IN THE HIGH COURT OF SOUTH AFRICA

[EASTERN CAPE DIVISION, EAST LONDON CIRCUIT COURT]

CASE NO.: EL536/2019

In the matter between: -

EAST LONDON INDUSTRIAL DEVELOPMENT ZONE (SOC) LTD **Plaintiff**

and

WILD COAST ABALONE (PTY) LTD **First Defendant**

ANDRE BOK **Second Defendant**

JUDGMENT

NORMAN J:

[1] Plaintiff is the East London Industrial Development Zone (Soc) Ltd, a State-owned company, that has its registered principal place of business in East London. It instituted an action against two defendants. The first defendant is the Wild Coast Abalone (Pty) Ltd (Wild Coast), a private company with limited liability that carries on business at portion 1 of Farm 259, Haga Haga. The

second defendant is Andre Bok (Bok), an adult male who resides in East London.

[2] It is common cause between the parties that at all material times hereto, plaintiff owned the property situated at Erf 60891 in Zone 1A, Ikhala Road, Sunnyridge, in East London, together with all structural improvements and additions thereto ("the property"). On 23 April 2009 it entered into a lease agreement in respect of the aforesaid property with Five-Fold Investments No.4 (Pty) Ltd. The lease agreement commenced on 1 April 2009 and terminated on 31 March 2019.

[3] Thereafter the tenant changed its name to Pure Ocean East London (Pty) Ltd ("Pure Ocean") and an addendum to the lease agreement was concluded between the parties. The tenant was subsequently placed under provisional liquidation on 4 March 2016, which order was made final on 9 May 2016. On 12 July 2016 during the liquidation process Wild Coast purchased the movable assets of *Pure Ocean* from the liquidator. Those assets were situated on the property.

[4] Plaintiff alleged that Wild Coast and Bok operated a joint venture, alternatively, a partnership for their mutual and joint benefit under the style of Wild Coast. They undertook the business of farming of fish and other marine aqua culture activities from the plaintiff's mentioned property ("the business"). In the alternative, plaintiff alleged that Bok was employed by Wild Coast and acted within the course and scope of his employment with it and in furthering Wild Coast's interests.

Pleadings

[5] Plaintiff's first claim is based on allegations that after purchasing the assets, Wild Coast and Bok took occupation of the property and conducted the business from the property with effect from 12 July 2016 until 19 March 2018. They were evicted from the property in terms of a court order issued under EL1280/2017 and ECD3280/2017 on 6 March 2018. They finally vacated the property on 19 March 2018.

[6] Plaintiff contends that West Coast and Bok were in unlawful occupation of the property during the period 12 July 2016 until 19 March 2018. As a result of such unlawful occupation plaintiff contends that it could not let the property to anyone else for reward. As a result, it contends, it suffered damages in respect of loss of market related rental for the property during the period from July 2016 in the amount of R19 980.00 per month escalating at 7% per annum on each anniversary of the said lease. That was the rental plaintiff charged and was entitled to receive from his previous tenant in respect of the leased property. It accordingly claimed damages in the amount of R432 132.93.

[7] The second claim is premised on the alleged unlawful occupation of the property by Wild Coast and Bok during the same period. Plaintiff contends that during that period it paid, to the local government authority, for utility service charges including but not limited to electricity, water and gas , rates and taxes in respect of the property which Wild Coast and Bok utilized for their benefit in conducting the business. The amount claimed for utility service

charges, rates and taxes for the period 11 October 2016 until 26 March 2018 is the sum of R352 776.41. Plaintiff claimed that it has been impoverished and Wild Coast and / or Bok have been unjustifiably enriched at its expense.

[8] Plaintiff filed the third claim based on the conduct of Wild Coast and Bok when they vacated the property as a result of the eviction order. It alleged that they or persons acting under their direction or control wrongfully and unlawfully dismantled tunnels which were improvements, alternatively, additions made to the property by the tenant in respect of which the plaintiff had become the owner. During the dismantling process and in their attempt to remove the tunnels, the tunnels allegedly got damaged. Plaintiff claims fair and reasonable costs of assembling the tunnels, remedying the damage caused to the tunnels and restoring them to the condition they were in prior to Wild Coast and Bok's unlawful conduct in the sum of R485 000.00 excluding value added tax (VAT).

[9] Both Wild Coast and Bok defended the action. Wild Coast in relevant parts pleaded:

> "***Ad Paragraph 4 thereof:***
>
> *All these allegations are denied as if specifically traversed, and the Plaintiff is put to the proof thereof. The First Defendant contends that a company, Aqua Management Systems (Pty) Ltd conducted the business of farming with from the property of the Plaintiff to which reference is made later in the particulars of claim."*

[10] Later and in paragraph 11.4 it pleaded:

> "***Ad Paragraph 12 thereof****:*
>
> *11.1 …*
>
> *11.2…*
>
> *11.3…*
>
> *11.4 The First Defendant pleads that after it purchased the assets the First Plaintiff entered into an arrangement with a company known as Aqua Management Systems (Pty) Ltd , represented by the Second Defendant. In terms of this arrangement the First Defendant allowed the aforesaid company to use the assets purchased to conduct the business of a fish*

farm from the premises on the basis that the company would operate for its own loss and/ or profit, with the understanding that the First Defendant wanted the company to preserve the assets and the business so as to enable the First Defendant to successfully resale the business and/ or the assets at a later stage." (my emphasis).

[11] Wild Coast also admitted that it knew the person by the name of Andre Bok. Plaintiff replicated to Wild Coast's plea by alleging that Wild Coast and/or its agent attempted to remove the AZROM AGRI tunnel on 19 March 2018. Plaintiff objected to the tunnels being removed from the premises as they were its property. Plaintiff further averred that it is the owner of the immovable property set out in Annexure A to West Coal's counter-claim.

[12] Bok pleaded as follows:

"12. Ad paragraph 12 thereof

12.1 This paragraph is denied and Plaintiff is put to the proof thereof.

12.2. The Second Defendant pleads further:

12.2.1 Certain assets of the First Defendant were on the property during the relevant period.

12.2.2 A company known as Aqua Management Systems (Pty) Ltd simultaneously occupied the property during the relevant period. (my emphasis)

13. Ad paragraph 13 thereof

The Second Defendant admits that the court orders were granted under the quoted case numbers on 6 March 2018. The Second Defendant furthermore denies that he was in occupation of the property or finally vacated the property on 19 March 2018. The Second Defendant pleads that certain assets of the First Defendant were on the property during the relevant period and that Aqua Management Systems (Pty) Ltd simultaneously occupied the property. The remainder of the contents of this paragraph is denied and Plaintiff is put to the proof thereof."

The impugned amendment

[13] The introduction of *Aqua Management Systems (Pty) Ltd ("Aqua") both* in the plea of Wild Coast and Bok caused the plaintiff to seek an amendment of its particulars of claim. It is common cause that plaintiff on 02 March 2022 and on 30 March 2022 delivered notices to amend its particulars of claim by replacing Bok with Aqua. On both occasions Wild Coast filed notices in terms of rule 30 (2)(b) complaining that the steps taken by plaintiff were irregular.

Plaintiff withdrew the notices on each occasion and tendered Wild Coast's costs.

[14] On 28 April 2022, plaintiff delivered again a notice of intention to amend. For the sake of completeness I shall record herein the contents of the notice to amend:

> ***"Kindly take notice that*** *the Plaintiff intends to amend the Plaintiff's Particulars of Claim as follows:*
>
> *1. By deleting paragraph 3 thereof in its entirety and replacing it with:*
>
> *"The Second Defendant is Aqua Management Systems (Pty) Ltd, an incorporated company with limited liability which carries on business at and/ or has its registered address at 43 Kennington Road, Nahoon, East London.*
>
> *2. By deleting paragraph 4 thereof in its entirety and replacing it with:*
>
> *2.1 The Second Defendant was at all times material hereto represented by its sole director Andre Bok.*
>
> *2.2 The Second Defendant and the First Defendant operated a joint venture, alternatively, a partnership for their joint and mutual benefit by undertaking the business of the farming of fish and other marine aqua culture activities from the Plaintiff's property as described in paragraph 5 hereunder under the style of Wild Coast Abalone.*
>
> ***And kindly take notice further*** *that unless written objection to the amendment is made within ten (10) days of service of this notice the plaintiff will amend its Particulars of Claim accordingly."*

[15] Again, on 05 May 2022, Wild Coast delivered a notice in terms of rule 30(2)(b) on the basis that the notice to amend constituted an irregular step.

[16] The notice reads:

> "*NOTICE IN TERMS OF UNIFORM RULE 30(2)(b)*
>
> *KINDLY TAKE NOTICE THAT the first defendant herewith afford the plaintiff an opportunity of ten (10) days of removing the following cause of complaint –*
>
> *1. The plaintiff has filed a notice of intention to amend dated 26 April 2022, to substitute the second defendant with Aqua Management Systems (Pty) Ltd which procedure is an irregular proceedings.*
>
> *KINDLY TAKE FURTHER NOTICE THAT unless the cause of complaint is removed within ten (10) days period the first defendant will apply for the relief provided for in Uniform Rule 30(1)."*

[17] Plaintiff disregarded the rule 30 notice. On 5 May 2022 plaintiff proceeded to file the amended pages. Thereafter Wild Coast brought the rule 30 application, which is the subject matter of these proceedings. The main contention in the application is that substitution of one party with another cannot take place by notice. A party wishing to substitute should do so by invoking the provisions of rule 10 and join such party to the action. Plaintiff's response to the application is that Wild Coast and Bok were cited as partners in a joint venture or partnership; the purpose of the amendment was not to change the parties or substitute a party but to correct a description of a party by citing Aqua as a partner of Wild Coast instead of Andre' Bok. The amendment is consonant with the rules of court which facilitate a procedure in terms of which partners can be held responsible for partnership debts. It contended that the rule 30 notice has no merit.

[18] In reply Wild Coast contended that plaintiff was endeavoring to slip in the company in substitution and thus bypass a special plea of prescription which would be raised if there is a joinder of another party. It contended that this is a substitution of a new party and not an amendment.

The issue for determination

[19] The issue is whether the amendment which seeks to replace Bok with Aqua is irregular?

Legal submissions

[20] Mr Kotze appeared for Wild Coast and Mr Schultz for the plaintiff. Mr Kotze submitted that: Plaintiff effectively seeks to substitute a party by way of an

amendment. Although plaintiff contends that it is correcting a misdescription of a party, ex *facie,* the notice of amendment it is in effect introducing a new party. Referring to a decision of Van Zyl J (as he then was) in ***EX-TRTC United Workers Front and Others v Premier, Eastern Cape Province***[1], he submitted that a rule of practice developed to the effect that, during the subsistence of the partnership, a plaintiff who instituted action to enforce a partnership obligation had to cite and join all the partners constituting the partnership. In this case, he argued, plaintiff seeks to change the name of a natural person by substituting it with a legal entity, and that, he argued, is not permissible. He submitted that Wild Coast contends that the claim against the party sought to be introduced has prescribed. He submitted that if the amendment is granted Wild Coast will not be able to raise prescription. He distinguished the facts of this case from the ***Cupido v Kings Lodge Hotel***[2] decision relied upon by the plaintiff.

[21] Mr Schultz, on the other hand, submitted that: The argument by Wild Coast that plaintiff cannot use the amendment procedure to substitute a party is a fundamental legal misconception. It is apparent from the plea of Wild Coast and Bok that there is a commercial relationship between the two entities. There is a partnership and on this basis the court can grant the substitution by way of an amendment. He further argued that Wild Coast introduced a new cause of complaint in its replying affidavit to the effect that Aqua Management was not given notice. This was raised in reply and that is impermissible. He relied on ***Whittaker v Roos & Another***[3] for the submission that the court has

---

1 ***EX -TRTC United Workers Front and Others v Premier, Eastern Cape Province*** 2010 (2) 114 ECB.
2 ***Cupido v Kings Lodge Hotel*** 1999 (4) SA 257 E.
3 ***Whittaker v Roos & Another*** 1911 TPD 1092 at 1102.

the greatest latitude in granting amendments in order for it to ensure that justice is done between the parties.

[22] He further relied on rule 14 of the Uniform Rules of Court for the submission that Rule 14 is intended to simplify the method of citation in respect of a number of situations. For example, situations where a business bore a name which was descriptive of it and in order to eliminate technical difficulties when citing parties involved in civil litigation. In this regard, he relied on ***Cupido v Kings Lodge Hotel***[4]***.***

[23] In reply, Mr Kotze submitted that the plaintiff failed to serve the notice of amendment on the party it sought to substitute through the amendment procedure. He submitted that even if Wild Coast is wrong on this issue, plaintiff was not entitled to proceed with an amendment when there was an objection. In this regard, Wild Coast prayed that this court should grant the application with costs.

Discussion

[24] Rule 28 of the Uniform Rules provides:

> *"AMENDMENT OF PLEADINGS AND DOCUMENTS*
>
> *(1) Any party desiring to amend a pleading or document other than a sworn statement, filed in connection with any proceedings, shall notify all other parties of his intention to amend and shall furnish particulars of the amendment.*
>
> *(2) The notice referred to in subrule (1) shall state that unless written objection to the proposed amendment is delivered within 10 days of delivery of the notice the amendment will be effected.*
>
> *(3) An objection to a proposed amendment shall clearly and concisely state the grounds upon which the objection is founded.*
>
> *(4) If an objection which complies with subrule (3) is delivered within the period referred to in subrule (2), the party wishing to amend may, within 10 days, lodge an application for leave to amend.*

---

4 ***Cupido v Kings Lodge Hotel*** 1999 (4) SA 257 E.

(5) If no objection is delivered as contemplated in subrule (4), every party who received notice of the proposed amendment shall be deemed to have consented to the amendment and the party who gave notice of the proposed amendment may, within 10 days after the expiration of the period mentioned in subrule (2), effect the amendment as contemplated in subrule (7).

(6) Unless the court otherwise directs, an amendment authorised by an order of the court may not be effected later than 10 days after such authorisation.

(7) Unless the court otherwise directs, a party who is entitled to amend shall effect the amendment by delivering each relevant page in its amended form.

(8) Any party affected by an amendment may, within 15 days after the amendment has been effected or within such other period as the court may determine, make any consequential adjustment to the documents filed by him, and may also take the steps contemplated in rules 23 and 30.

(9) A party giving notice of amendment in terms of subrule (1) shall, unless the court otherwise directs, be liable for the costs thereby occasioned to any other party.

(10) The court may, notwithstanding anything to the contrary in this rule, at any stage before judgment grant leave to amend any pleading or document on such other terms as to costs or other matters as it deems fit."

[25] As aforementioned rule 28(8) makes reference to rules 23 and 30. Rule 23 deals with exceptions and applications to strike out and rule 30 deals with irregular proceedings. What is important about rule 30(3) is what remedies or what approaches can a court take when an irregular proceeding process is taken.

"30. Irregular proceedings

(3) If at the hearing of such application the court is of opinion that the proceeding or step is irregular or improper, it may set it aside in whole or in part, either as against all the parties or as against some of them, and grant leave to amend or make any such order as to it seems meet.

(4) Until a party has complied with any order of court made against him in terms of this rule, he shall not take any further step in the cause, save to apply for an extension of time within which to comply with such order."

[26] The rules including rule 30 are not intended to non- suit a party who has brought an irregular proceeding. That, in my view, is consistent with the constitutional imperatives, including that:

"Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."[5]

[27] Plaintiff alleged that the relationship between Bok or Aqua and Wild Coast was a partnership or a joint venture. The relationship has been categorized by Wild Coast as an arrangement. Professor JJ Henning[6] stated:

"Summary

The general rule in South African law is that a partnership has no existence in itself distinct from the partners of which it is composed. A brief analysis of South African legislation, however, reveals a significant number of instances departing from the general rule to some extent. This leads to a conclusion that, notwithstanding the general rule, whether or not a partnership can be treated as a mere aggregate of individuals or a "juristic person", "entity", "person", "private body" or the like for purposes of a particular statutory provision is a matter of careful interpretation. Thus, the basic principle or general rule in South African law is that a partnership is not a legal entity or persona separate from its members; it has no existence of its own, distinct from the partners of which it is composed, although some exceptions or quasi-exceptions are acknowledged. The rights and duties of the partnership are the rights and duties of the partners, and its property is owned by the partners jointly in undivided shares. If two or more individuals, in their capacity as partners, enter into an agreement with another person, the identity of the partners is synonymous with the identity of the individuals entering into the agreement. Evidence that they entered into the agreement as partners is merely evidence as to the relationship between the two or more individuals – a relationship established by contract."

[28] At paragraph 2.2.3 Professor Henning deals with the rules of court and had this to say:

"A partnership may sue or be sued in its own name. A partnership that was dissolved after the accrual of the cause of action, but before the issue of summons, may nevertheless be sued in its name at the date of the accrual of the cause of action. If so sued and judgement is taken against a partnership without the name of any of the partners being disclosed, execution may follow only against the property of the partnership. The assets of a partner who has not been served, who has not appeared, who has not been adjudged to be a partner, and whose name has not been disclosed as partner under the court rules cannot without further proceedings be attached in execution of a judgement against the partnership. These rules deal with procedure and not with substantive law. It does not turn a partnership or firm into a different entity or a juristic person existing separately from its members or owners."[7] (footnotes omitted).

---

[5] Section 34 of the Constitution, Act 108 of 1996

[6] Professor JJ Henning, Senior Professor in the Faculty of Law University of the Free State Journal for Juridical Science 2014: 39 (2) pages 53 to 66 in an article entitled: "Some Manifestations of the Statutory Recognition of a partnership as an entity.

[7] *Ahmed v Belmont Supermarket* 1991 3 SA 809 N, page 811 para A-B; *Standard Bank v Pearson* 1961 3 SA 721 E.

[29] Our law recognizes two broad categories of partnerships, namely universal partnerships and particular and or specific partnerships, those being those partnerships entered into for the purpose of a particular enterprise such as partnerships in particular things; partnerships limited to in a specific kind of property or undertaking, partnerships in the exercise of some profession or art and commercial and trading partnerships[8].

[30] The four essential elements proposed by *Pothier* which must be present when one alleges that a partnership is present, are: That each of the partners bring something into the partnership, whether it be money, labour or skill, that the business should be carried out for the joint benefit of both parties, that the object should be to make of profit, and that the contract between the parties should be a legitimate contract. The fourth element has been discounted by our courts for being common to all contracts as was found in the *Mncora* case referred to above[9].

[31] In South African Law a joint venture is a business arrangement in which two or more parties agree to pull their resources and expertise to achieve a specific goal or project. In ***Essence Lading CC v Infiniti Insurance Ltd Mediterranean Shipping Company (Pty) Ltd***[10] Marais AJ found that if the plaintiff cited the wrong defendant the plaintiff should in principle withdraw the action and start afresh against the correct defendant. He also found that a method of correction of errors in citation of defendants wherein conflicts with constitutional imperatives of a fair and just hearing trumps the need for

[8] LAWSA , 2nd Ed para 255, see also *Butters v Mncora* 2012 (4) SA 1 (SCA) at 6C to E.

[9] See also ***MM Vedh v GDP Vedh*** (5508/11) [2013] ZAGPPHC 530 (17 April 2013) judgment by AB Russow AJ paras 39-40.

[10] ***Essence Lading CC v Infiniti Insurance Ltd Mediterranean Shipping Company (Pty) Ltd*** (2022/4024) [2023] ZAGPJHC 676; [2023] 3 All SA 410 (GJ) (9 June 2023)

procedural pragmatism. He also found that a withdrawal of action is not the only outcome, applications for substitution or joinder of new party may be brought on proper notice to the new party coupled with appropriate amendment.

[32] The test to be applied in substitution of or joinder applications is substantially the same test which is applied to amendments. It was not contended that the substitution was not *bona fide.* The amendment would not result in prejudice or an injustice that cannot be cured by an appropriate costs order.

[33] In ***Luxavia (Pty) Ltd v Gray Security Services (Pty) Ltd***[11] *reference is made to various cases such as:*

> "[10] In ***Moolman v Estate Moolman & Another***[12] a 'practical rule' developed in a number of English cases was applied being that 'amendments will always be allowed unless the application to amend is *mala fide* or unless such amendment would cause an in-justice to the other side which cannot be compensated by costs . . .'. A fuller and more recent statement of this rule is to be found in the judgment of Rose Innes J, in *Devonia Shipping Ltd v MV Luis (Yeoman Shipping Co Ltd Intervening)*[13]:
>
> > *'The general rule is that an amendment of a notice of motion, as in the case of a summons or pleading in an action, will always be allowed unless the application to amend is mala fide or unless the amendment would cause an injustice or prejudice to the other side which cannot be compensated by an order for costs or, in other words, unless the parties cannot be put back for the purposes of justice in the same position as they were when the notice of motion which is sought to amend was filed . . . A material amendment such as the alteration or correction of the name of the applicant, or the substitution of a new applicant, should in my view usually be granted subject to the considerations mentioned of prejudice to the respondent. . . . The risk of prejudice will usually be less in the case where the correct applicant 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 applicant. The criterion in both cases, however, is prejudice which cannot be remedied by an order as to costs and there is no difference in principle between the two cases. . . .'"*

---

[11] ***Luxavia (Pty) Ltd v Gray Security Services (Pty) Ltd 2001(4) SA 211 (WLD)*** at page 217 -218, para 10,

[12] ***Moolman v Estate Moolman & Another*** 1927 CPD 27 at 29.

[13] ***Devonia Shipping Ltd v MV Luis (Yeoman Shipping Co Ltd Intervening)*** 1994 (2) SA 363 (C) at 369 F-I.

[34] I find that in this case it is appropriate to utilize rule 28 in the substitution of a wrong defendant, because Aqua, is represented in the action by Bok , its representative or agent and by Wild Coast, its co-partner . Therefore, service of the notice of amendment on Bok which clearly demonstrated that he was going to be replaced by Aqua was adequate in the light of the obligations that he, as a sole director has towards Aqua. In any event, from the pleadings it appears that the basis of the claim against him arose from the relationship that he had with Aqua as its representative. No incurable injustice would result, in my view. The facts of this case are distinguishable from those that applied in ***MEC for Safety and Security, EC v Mtokwana***[14], because unlike in *Mtokwana* where a wrong party , the MEC for Safety and Security , who was not vicariously liable for the delict was sued and an attempt was made to amend the summons by introducing the National Minister of Police who was not even served with the process. *In casu*, both defendants introduced Aqua in their pleas and alluded to the relationship they have with it.

[35] A proposed amendment must relate to the facts of each case. Plaintiff has employed the term "*replacing*" in its notice to amend. The Oxford Dictionary defines 'replace' as follows:

> "***1.*** *take the place of* ***2.*** *provide a substitute for* ***3.*** *Put back in a previous place or position."*

[36] Although plaintiff described the amendment as correcting a misdescription of a party, it is in effect a substitution of Andre Bok, Aqua's sole director with Aqua. Mr Schultz, in argument, argued the law in respect of both substitution and correcting a wrong description of a party. There is a direct link between

[14] ***MEC for Safety and Security, EC v Mtokwana*** 2010 (4) SA 428.

Aqua and Bok, on the one hand, and between Aqua and Wild Coast, on the other. That is evident from the amendment sought.

[37] In ***Fisher v Natal Rubber Compounders (Pty) Ltd***[15] **,** the Supreme Court of Appeal dealt with essential continuity which I believe is also a relevant consideration in this case although it applies to defendants. The SCA held that essential continuity requires a creditor to prosecute the same claim under the same process to final judgment. The Court set two requirements for essential continuity, namely, the substitution must not amount to a document or process whereby legal proceedings are commenced (otherwise this will cause a break in the legal process); and the claim must relate to the same debt. Similarly, as in this case, Aqua simply stepped into the shoes of Bok[16]. In *Silhoutte* the rationale was that *Silhoutte* ceased to pursue the claim and Dyer stepped in when the summons was amended. But Dyer had not acquired the claim that *Silhoutte* had been pursuing, so there was no continuity in pursuing the claim as in this case. [17] The *Silhoutte* decision disposes of the submission that it is impermissible to substitute a natural person for a legal entity. Secondly, it also disposes of the argument that Aqua will not be able to raise prescription and will thus suffer incurable prejudice. Aqua is brought into a claim where there is continuity in the claim that was instituted by the plaintiff against Aqua's director, Bok and its business partner , Wild Coast.

---

[15] ***Fisher v Natal Rubber Compounders (Pty) Ltd*** (20640/14) [2016] ZASCA 33.
[16] ***Silhoutte Investments Ltd v Virgin Hotels Group Ltd*** 2009 (4) SA 617 (SCA).
[17] *Fisher*, supra, paragraph 8.

[38] If the substitution of a party is intended, the notice of intention to amend must make it clear that such a substitution is intended[18]. As aforementioned the plaintiff made it clear that it was replacing Bok with Aqua.

[39] The issue relating to notice was raised in reply by Wild Coast and not as a ground of objection. It was argued on behalf of the plaintiff that I should ignore that ground for that reason. I believe that it would be prudent to deal with it briefly. First, the issue of giving notice to the party to be cited as a substitute is to avoid incurable prejudice. That is prejudice that cannot be remedied by a cost order. Second, it is to afford that party an opportunity to object to its substitution. In this case the sole director of Aqua was given notice of the amendment. Not only that but the business partner of Aqua, namely, Wild Coast was also given notice.

[40] The above facts distinguish this case from *Essence Lading, supra*, because Wild Coast, pleaded an arrangement between it and Aqua in paragraph 11.4 as aforementioned. That portion of the plea confirms not only the existence of Aqua and its relationship with Wild Coast but identifies Bok as the representative of Aqua. The notice to amend was not only served on Wild Coast but it was served on Bok, who is the sole director of Aqua. There is accordingly no prejudice to Aqua in this regard.

[41] According to section 66 of the Companies Act 71 of 2008, a director is defined "*as a member of the board of a company'*. The same section places the management of the business and affairs of a company under the direction of its board. In any event, Bok has not objected to the proposed amendment. I

[18] ***Luxaria (Pty) Ltd v Gray Security Services (Pty) Ltd*** 2001 (4) SA 211 (W) at 216 paras F-G.

am satisfied that because the plaintiff does not seek to amend the nature and extent of its claim no prejudice would be suffered by Aqua and Wild Coast. I am fortified in this view by the fact that there is no suggestion that the claim itself is a nullity.

[42] For all the above reasons, I find that the amendment was properly made. It follows that the rule 30 application must fail. On the issue of costs, there are no factors that have been placed before me which would call for a departure from the normal rule that costs should follow the result.

[43] I accordingly make the following Order :

The Rule 30 application is dismissed with costs.

_____

T.V NORMAN

JUDGE OF THE HIGH COURT

Matter heard on : **12 October 2023**

Judgment delivered on : **30 November 2023**

APPEARANCES:

For the APPLICANT/1ST DEFNDANT : **ADV KOTZE**

Instructed by : **Clark Laing Inc.**
58 Jarvis Road, Berea
East London
TEL: 043 721 1556
REF: FRANE VAN ROOYEN

For the 2ND DEFENDANT : **BATE CHUBB & DICKSON INC.**
Attorneys for the 2ND DEFENDANT
SUITE 3 NORVIA HOUSE
VINCENT
EAST LONDON
REF: MR KRETZMANN/kp/B301/MAT41635

For the PLAINTIFF/RESPONDENT : **ADV SCHULTZ**

Instructed by : **Couzyn Hertzog & Horak Inc.**
Attorneys for 1st DEFENDANT
321 Middel Street
Brooklyn
PRETORIA
EMAIL: Laetitias@couzyn.co.za
REF: J STERK/ls/WIL121/0004

C/O **Gravett Schoeman Inc.**

The Hub, Bonza Bay Road

Beacon Bay

EAST LONDON

TEL: 043 748 3038

REF: MR I. THEOPHILUS/FW/MAT51499