case no: 582/97

In the matter between

**ASSOCIATED PAINT & CHEMICAL INDUSTRIES (PTY) LTD t/a ALBESTRA PAINT AND LACQUERS** Appellant

and

**ADRIAAN SMIT** Respondent

**Coram:** GROSSKOPF, SCHUTZ and PLEWMAN JJA

**Heard:** 10 March 2000

**Delivered:** 28 March 2000

Amendment of claim - Prescription - Interruption -
s 15(1) of Prescription Act 68 of 1969

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**J U D G M E N T**

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**F H GROSSKOPF JA:**

[1] In April 1996 A P & C I (WYNBERG) (PTY) LTD t/a ALBESTRA PAINTS ("the plaintiff") instituted an action against the respondent ("the defendant") in the Orange Free State Provincial Division. The plaintiff issued a simple summons claiming payment of the sum of R190 462,43

> "being in respect of goods sold and delivered by plaintiff to defendant at the latter's special instance and request during May-December 1993, which amount is now due, owing and payable by defendant to plaintiff".

[2] The plaintiff applied for summary judgment but the defendant was granted leave to defend. The plaintiff thereupon filed a declaration in which the parties were cited in the heading as before. However, in paragraph 1 of the declaration the "plaintiff" was now alleged to be ASSOCIATED PAINT AND CHEMICAL INDUSTRIES (PTY) LTD t/a ALBESTRA PAINTS ("the proposed new plaintiff"), and no longer A P & C I (WYNBERG) (PTY) LTD t/a ALBESTRA

PAINTS, as described in the summons. It is common cause that the plaintiff and the proposed new plaintiff were both registered companies and therefore separate legal entities. The plaintiff however failed to apply for an amendment to substitute the proposed new plaintiff for the plaintiff in the summons.

[3] The declaration departs from the summons in another respect as well. Whereas the summons sets out that the goods were sold and delivered to the defendant the declaration alleges that the goods were sold and delivered to Danre, a partnership between the defendant and one van Rensburg. There has been no application to amend the summons in order to bring it in line with the declaration in this respect.

[4] Despite these conflicting allegations in the summons on the one hand and the declaration on the other, the defendant did not deem it necessary to apply to court to set it aside as an irregularity in terms of Rule 30(1). The defendant simply proceeded to file a plea in which he admitted

> "that the plaintiff is ASSOCIATED PAINT AND CHEMICAL INDUSTRIES (PTY) LTD"

As a result of this admission every reference to "the plaintiff" in the plea should therefore be seen as a reference to the proposed new plaintiff and not to the plaintiff as described in the summons.

[5] The plea starts off with a tactical denial of all the relevant allegations in the declaration, but then proceeds in the alternative to set out that the proposed new plaintiff and the defendant entered into an oral agreement in terms whereof the proposed new plaintiff sold and delivered paint products to a business called Danre on certain terms and conditions. It is also alleged in the plea that the defendant made certain payments to the proposed new plaintiff and that Danre became entitled to substantial credits and discounts on account of further oral agreements between the parties. The plea concludes with an admission that the defendant owes the proposed new plaintiff a certain sum of money, but with a prayer that judgment be stayed pending adjudication of the defendant's conditional counterclaim for

damages.

[6] The defendant is of course bound by his formal admissions (*Water Renovation (Pty) Ltd v Gold Fields of SA Ltd* 1994(2) SA 588(A) at 605H-I). Counsel for the plaintiff placed great reliance upon the defendant's admission relating to the proposed new plaintiff, but this admission, binding as it may be, did not bring about an automatic substitution of one plaintiff for another.

[7] It was only when the matter was ripe for hearing that it dawned upon the plaintiff that the summons and the heading of all the pleadings still reflected the company A P & C I (WYNBERG) (PTY) LTD t/a ALBESTRA PAINTS as the plaintiff. In July 1997, and in a document wrongly described as a "Notice of Amendment in terms of Rule 28(5)", the plaintiff gave the defendant notice of its intention to amend the summons, declaration and subsequent pleadings

> "by the deletion of its name wherever same appears in the citation and body of the pleadings and the substitution therefor of the following:

‘ASSOCIATED PAINTS AND CHEMICAL INDUSTRIES (PTY) LIMITED t.a. ALBESTRA PAINTS AND LACQUERS.’ ”

[8] The defendant filed a notice of objection to the proposed amendment whereupon the plaintiff applied for a further amendment by deleting the word “Wynberg” from the plaintiff’s name and by substituting the words “Albestra Paints and Lacquers” for “Albestra Paint” wherever they appear in the pleadings as part of the plaintiff’s name. If this amendment had been granted the name of the plaintiff would have read “A P & C I (Pty) Ltd t/a Albestra Paints and Lacquers”, which on the information before us would in any event have been a misnomer.

[9] The defendant opposed the proposed amendment on the ground that if it were granted he would be deprived of his defence that the debt had become prescribed. (*Trans-African Insurance Co Ltd v Maluleka* 1956 (2) SA 273 (A) at 279 A-C; *Miller v H.L. Shippel & Co (Pty) Ltd* 1969 (3) SA 447 (T) at 453 F-454 A; *Dumasi v Commisioner, Venda Police* 1990 (1) SA 1068 (V) at 1071 B-E.) By raising the question of prescription in his opposing affidavit the defendant in my

view complied with the provisions of s 17(2) of the Prescription Act 68 of 1969 ("the 1969 Act").

[10] The application to amend was refused by the court *a quo*. It also refused leave to appeal. The plaintiff then applied to the Chief Justice for leave to appeal. Notwithstanding the dismissal of the application to amend the plaintiff brought its application to the Chief Justice in the name of the proposed new plaintiff as if there had in fact been a substitution of plaintiffs. Once leave to appeal was granted the plaintiff prosecuted the appeal in the name of the proposed new plaintiff, an entity who is not in effect a party to these proceedings. Defendant's counsel submitted that the appeal is not properly before us, but I do not propose to dismiss the appeal on such a highly technical ground.

[11] Counsel for the plaintiff submitted that the amendment sought was really only to correct a misdescription of the plaintiff but in my judgement this is not a case of mere misnomer. The effect of the amendment would be to introduce a new

plaintiff. (*L & G Cantamessa v Reef Plumbers, L & G Cantamessa (Pty) Ltd v Reef Plumbers* 1935 TPD 56 at 60.) On this ground alone the present matter can be distinguished from the case of *Mutsi v Santam Versekeringsmaatskappy Bpk en 'n Ander* 1963(3) SA 11 (O) on which counsel for the plaintiff relied. (Cf *Greef v Janet en 'n Ander* 1986(1) SA 647 (T) at 654 A-F.) Prescription in any event anticipated the amendment, as will be explained later.

[12] The 1969 Act makes provision for the extinction of a *debt* by prescription, whereas the previous Prescription Act, 18 of 1943 ("the 1943 Act") rendered a *right* unenforceable by the lapse of time The change in the 1969 Act from prescription of actions to prescription of debts does not however affect the principle that a prescribed debt cannot support a claim. (*Sentrachem Ltd v Prinsloo* 1997(2) SA 1(A) at 15 H).

[13] As a general rule a plaintiff is not precluded by prescription from amending his claim, provided the debt which is claimed in the amendment is the same or

substantially the same debt as originally claimed, and provided of course that prescription of the debt originally claimed has been duly interrupted. See *Sentrachem Ltd v Prinsloo, supra*, at 15 A-16 D, and more particularly 15 J-16 D where *Eksteen J A* held as follows:

> "*Die eintlike toets is om te bepaal of die eiser nog steeds dieselfde, of wesenlik dieselfde skuld probeer afdwing.* Die skuld of vorderingsreg moet minstens uit die oorspronklike dagvaarding kenbaar wees, sodat 'n daaropvolgende wysiging eintlik sou neerkom op die opklaring van 'n gebrekkige of onvolkome pleitstuk waarin die vorderingsreg, waarop daar deurgaans gesteun is, uiteengesit word. (*Churchill v Standard General Insurance Co Ltd* 1977 (1) SA 506 (A) op 517 B-C; *Maluleka* se saak *supra* op 279 C; *Mokoena v SA Eagle Insurance Co Ltd* 1982 (1) SA 780 (O) en *Frol Holdings (Pty) Ltd v Sword Contractors CC* 1996(3) SA 1016 (O).) So 'n wysiging sal uiteraard nie 'n ander vorderingsreg naas die oorspronklike kan inbring nie, of 'n vorderingsreg wat in die oorspronklike dagvaarding prematuur of voorbarig was, te red nie, of om 'n nuwe party tot die geding te voeg nie. (Vergelyk *Churchill* se saak *supra; Imprefed (Pty) Ltd v National Transport Commission* 1990 (3) SA 324 (T); *Neon and Cold Cathode Illuminations (Pty) Ltd v Ephron* 1978 (1) SA 463 (A) en *Park Finance Corporation (Pty) Ltd v Van Niekerk*

1956 (1) SA 669 (T).)”
(Emphasis added.)

(See further *Mazibuko v Singer* 1979(3) SA 258 (W) at 265D-266F; *Standard Bank of South Africa Ltd v Oneanate Investments (Pty) Ltd (in liquidation)* 1998(1) SA 811 (SCA) at 826J-827D; *Drennan Maud & Partners v Pennington Town Board* 1998(3) SA 200 (SCA) at 212 E-I.)

[14] In *Park Finance Corporation (Pty) Ltd v Van Niekerk* 1956 (1) SA 669 (T), the last case referred to in the above quotation, *Ramsbottom J* refused an amendment in circumstances similar to those in the present case. The learned judge there held that the service of the summons did not interrupt prescription in respect of an amended claim which was a “different right” arising out of a contract between the defendant and a different party. The plaintiff company in that case sued the defendant on a written contract. When the written contract was subsequently produced it appeared that not the plaintiff company, but a firm, Park Finance Corporation, had in fact concluded the contract with the defendant before

the plaintiff company was incorporated. The defendant admitted that he had contracted with the firm but denied having done so with the plaintiff company. The plaintiff applied to amend its claim by alleging that the contract had actually been concluded between the firm and the defendant and that the firm had ceded its rights to the plaintiff prior to the institution of the action. By then the amended claim would have been extinguished by prescription unless the running of prescription had been interrupted. *Ramsbottom J* refused the amendment on the ground that prescription had not been interrupted. The learned judge concluded at 674 D-E:

> "In my opinion the right which the plaintiff now wishes to enforce is a right arising out of a contract between different parties and is a different right from that which the action was brought to enforce, and therefore the service of the summons did not interrupt the prescription of the different right which the plaintiff now wishes to enforce."

[15] In *Neon and Cold Cathode Illuminations (Pty) Ltd v Ephron* 1978 (1) SA 463 (A) *Trollip JA* also referred to the decision in the *Park Finance Corporation* case and intimated at 474 E that he had

> "some reservation about the correctness of the decision on the facts"

and further remarked at 475 A-B that

> "the decision on the facts in the *Park Finance Corporation* case, *supra*, might well have been wrong, but no firm view need be expressed on this aspect."

*Trollip JA* held at 471 A-B that in deciding whether prescription was interrupted by legal process the right sought to be enforced by means of the amendment should be "the same or substantially the same right" as alleged in the originating process, and added

> "[f]or the substance rather than the form of the previous process must be considered in determining whether or not it interrupted prescription."

(See also *Wavecrest Sea Enterprises (Pty) Ltd v Elliot* 1995 (4) SA 596 (SEC) at 599 E-600 A, 600 H-I and 601 H-602 F.)

[16] In our case the only real difference between the debt originally claimed and the debt claimed in the proposed amendment is the identity of the creditor who seeks to enforce payment of the debt. Even if I assume that the debt which the proposed new plaintiff now seeks to claim by means of the amendment is substantially the same debt which the plaintiff sought to enforce in the original summons (a questionable assertion), the problem still remains whether prescription in respect of the original debt had been duly interrupted. In this connection the plaintiff is faced with the difficulty whether the summons was issued by the "creditor".

[17] The essential question therefore is whether the service on the debtor of the summons whereby the plaintiff claimed payment of the debt interrupted the running of prescription. Both the *Park Finance Corporation* and the *Neon and Cold Cathode* cases were decided under the 1943 Act which provided in s 6 (1)(b) that

> "[e]xtinctive prescription shall be interrupted by -
>
> (b) service on the debtor of any process whereby action is instituted."

S 15(1) of the 1969 Act now specifically provides for the service on the debtor of any process whereby *the creditor* claims payment of the debt. It reads:

> "The running of prescription shall, subject to the provisions of subsection (2), be interrupted by the service on the debtor of any process whereby *the creditor* claims payment of the debt." (Emphasis added.)

[18] In the present case a summons was served on the defendant whereby the plaintiff claimed payment of the debt. It subsequently transpired that the plaintiff was not the defendant's creditor. In an affidavit in support of the plaintiff's application for the amendment his Germiston attorney conceded that the wrong company had been cited as the plaintiff in the summons and that the defendant at no time concluded any contract or had any dealings with the plaintiff. It is common cause therefore that a debtor-creditor relationship between the defendant and the plaintiff never existed. Consequently the summons did not constitute a process whereby *the creditor* claimed payment of the debt. The running of prescription in

respect of the debt was accordingly not interrupted by service of the summons on the defendant. (*Standard General Insurance Co Ltd v Eli Lilly (SA) (Pty) Ltd (FBC Holdings (Pty) Ltd, Third Party*) 1996(1) SA 382 (W) at 385 A-H and 387 H; and see *Grindrod (Pty) Ltd v Seaman* 1998(2) SA 347 (C) at 353 A- 354 F.)

[19] There are two further aspects with regard to the interruption of prescription which can be disposed of briefly. The first is that service of a declaration cannot interrupt prescription in terms of s 15(1) of the 1969 Act for the simple reason that a declaration is not a "process" as described in s 15(6) of the 1969 Act. The fact that the declaration in the present matter described the correct plaintiff as creditor is therefore of no consequence in the absence of a proper amendment of the summons.

The second aspect concerns interruption of prescription in terms of s 14(1) of the 1969 Act. This section provides for the interruption of prescription

> "by an express or tacit acknowledgement of liability by the debtor".

The defendant, as pointed out above, made a number of admissions in his plea which could perhaps be regarded as an "acknowledgement of liability", but those admissions were always made in the alternative while the main plea remained a blanket denial of liability. There was therefore no unconditional acknowledgement of liability.

[20] In terms of s 12(1) of the 1969 Act prescription commenced running when the defendant's debt became due, which was not later than December 1993. S 10(1) and s 11(d) of the 1969 Act provide for a period of prescription of three years in the present case. As pointed out above the running of prescription was not interrupted by the service of the plaintiff's summons on the defendant in April 1996, or by any other means. In the result the debt had already been extinguished by prescription and the claim had accordingly lapsed when the plaintiff eventually applied for the amendment in August 1997. The amendment of the claim

could therefore not be granted.

[21] The appeal is dismissed with costs.

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**F H GROSSKOPF**
JUDGE OF APPEAL

SCHUTZ J A)
PLEWMAN JA) concur