease agreement concluded by the parties – no prejudice was demonstrated by the appellant – application to amend was correctly granted – appeal dismissed.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Mia J and Malungana AJ sitting as a court of appeal):

The appeal is dismissed with costs.

JUDGMENT

Molemela JA (Mathopo and Mocumie JJA and Kgoele and Molefe AJJA concurring):

[1] This appeal arises from an interlocutory application pertaining to the amendment of the particulars of claim in an action that was instituted by Vowles Properties (Pty) Ltd (Vowles) against Macsteel Tube and Pipe, a Division of Macsteel Service Centres SA (Pty) Ltd (Macsteel).[1] The background facts which serve as a backdrop for the adjudication of this appeal are set out in the paragraphs that follow.

[2] On 26 July 2009, Vowles and Macsteel concluded a lease agreement in terms of which the latter leased the former's fixed property which was to be utilised for steel fabrication and storage, among others. One of the terms of the agreement was that Macsteel was required to maintain the leased premises in good order and could not sublet the leased premises without Vowles' consent. On 11 December 2015, Vowles instituted action in the Kempton Park Regional Court (the regional court) against

[1] This is how Macsteel was cited in the face of the original summons. In its proposed amendment, Vowles sought the substitution of that description with the following citation: 'Macsteel Service Centres SA (Pty) Ltd t/a Macsteel Tube and Pipe, a private company duly registered and incorporated in terms of the Company Laws of the Republic of South Africa, conducting business at 15 Esson Road, Lillianton, Boksburg'.

Macsteel. It is common cause that the lease terminated on 31 December 2012. In its particulars of claim, Vowles claimed an amount of R1 567 096.03 as damages for breach of contract on the basis that Macsteel had breached the terms of the agreement by failing to return the leased premises in the same condition as they were when it first took occupation thereof. Macsteel is the appellant in this appeal, and Vowles the respondent. A second party, Reclamation Holdings (Pty) Ltd, which was the appellant's tenant in terms of a subletting arrangement, was cited as a co-defendant in the particulars of claim. The subletting arrangement need not detain this appeal, because the appellant's tenant is not a party before us.

[3] Macsteel excepted to the particulars of claim. On 15 July 2016, the regional court, by agreement between the parties, upheld the exception raised by Macsteel. In terms of that order (the July 2016 order), the original particulars of claim were set aside and Vowles was ordered to file amended particulars of claim within 20 days of the July 2016 order. The first time that Vowles attempted to amend the particulars of claim was when on 9 September 2016, more than 20 days after the issuance of the July 2016 order, it delivered a notice of amendment in terms of rule 55A of the Magistrates' Court Rules (the first rule 55A(1) notice) pursuant to being served with a notice of bar. Macsteel objected to the amendment on the basis that the particulars of claim no longer existed, as they had been set aside in terms of the July 2016 order. It sought an order dismissing Vowles' action, alternatively setting aside Vowles' notice of amendment.

[4] On 24 January 2017, the regional court granted an order setting aside the notice of amendment filed by Vowles as an irregular step. On 20 February 2017, Vowles delivered its second notice of amendment in terms of rule 55A(1) (the second rule 55A(1) notice). Macsteel again objected, as result of which Vowles withdrew that notice. On 27 October 2017, Vowles filed another notice of amendment, this time stating that the application was within the contemplation of rule 55A(4) (the October 2017 amendment application). The notice stipulated that Vowles intended to make its application on 2 February 2018 at 09h00. However, on 30 January 2018, Vowles' attorneys filed a notice of withdrawal as attorney of record. Vowles did not attend the proceedings on 30 January 2018, as a result of which the regional court dismissed that application with costs.

[5] On 19 June 2018, Vowles, having appointed new attorneys of record, delivered a Notice of Motion (the 2018 amendment application) indicating its intention to, in terms of s 111(1) of the Magistrates' Court Act 32 of 1944 (Magistrates' Court Act), alternatively in terms of rule 55A(10), amend the summons by replacing it with a copy appended to the Notice of Motion as Annexure A. Vowles sought a number of orders in the alternative, including an order declaring the proposed amendment as being an amendment of the particulars of claim in compliance with the July 2016 order. Macsteel opposed the application and raised a number of objections, including its previous objections.

[6] Furthermore, Macsteel contended that Vowles had not brought its application in terms of rule 55A(1), which was the ordinary manner in which such applications are brought and had instead elected to bring this application under the rule 55A(10). Although Macsteel accepted that it was within the discretion of the court to grant applications under this sub-rule, it contended that because Vowles had not explained in its founding affidavit why it elected to follow this route, and not the usual procedure for amendments, as set out in rule 55A(1), there was no basis for the regional court to conclude that it should exercise its discretion in favour of Vowles and grant the June 2018 amendment.

[7] On 24 October 2018, the regional court granted Vowles leave to amend the particulars of claim and ordered Macsteel to pay the costs of the application. Macsteel was aggrieved by that order and noted an appeal on the basis that the regional court had made findings which were final in effect, which would prejudice Macsteel's conduct in defending Vowles' claim. On 21 November 2018, Macsteel noted an appeal against the whole of the judgment and order of the regional court except the costs order. Before the Gauteng Division of the High Court, Johannesburg (the high court), sitting as a full court, Macsteel submitted that the regional court had erred in allowing the amendment of the particulars of claim. According to Macsteel, Vowles' application to amend its particulars of claim should have been dismissed. The high court rejected that contention and dismissed the appeal with costs on 20 April 2020. Aggrieved by that order, Macsteel approached

this Court seeking special leave to appeal against the order of the high court. Special leave was granted by this Court on 28 July 2020.

[8] The main issues raised for adjudication in this appeal are whether the regional court made a definitive order that cannot be altered in relation to jurisdiction and, in particular, whether the amendment sought had the effect of introducing a new cause of action or a new party in relation to a claim that had prescribed. An ancillary issue raised for determination related to whether or not the order granted by the regional court was appealable.

[9] Section 111 of the Magistrates' Court Act is relevant to this appeal. It provides that a court may at any time before judgment, amend any summons or pleading, if the granting of the amendment will not prejudice any party in the conduct of that party's action or defence. There is a plethora of case-law on the subject and it is now well-established that a court will always allow an amendment unless the amendment is *mala fide* or if the amendment would cause prejudice to the other side, which prejudice cannot be cured by a costs order. This principle was formulated as follows in the well-known case of *Moolman v Estate Moolman and Another*[2] and was confirmed in numerous judgments of this Court:

'. . . [T]he practical rule adopted seems to be that amendments will always be allowed unless the application to amend is *mala fide* or unless such amendment would cause an injustice to the other side which cannot be compensated by costs. . . .'

[10] Against the backdrop of the legal position set out in the preceding paragraph, I turn now to deal with the issues raised in this appeal. It is opportune to start with the ancillary issue of the appealability of the order made by the regional court. It was contended on behalf of Vowles that the order granted by the regional court did not have the effect of a final judgment and was consequently not appealable.[3] We were accordingly urged to strike the appeal from the roll with costs.

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[2] *Moolman v Estate Moolman and Another* 1927 CPD 27 at 29.

[3] Relying on the provisions of s 83 of the Magistrate's Court Act 32 of 1944, it was contended on behalf of Vowles that the granting of the amendment is not a judgment within the contemplation of s 48 of the Magistrates Court Act. The right of appeal, so it was contended, is limited to the provisions of s 83*(b)* which stipulates that a party has the right to appeal against any rule or order 'having the effect of a final judgment'.

[11] It is trite that an appeal lies against an order and not against the reasoning. In *Zweni v Minister of Law*,[4] *and Order* this Court held:

'A "judgment or order" is a decision which, as a general principle, has three attributes, first, the decision must be final in effect and not susceptible of alteration by the court of first instance; second, it must be definitive of the rights of the parties; and, third, it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings *(Van Streepen & Germs (Pty) Ltd* case *supra* at 586I-587B; *Marsay v Dilley* 1992 (3) SA 944 (A) 962C-F). The second is the same as the oft-stated requirement that a decision, in order to qualify as a judgment or order, must grant definite and distinct relief *(Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue & Another* 1992 (4) SA 202 (A) at 214D-G).'

[12] It is true that the refusal of an amendment may have a final and definitive effect because a party may be precluded from leading evidence at the trial in respect of the aspects which were to be introduced by the amendment of the pleadings. However, the granting of an amendment does not, without more, have that effect. Ordinarily, an order granting leave to amend is an interlocutory order which is not final and definitive of the rights of the parties.

[13] A perusal of the order granted by the regional court does not suggest that the order it granted had a final effect. However, given Macsteel's contention that some of the findings made by the regional court were definitive of the parties' rights and were final in effect, it may be necessary to consider the reasoning that informed its decision. In doing so, it must be borne in mind that some of the remarks were made in the course of that court addressing itself to the controversy about whether the grounds of objections raised by Macsteel against the proposed amendment manifested prejudice that was likely to hinder Macsteel in its defence of the claim. I consider next the four grounds of objections raised by Macsteel as considered by the regional court.

[14] The first ground of objection was directed at the jurisdiction of the regional court to adjudicate the claim beyond its monetary threshold. Section 45(1) of the

[4] *Zweni v Minister of Law and Order;* 1993 (1) SA 523 (A); [1993] 1 All SA 365 (A) para 8.

Magistrates Court Act[5] permits the parties to a contract to consent in writing to the adjudication of their contractual dispute in either the court for the district or the court for the regional division in respect of an action which would ordinarily fall beyond the jurisdiction of those courts. The regional court recorded that Vowles had referred it to clause 20 of the lease agreement, which stipulated as follows:

'The both parties hereby consents to the jurisdiction of the Magistrate's Court (for the district having physical jurisdiction over the person of the LANDLORD) in respect of all proceedings arising out of this AGREEMENT OF LEASE, notwithstanding the amount claimed or the nature of the claim. In no way derogating there from the LANDLORD shall be entitled to institute any action arising out of this AGREEMENT OF LEASE in any other court of competent jurisdiction'.

[15] The regional court then stated as follows on this aspect:

'The respondent has argued that in terms of the first two lines in this clause, that this Court is not the district court and that the district having physical jurisdiction over with the person of the landlord, who is in fact the applicant, is in fact Benoni Court.

Of course the applicant has disagreed with this contention and I shall say no more, except to say the following: The district of Benoni, did at the time of institution of this summons, fall under the Regional Court of Kempton Park.

Additionally, the clause is wide enough to include any competent court and the applicant is then free to even persist in high court if he so wishes. There is no merit in this first ground of objection raised by the respondent.'

In my view, the regional court merely recognised the existence of a clause in the parties' agreement purportedly clothing a court in the district having physical jurisdiction over Vowles, with the jurisdiction to adjudicate the action, but did not finally determine the issue of jurisdiction. The dismissal of this ground of objection appears to have been on the basis that the issue of jurisdiction could not, given clause 20 of the lease agreement, serve as a bar to granting the amendment. Thus, nothing precluded Macsteel from subsequently raising the issue of jurisdiction as a point *in limine*. It follows that this ground of appeal has no merit.

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[5] Section 45(1) provides: 'Subject to the provisions of section 46, the parties may consent in writing to the jurisdiction of either the court for the district or the court for the regional division to determine any action or proceedings otherwise beyond its jurisdiction in terms of section 29(1).' The matters excluded by s 46 include matters pertaining to the validity of a will, status of a person in respect of mental capacity, specific performance without the alternative of damages, delivery of property exceeding a certain value, and a decree of perpetual silence.

[16] The second ground of objection was that the augmentation of the amount of the claim was tantamount to introducing a new cause of action. There is no merit to this contention. A plaintiff is not precluded from augmenting its claim for damages if the new claim merely represents a fresh quantification of the original claim.[6] It follows that this ground of appeal also has no merit.

[17] In its third ground of objection, Macsteel asserted that the amendment of the citation of Macsteel introduced a new legal entity as a defendant in circumstances where the claim had prescribed. Macsteel took issue with the fact that the amended particulars of claim cited the defendant as 'Macsteel Tube and Pipe Ltd, a division of Macsteel Service Centres SA (Pty) Ltd. Macsteel submitted that insofar as Vowles had included the phrase 'a division of' in Macsteel's citation, it had actually cited a non-existent party. Macsteel further argued that Vowles was attempting to introduce a new defendant, namely 'Macsteel Services Centres SA (Pty) Ltd trading as a division thereof in the name of Macsteel Tube and Pipe' as a new defendant in the place of a non-existent one. Macsteel contended that the regional court's observation that the citation of the defendant matched the description of Macsteel in the lease agreement, that the citation referred to the trading name of a defendant who was easily identifiable was definitive of the parties' rights and was also final in effect.

[18] The regional court's finding that the correction of the cited defendant is not tantamount to introducing a new party to the proceedings finds support in *Foxlake Investments (Pty) Ltd t/a Foxway Developments v Ultimate Raft Foundation Design Solutions CC t/a Ultimate Raft Design and Another (Foxlake)*, where this Court stated as follows:[7]

'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

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[6] See Jones & Buckle *The Civil Practice of the Magistrates' Courts in South Africa – Volume 1: The Act* 10 ed (2012) p691.

[7] *Foxlake Investments (Pty) Ltd t/a Foxway Developments v Ultimate Raft Foundation Design Solutions CC t/a Ultimate Raft Design and Another (Foxlake)* [2016] ZASCA 54 para 14.

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.'

[19] The facts in the *Foxlake* judgment bear many similarities with the present matter. The regional court's observation that the citation in the original particulars of claim matches the description in the lease agreement is borne out by the lease agreement. Macsteel's address was exactly the same in both the original summons and the proposed amendment. The regional court's finding that the defendant is easily identifiable cannot be faulted. By parity of reasoning, in this matter, Macsteel's objection to the amendment of its citation was ill-conceived because the amendment of the citation was merely intended to align Macsteel's description in the summons to the description in the lease agreement. The question of prejudice therefore did not arise.

[20] Given the following remarks of this Court in *Blaauwberg*,[8] there can be no doubt about the fallacy of Macsteel's contentions that the defendant cited in the original summons was a non-existent party and that the defendant cited in the proposed amendment introduced a new legal entity:

'While the entitlement of the debtor to know it is the object of the [court] 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. . . 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 citation.'

It is clear from this passage, and the passage in *Foxlake* quoted in the preceding paragraph, that even if it were to be accepted in Macsteel's favour that the regional court's finding (that the amendment did not introduce a new defendant) was indeed final in effect, these judgments deal a fatal blow to any prospects of success on an appeal directed at this leg of Macsteel's objection. It is plain that Macsteel

[8] *Blaauwberg Meat Wholesalers CC v Anglo Dutch Meats (Exports) Ltd* [2003] ZASCA 144; 2004 (3) SA 160 SA para 18.

recognised its connection with the claim notwithstanding that it considered the citation to be flawed. It follows that this ground of appeal also has no merit.

[21] The fourth ground of objection was that the proposed amendment violated the July 2016 order, as the original particulars of claim had been set aside. Macsteel contended that in terms of the July 2016 order, Vowles was obliged to re-issue fresh particulars of claim as opposed to amending them. This contention has no merit. It must be borne in mind that although Macsteel's exception was upheld, the regional court specifically ordered that *amended* particulars of claim be filed (within 20 days). The fact that the particulars of claim were set aside and were to be substituted with amended particulars of claim did not mean there was no longer a pending action between Macsteel and Vowles. Significantly, Vowles asked the regional court to condone the late filing of its application to amend the particulars of claim; the regional court, within its discretion, condoned the delay.

[22] Furthermore, Macsteel's contention that summons was to be re-issued is negated by the fact that in its notice of bar, it invited Vowles to file its amended particulars of claim within five days. Logically, it would not have asked for the filing of amended particulars of claim if its understanding of the order was that Vowles was obliged to re-issue particulars of claim. Further and in any event, to the extent that Macsteel averred that a prescribed cause of action was introduced by the substitution of the particulars of claim, nothing precluded Macsteel from raising a special plea of prescription when filing its plea. It follows that the contention that the regional court made a final determination in relation to prescription has no merit.

[23] As stated before, prejudice is a key consideration in the determination of an application for amendment of pleadings. Macsteel failed to present facts showing the prejudice it stood to suffer on account of the proposed amendment. No prejudice could be established from the objections raised by Macsteel. Since no prejudice was shown, nothing stood in the way of the regional court granting the amendment. It remains now to consider the issue of the discretion exercised by the regional court in deciding whether or not to grant the amendment.

[24] It is trite that applications for amendment of pleadings are regulated by a wide and generous discretion which leans towards the proper ventilation of disputes.[9] Furthermore, 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 of costs, 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".'[10] The regional court's exercise of its discretion is evident from the following passage in its judgment:

'The granting [or] refusing of an amendment is a matter of the Courts discretion and of course it must be applied judiciously. The tendency in courts has generally been to allow an amendment if it can be done with no prejudice to the other side and it is true that the Courts approach applications in terms of rule 55(a), a little bit more charitably.'

[25] It is unnecessary for purposes of this appeal to determine whether the discretion exercised by the regional court in granting the amendment brought in terms of rule 55(10) was a discretion in the true sense or the loose sense. It suffices merely to state that regardless of the nature of the discretion, the regional court's decision ought not to be interfered with lightly on appeal.[11]

[26] Insofar as Macsteel contended that it would be prejudiced by the granting of the amendment because of Vowles' inordinate delay in bringing its application for amendment of its particulars of claim, it bears noting that a litigant's delay in bringing forward its amendment is not a ground for refusing the amendment.[12] This is all the more so in circumstances where the injustice to the other side can be cured by an appropriate order of costs.[13]

[27] In this matter, the regional court considered the inordinate delay in bringing the application and bemoaned the '. . . inordinate stops and starts to get the matter off the ground. . . '. Having concluded that there was no demonstrable prejudice that

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[9] Fn 8 above para 8.
[10] *Affordable Medicines Trust and Others v Minister of Health and Another* 2005 (6) BCLR 529 (CC); 2006 (3) SA 247 (CC) para 9.
[11] *Trencon Construction Pty (Ltd) v Industrial Development Corporation of South Africa Limited and Another* [2015] ZACC 22; 2015 (10) BCLR 1199 (CC); 2015 (5) SA 245 (CC) paras 83-88.
[12] See fn 8 above para 9.
[13] See fn 10 above para 9.

could not be cured by an appropriate order of costs, it granted the amendment but ordered Vowles to pay the costs of the application on an attorney and client scale. On the strength of the authorities mentioned in the preceding paragraph, I am satisfied that there is nothing to suggest that the regional court's decision to condone the delay and grant the amendment was not preceded by a judicial exercise of that court's discretion. In my view, that decision cannot be faulted. That being the case, it follows that the high court correctly dismissed the appeal. For all the reasons mentioned in the foregoing paragraphs, the appeal has no merit and falls to be dismissed.

Order

[28] The appeal is dismissed with costs.

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M B MOLEMELA
JUDGE OF APPEAL

APPEARANCES

For appellant:	A C McKenzie
Instructed by:	Webber Wentzel, Sandton
	Symington De Kok Attorneys, Bloemfontein
For respondent:	A P Bruwer
Instructed by:	Schalk Britz Inc, Benoni
	Honey Attorneys, Bloemfontein.