THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable
Case no: 01/03

In the matter between:

FIRSTRAND BANK LIMITED *Appellant*

and

NEDBANK (SWAZILAND) LIMITED *Respondent*

Coram: *SCOTT, MTHIYANE, NUGENT, LEWIS JJA et PONNAN AJA*

Date of hearing: 23 MARCH 2004

Date of delivery: 30 MARCH 2004

Summary: **Special plea of prescription – amendment of particulars of claim – different right of action – prescription not interrupted**

JUDGMENT

SCOTT JA/…

SCOTT JA:

[1] The appellant is a registered commercial bank with its principal place of business at Bank City, Johannesburg. The respondent is a bank registered in Swaziland. On 20 July 2000 the respondent caused a summons issued out of the High Court, Johannesburg, to be served on the appellant. On 26 June 2001, after the period of prescription had elapsed, the respondent delivered a notice of amendment. The notice was subsequently withdrawn and replaced by a notice delivered on 2 October 2001. Two further amendments followed but nothing turns on these. The appellant filed a special plea in which it raised the defence of prescription. It pleaded, in effect, that the debt which the respondent sought to recover in the claim, as amended, was different from the debt originally relied upon, that service of the summons and particulars of claim on 20 July 2000 had not interrupted the running of prescription, and that the respondent's claim, as amended, had accordingly prescribed. The parties agreed upon a written statement of facts and the court *a quo* was called upon to decide the issue of prescription by way of a special case in terms of Rule 33(1). The matter came before Snyders J who dismissed the special plea with costs, holding that the original

summons interrupted prescription in respect of the debt which the respondent was seeking to recover in the claim as amended. The appeal is with the leave of the court *a quo*.

[2] In the original particulars of claim the respondent sued as a cessionary of a claim which Swaziland Timber Products Limited ('Swazi Timber') had against the appellant based on the latter's unjustified enrichment at the expense of the former. The allegations made in support of the claim were briefly the following. Swazi Timber operated an account at the respondent's Matsapha branch, Swaziland. The respondent, in turn, had an automated clearing bureau account with Nedcor Bank Ltd ('Nedcor') in South Africa which it used for the purpose of clearing cheques drawn on or by it and presented for payment in South Africa. A Mr Cawood and a company, Diamond Laser Bureau (Pty) Ltd ('Diamond Laser'), operated current accounts at the appellant's Birnam branch in Johannesburg. The accounts were overdrawn and Cawood and Diamond Laser were unable to settle their indebtedness to the appellant. During September 1997 Cawood, who was employed by Swazi Timber, removed cheques which had been signed in blank by duly authorised signatories of Swazi Timber and inserted his own name, and that of Diamond Laser, as

payees of the cheques. These he deposited in his and Diamond Laser's accounts at the appellant's Birnam branch. Swazi Timber instructed the respondent to stop payment of the cheques but agreed that it had 'no claim against the bank in the event of such document being inadvertently paid by the bank'. Despite Swazi Timber's instruction, Nedcor paid the proceeds of the cheques to the appellant as collecting banker and debited the respondent's automated clearing bureau account. The respondent, in turn, debited the account of Swazi Timber with the amount of the cheques with the result, so it was alleged, that Swazi Timber was impoverished and the appellant was correspondingly enriched by being able to apply the proceeds in reduction of the indebtedness to it of Cawood and Diamond Laser which would otherwise have been irrecoverable.

[3] The effect of the amendment both in terms of the original notice and in terms of the notice delivered on 20 October 2001 was to delete all reference to the respondent suing as a cessionary and to delete the allegation that Swazi Timber stopped payment of the cheques on the terms set forth above. Instead, it was alleged that Nedcor, in terms of its mandate from the respondent, received the cheques in question from the automated clearing bureau,

debited the respondent's account with the value of the cheques and thereafter despatched them to the respondent in Swaziland for validation of payment; that the cheques were intercepted by an unknown party in transit and that in pursuance of an agreement between Nedcor and the respondent, the latter bore the risk of loss of the cheques. Accordingly, so it was alleged, the cheques were not presented for payment to the respondent, which was thereby prevented from debiting Swazi Timber's account with their value and from dishonouring and returning the cheques in terms of the clearing house rules in time for their provisional payment to be countermanded. It was alleged that in the result the appellant was unjustly enriched at the expense of the respondent (no longer Swazi Timber) entitling the latter to sue in its own right.

[4] Section 15(1) of the Prescription Act 68 of 1969 provides:

'The running of prescription shall, subject to subsection (2), be interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt.'

As observed by Corbett JA in *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 842E-F, '. . . it is clear that the "debt" is necessarily the correlative of a right of action vested in the creditor, which likewise becomes extinguished simultaneously with the debt'. The distinction between 'right of action' and 'cause of action'

has been repeatedly emphasized by this court. More recently in *CGU Insurance Ltd v Rumdel Construction (Pty) Ltd* [2003] 2 All SA 597 (SCA), para 6, at 601c-d 'debt' (and hence its correlative 'right of action') was noted to bear 'a wide and general meaning'; and not the technical meaning given to 'cause of action', being the phrase ordinarily used to describe the set of material facts relied upon to establish the right of action. Even a summons which fails to disclose a cause of action for want of one or other averment may therefore interrupt the running of prescription provided only that the right of action sought to be enforced in the summons subsequent to its amendment is recognisable as the same or substantially the same right of action as that disclosed in the original summons. (See *Sentrachem Ltd v Prinsloo* 1997 (2) SA 1 (A) at 15H-16B; *Churchill v Standard General Insurance Co Ltd* 1977 (1) SA 506 (A) at 517B-C.) If it is, the running of prescription will have been interrupted and it will not matter that the effect of the amendment is to clarify or even expand the claim. (As to the expansion of the claim, see eg *Schnellen v Rondalia Assurance Corporation of SA Ltd* 1969 (1) SA 517 (W) at 520H-521G.) The sole question in the present appeal is therefore whether the right of action relied upon in the particulars of claim as amended is

recognisable as the same or substantially the same as that relied upon in the particulars of claim in its original form.

[5] Counsel for the appellant referred us to *Park Finance Corporation (Pty) Ltd v Van Niekerk* 1956 (1) SA 669 (T). In that case the plaintiff issued summons in which it claimed payment of an amount which it alleged it had in terms of a written contract expended in connection with the construction of a residence for the defendant. It transpired that the defendant had concluded the contract not with the plaintiff company, but with a firm, *Park Finance Corporation*, which had subsequently, but before the issue of summons, ceded its rights under the agreement to the plaintiff. After the prescriptive period had elapsed, the plaintiff sought to amend its declaration accordingly. In refusing the amendment on the ground that the claim had prescribed, Ramsbottom J held that the right of action sought to be enforced in the original summons in fact did not exist, while the right relied upon in the amended summons was 'quite a different right' (at 673G-674C). However, in *Neon and Cold Cathode Illuminations (Pty) Ltd v Ephron* 1978(1) SA 463 (A) at 474D Trollip JA expressed some reservation about the correctness of this decision on the facts of the case. He said, at 474H, –

'. . . there is much to be said for the argument advanced by counsel for the plaintiff on the particular facts of that case. It is summarized at p 673C-G. Briefly it was in effect that the amendment merely sought to enforce the same or substantially the same right of action as alleged, albeit defectively, in the originating process, for when action was instituted there existed only one right arising out of the one contract, which right actually did reside in the plaintiff, not as a party to the contract as was wrongly alleged, but as the cessionary thereof, but that error did not nullify the process. In the light of the subsequent decisions in cases such as *Van Vuuren's* and *Churchill's, supra,* 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.'

This reservation concerning the correctness of *Park Finance* on the facts was referred to by F H Grosskopf JA in *Associated Paint & Chemical Industries (Pty) Ltd t/a Albestra Paint and Lacquers v Smit* 2000 (2) SA 789 (SCA) at 795C-F, but without comment. On facts not dissimilar to those in *Park Finance* Melunsky J in *Wavecrest Sea Enterprises (Pty) Ltd v Elliot* 1995 (4) SA 596 (SECLD) declined to follow *Park Finance*, largely on the strength of Trollip JA's reservation as to its correctness.

[6] But even if *Park Finance* was not correctly decided (which it is unnecessary to decide) it is distinguishable from the present case. What was sought to be enforced in that case, both in the original summons and in the amendment, was a right that accrued

from the contract in favour of the other contracting party. It was merely in relation to the identity of that other contracting party that the two claims differed. The right of action that was in issue was in substance always the same. In the present case, as I shall show, not only has the identity of the creditor changed, but the very basis of the right of action has changed.

[7] The same might be said of *Grindrod (Pty) Ltd v Seaman* 1998 (2) 347 (C). In that case it was held that a summons would not have interrupted the running of prescription in the event of it being found that after service on the defendant the plaintiff had ceded the claim to a third party who later, subsequent to the completion of the prescriptive period, had ceded it back to the plaintiff. The court reasoned that in the event of such a finding the right of action of the plaintiff and the right of action of the cessionary to whom it was ceded, were not one and the same, and that prescription would have continued to run when the claim was ceded. It is also not necessary to decide whether the decision in that case was correct for even if it was not, the facts are similarly distinguishable from those of the present case.

[8] The basic ingredients of any enrichment action include the enrichment of one party (the defendant) and a corresponding

impoverishment of another (the plaintiff). In the absence of an impoverishment there can be no right of action. In the original particulars of claim in the present case it was the impoverishment of Swazi Timber that gave rise to and formed the basis of the right sought to be enforced; in the amended particulars of claim it was the impoverishment of the respondent itself. But once it is accepted that Swazi Timber was not the impoverished party it follows that the right of action relied upon in the original particulars of claim was not only non-existent, it was, in any event, an entirely different 'right' from the right sought to be enforced in the amended claim.

[9] It is true, as emphasized by counsel for the respondent, that the enriched party, ie the appellant, remained the same. But the mere fact that there is some overlapping of factual allegations contained in the pre- and post amendment particulars of claim is not enough (*cf Evins v Shield Insurance Co Ltd, supra,* at 838H-839D). The right of action disclosed in the amended particulars of claim must at least be recognisable as the same or substantially the same as the right disclosed in the original claim. In the present case the right disclosed in the amended particulars of claim is recognisable as neither.

[10] In the result:

(a) The appeal succeeds with costs, including the costs of two counsel;

(b) The order of the court *a quo is* set aside and the following is substituted –

'The defendant's special plea of prescription is upheld and the plaintiff's claim is dismissed with costs.'

D G SCOTT
JUDGE OF APPEAL

CONCUR:

MTHIYANE JA
NUGENT JA
LEWIS JA
PONNAN AJA