THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case number: 705/08

In the matter between:

TECMED (PTY) LIMITED	**FIRST APPELLANT**
MICHAEL VOI HARRY MILFORD	**SECOND APPELLANT**
WERNER BEGERÉ	**THIRD APPELLANT**
BARNEY HURWITZ	**FOURTH APPELLANT**
ADRIEN PULE	**FIFTH APPELLANT**

and

NISSHO IWAI CORPORATION	**FIRST RESPONDENT**
SOJITZ CORPORATION	**SECOND RESPONDENT**

Neutral citation: *Tecmed v Nissho Iwai Corporation* (705/08) [2009] ZASCA 143 (25 November 2009)

CORAM: **Harms DP, Brand *et* Malan JJA**

HEARD: **10 November 2009**

DELIVERED: **25 November 2009**

SUMMARY: Universal succession of all plaintiff's rights and obligations under Japanese law after *litis contestation* - substantive application to substitute successor as the plaintiff successful – validity of Rule 15 notice consequently not considered – s 15(2) of Prescription Act 68 of 1969 not set in motion by substitution.

ORDER

On appeal from: Johannesburg High Court (Antrobus AJ sitting as court of first instance).

The appeal is dismissed with costs, including the costs occasioned by the employment of two counsel.

JUDGMENT

BRAND JA (Harms DP *et* Malan JA concurring)

[1] This appeal originates from four interlocutory applications in the same main action that were heard together and determined in one judgment by Antrobus AJ in the Johannesburg High Court. In the pending main action, the first respondent, Nissho Iwai, issued summons against the first to fifth appellants (the 'defendants'), jointly and severally, for payment of the sum of US $3 606 449.45 together with interest and costs. The claim against the first defendant was said to arise from goods sold and delivered under a written distributorship agreement between Nissho Iwai and the first defendant. The claim against the second to fifth respondents was based on suretyships that they signed for the debts of the first defendant in favour of Nissho Iwai.

[2] The main action was instituted in February 2003. In October 2003 all the defendants delivered a plea while the first defendant also filed a counter-claim against the plaintiff. In February 2006 Nissho Iwai delivered its plea to the first defendant's counter-claim. The four interlocutory applications that then followed have one thing in common: they were all precipitated by a notice in terms of Uniform Rule 15, dated 9 May 2006, and served on the defendants' attorneys by Bowman Gilfillan, purportedly as attorneys for 'the

plaintiff', which was described in the heading of the notice as 'Nissho Iwai'. It read:

‘Be pleased to take notice that Sojitz Corporation, a company duly incorporated in accordance with the laws of Japan, carrying on business as a distributor of medical and related equipment and having its principal place of business at . . . Tokyo, . . . Japan is hereby substituted for Nissho Iwai Corporation as plaintiff in the above action.

Be pleased to take further notice that as of 1 April 2004, Nissho Iwai Corporation merged with Nichimen Corporation. The merged entity changed its name to Sojitz Corporation. All assets, liabilities, rights and obligations of Nissho Iwai Corporation were automatically and statutorily succeeded to by Sojitz Corporation under Japanese law.’

[3] The first interlocutory application, the so-called authority application, that ensued was one by the defendants on 21 February 2007 for the setting aside of the Rule 15 notice as an irregular step. In the same application, the defendants also raised a query, as envisaged in Rule 7(1), with regard to Bowman Gilfillan’s authority to act on behalf of Nissho Iwai. The ground relied upon in the authority application for querying Bowman Gilfillan’s authority to act for Nissho Iwai was essentially that the Rule 15 notice created uncertainty as to whether the attorneys were still acting for Nissho Iwai or for Sojitz Corporation, who was alleged to have taken over all the rights of the former. The basis advanced in the authority application for the setting aside of the Rule 15 notice will presently be reverted to in more detail. But, what it boiled down to for present purposes, was that Rule 15 does not provide for the kind of substitution that the notice sought to achieve. What is contemplated by Rule 15, so the objection went, is a substitution necessitated by the change of status of a litigating party and not the transfer of rights from one corporate entity to another, as described in the Rule 15 notice. In consequence, so the defendants’ objection concluded, the Rule 15 notice, in so far as it purported to effect a substitution of Nissho Iwai by Sojitz as the new plaintiff, was a nullity.

[4] In the authority application, the defendants further contended, as part of their objection to the Rule 15 notice, that the substitution of Sojitz as the plaintiff would require a substantive application to that effect. Such an application, so the defendants then argued, was a very necessary one in that they required to be fully informed of the basis upon which Sojitz sought to be substituted as plaintiff. This invitation led to the second interlocutory application, which was a substantive application – filed on 6 March 2007 – on behalf of 'the plaintiff', still defined in the heading of the application papers as 'Nissho Iwai', for the substitution, of Sojitz as plaintiff in the action against the defendants. Following the model adopted in the court a quo, I will refer to this as ‘the substitution application’.

[5] The substitution application was explicitly formulated on the contingent basis that the defendants were vindicated in their argument that the Rule 15 notice was irregular. The reason why Sojitz needed to be substituted for Nissho Iwai, as it was foreshadowed in the Rule 15 notice and elaborated upon in the substitution application, had its origin in a merger agreement between Nissho Iwai and another Japanese company, Nichiman Corporation, which became effective on 1 April 2004. Nichiman was then renamed the Sojitz Corporation. The merger was fully implemented, both in accordance with the provisions of the merger agreement and in accordance with articles 101, 102 and 103 of the Japanese Commercial Code. A translation of the merger agreement is annexed to the application papers. Clauses 1 and 8.1 are relevant. They provide:

‘1. Method of Merger

Nichiman and Nissho Iwai will merge in a spirit of equality. However, as a result of the merger, Nichiman will survive and Nissho Iwai will be dissolved.

8. Succession of Company Assets

8.1 Nichiman shall, as at the date of the merger, succeed any and all of Nissho Iwai’s assets, liabilities and rights and obligations . . . '

[6] The effect of the merger in terms of the Japanese code was set out by Japanese legal experts on both sides. The following features and consequences of the merger were common cause between them.

- The merger is described as an ‘absorption merger’ in terms of which one company, the dissolving company, which was Nissho Iwai in this case, ceased to exist while Nichiman (renamed Sojitz) continued. This was the effect of article 101 of the code.
- In terms of article 102 the amalgamation took effect on the day the merger agreement was registered, which was 1 April 2004.
- As at 1 April 2004, Sojitz succeeded to all the rights and liabilities of Nissho Iwai. This was the effect of both clause 8.1 of the merger agreement and article 103 of the code.

[7] The explanation – that in terms of Japanese law Nissho Iwai had ceased to exist – provided the defendants with another basis for their contention that the Rule 15 notice was irregular, namely that the notice was given on 8 May 2006, purportedly on behalf of Nissho Iwai, which, in accordance with the Japanese code, was no longer in existence at the time. By the same token, so the defendants contended, the substitution application was also a nullity because it was again brought on behalf of ‘the plaintiff’, described as 'Nissho Iwai', which entity had been dissolved and no longer existed since 1 April 2004.

[8] Rather out of context, but next in chronological order was the third interlocutory application which was brought in terms of Rule 30 in the name of Nissho Iwai as the plaintiff for the setting aside of the defendants’ Rule 7 notice as an irregular step. The basis advanced for the application was that the Rule 7 notice was filed outside the ten day time period provided for in that rule. This application, which was referred to by the court a quo as the 'Nissho Iwai Rule 30 application', proved to be of little, if any, consequence.

[9] The fourth interlocutory application in chronological order was filed in response to the defendants’ contention that the plaintiff's substitution application was a nullity because it was brought on behalf of Nissho Iwai, which was a non-existent entity. This was an application, filed on 29 January 2008, by Sojitz in its own name for leave to intervene in the substitution

application. As in the court a quo I propose to call this 'the intervention application'. It was supported by an affidavit from Sojitz's in-house counsel, Mr Hashimoto Masanao, in which he, inter alia, said the following:

'I confirm that all steps in the litigation process undertaken since the merger of Nissho Iwai Corporation with Sojitz Corporation, which became effective on 1 April 2004, have been taken on the instructions of Sojitz Corporation. I further confirm that Bowman Gilfillan Inc has at all times since the merger been authorised to represent Sojitz Corporation.'

[10] The defendants' answer to the intervention application was essentially twofold. First, that it was not competent for Sojitz to join itself in an application which was a nullity from the start, because it had been brought by a non-existent entity. Secondly, that in as much as Sojitz's *locus standi* as a creditor depended on a cession by Nissho Iwai, its claim had been extinguished by prescription, since more than three years had elapsed after the alleged cession at the time when Sojitz gave notice of its application to be joined as a plaintiff on 29 January 2008.

[11] In broad outline the court a quo approached the matter along the following lines.

- It first considered the Rule 15 notice of 9 May 2006. In the event it concluded that the provisions of the rule covered the facts of this case. As to the defendants' contention that the notice was given on behalf of a non-existent entity, ie Nissho Iwai, it found that properly construed, the Rule 15 notice was in fact given by Bowman Gilfillan on behalf of Sojitz.
- In the light of these findings, the court held that the Rule 15 notice achieved its purpose in effecting the substitution of Sojitz for Nissho Iwai as plaintiff from the date on which it was served.
- Its findings with reference to the Rule 15 notice, so the court held, rendered the substitution application not strictly necessary. Nonetheless it decided that the relief sought in the application was in effect for confirmation that the Rule 15 notice was valid and effective. Since that was what it essentially decided, the court found it appropriate to grant the relief sought in the substitution application as well.

- As to the defendants' contention that the substitution application was a nullity in that it was brought on behalf of the non-existent Nissho Iwai, the court held that although the application was brought in the name of the 'plaintiff' it must be construed as an application by Sojitz.
- In the circumstances the defendants' application to set aside the Rule 15 notice as well as their challenge of Bowman Gilfillan's authority under Rule 7 were held to be ill conceived. Consequently the court held that the authority application should be dismissed while the Nissho Iwai Rule 30 application should be upheld.
- The intervention application, so the court held, was unnecessary to decide, because it was brought as an alternative to the substitution application which had been decided in favour of the plaintiff.
- In sum, the court accordingly ordered that Sojitz be substituted for Nissho Iwai as the plaintiff and granted consequential relief for the amendment of the plaintiff's pleadings. It dismissed the defendants' authority application, granted the plaintiff's Rule 30 application and made no order on the intervention application.

[12] In considering the approach of the court a quo, sight should not be lost of the import of Rule 15. The purpose of the Rule was not to afford the High Court the power to substitute a party to proceedings. The High Court already had that inherent power under the common law (see eg *Curtis-Setchell & McKie v Koeppen* 1948 (3) SA 1017 (W) at 1021; *Putzier v Union and South West Africa Insurance Co Ltd* 1976 (4) SA 392 (A) at 402E-F). The court still has that power to grant a substitution of parties on substantive application where Rule 15 does not apply (see eg *Waikiwi Shipping Co Ltd v Thomas Barlow & Sons (Natal) Ltd* 1978 (1) SA 671 (A) at 678G; *Devonia Shipping Ltd v MV Luis (Yeoman Shipping Co Ltd intervening)* 1994 (2) SA 363 (C) at 369F-370B). The purpose of Rule 15 is merely to provide a simplified form of substitution, subject to the right of any affected party to apply to court for relief in terms of Rule 15(4) (see eg LTC Harms *Civil Procedure in the Supreme Court* B-1 to 5; HJ Erasmus *Superior Court Practice* B1-118).

[13] In the absence of any substantive application for substitution the effectiveness of a Rule 15 notice will obviously depend on whether it was given in a situation covered by the rule. But where, as in this case, a substantive application for substitution had in fact been brought, any investigation into the effectiveness of a preceding Rule 15 notice is most likely to result in a futile exercise. If the substantive application is upheld, the substitution will materialise. *Caedit questio*. If, on the other hand, the application is dismissed on its merits, the situation cannot be saved by a notice under Rule 15.

[14] As I see it, the focus should therefore immediately be directed at the substitution application. The settled approach to matters of this kind follows the considerations in applications for amendments of pleadings. Broadly stated it means that in the absence of any prejudice to the other side, these applications are usually granted (see eg *Devonia Shipping Ltd v MV Luis (Yeoman Shipping Co Ltd Intervening) (supra)* at 369F-I; *Rosner v Lydia Swanepoel Trust* 1998 (2) SA 123 (W) at 127D-H). As is pointed out in *Devonia Shipping* at 369H, the risk of prejudice will usually be less in the case where the correct party 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 party. But the criterion remains the same: will the substitution cause prejudice to the other side which cannot be remedied by an order for costs or some other suitable order, such as a postponement?

[15] In this case, the defendants' answer to the substitution application was not that they would be prejudiced in any way by the relief sought. Apart from the defence of prescription to which I shall presently return, the defendants' sole answer to the substitution application was that it was brought by a non-existent party. That answer obviously found its basis in the notice of motion itself which indicated that the application was brought by 'the plaintiff' and at the same time described 'the plaintiff' as 'Nissho Iwai Corporation'.

[16] Self-evidently, however, a proper interpretation of the application would not limit itself to that aspect alone. It would also have regard to the affidavits

filed in support. In this regard the deponent to the founding affidavit described herself as ‘the attorney for the plaintiff’. She immediately went on to explain that Nissho Iwai was no longer in existence; that it had been succeeded in its rights and obligations by Sojitz; and that she had been instructed by the legal advisors of Sojitz. In the event, she said, any judgment against the defendants will be for the benefit of Sojitz. Conversely, if any judgment were to be given in favour of the defendants, it was Sojitz who would satisfy that judgment. In conclusion she sought an order in terms of the notice of motion that Sojitz be substituted as the plaintiff. The affidavit by Mr Masanao confirmed the contents the founding affidavit. As I see it, the only sensible meaning that can be attributed to all this is the one given by the court a quo, namely, that in fact and in law the substitution application was brought by Sojitz and not by the non-existent Nissho Iwai.

[17] Another argument raised by the defendants, rather belatedly, for the first time on appeal, was that if Sojitz were to be substituted as plaintiff pursuant to the substitution application, the claim against the defendants would in any event have become prescribed and that the application should for that reason have been refused. In support of his argument the defendant sought to rely primarily on the judgment of this court in *Silhouette Investments Ltd v Virgin Hotels Group Ltd* 2009 (4) SA 617 (SCA), in so far as that judgment was based on s 15 of the Prescription Act 68 of 1969. The relevant part of s 15 provides:

'15. Judicial interruption of prescription – (1) 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.

(2) . . . [T]he interruption of prescription in terms of subsection (1) shall lapse, and the running of prescription shall not be deemed to have been interrupted, if the creditor does not successfully prosecute his claim under the process in question to final judgment or if he does so prosecute his claim but abandons the judgment or the judgment is set aside.'

[18] What happened in *Silhouette Investments*, in broad outline, was that the appellant instituted action against the respondent within the prescription

period of three years after the debt relied upon became due. It subsequently gave notice of its intention to amend its particulars of claim in two respects, first, by substituting one John Dyer as the plaintiff and, secondly, by alleging that after the institution of action, Mr Dyer had acquired, by cession, its claim against the respondent. The respondent pleaded to the amended particulars of claim. One of the defences raised in the plea was that in terms of the sale agreement the appellant was not entitled to cede its rights. This led to a further amendment of the particulars of claim in terms of which the appellant was substituted for Mr Dyer as the plaintiff. Notice of this amendment was given in October 2006, which was after the expiration of the three year prescription period.

[19] To this reamended particulars of claim the respondent raised a plea of prescription. It did not deny that the running of prescription in respect of the claim relied upon had been interrupted by service of the original summons in terms of s 15(1) of the Prescription Act. What the respondent contended for, however, on the basis of s 15(2), was that the appellant did not prosecute its claim under the original summons to final judgment and accordingly the interruption of prescription by that process had lapsed. If the appellant were eventually to obtain final judgment in its favour, so the respondent's argument went, the process under which it would be obtained would be the notice of amendment of October 2006 and not the original summons. Since the notice was only effected after the three year prescription period, so the respondent's argument concluded, the appellant's claim had become prescribed. The plea of prescription was upheld by the court of first instance, essentially on the acceptance of the respondent's argument and in dismissing the appeal against that order, this court did the same (see paras 27, 28 and 42 of the judgment).

[20] At the heart of *Silhouette Investments* lies the notion that the legal effect of a cession after *litis contestatio* is to terminate the proceedings instituted by the cedent with the corollary that the substitution of the cessionary as the plaintiff must be regarded as the institution of new proceedings. As to whether that underlying notion is correct in respect of

cessions, is not necessary to consider in this case. I say that because Sojitz does not rely on a transfer of rights by means of a cession. What it relies upon is a universal succession of all Nissho Iwai's rights and obligations by operation of Japanese law.

[21] As I see it, the resulting position is not materially different from the one created by our own legislature in the case of an amalgamation or takeover agreements between banks under s 54(2)(b) of the Banks Act 94 of 1990. In such event, s 54(3) of the Act essentially provides that all the rights and obligations of the amalgamating banks or transferor bank will vest in the amalgamated or transferee bank by operation of law. With reference to the situation thus created by the legislator it was held in *Absa Bank Ltd v Van Biljon* 2000 (1) SA 1163 (W) that the substitution of the transferee bank (Absa) as plaintiff in an action previously instituted by the transferor bank (Bankorp) does not activate the provisions of s 15(2) of the Prescription Act. By virtue of s 54(3) of the Bank's Act, so it was held, Absa stepped into the shoes of Bankorp and became the plaintiff by operation of law. In essence the plaintiff remains the same entity. In this light the formal substitution of Absa as plaintiff by way of an amendment of pleadings cannot be regarded as a termination of the proceedings instituted by Bankorp and the commencement of new proceedings by Absa as contemplated in s 15(2).

[22] I agree with the decision in *Absa*. It derives support from the reasoning of Longmore J in *Eurosteel Ltd v Stinnes AG* [2000] 1 All ER (Comm) 964 (QB), which I find particularly persuasive. What happened in *Eurosteel* mirrors the facts of this case in virtually every material respect. A German company, Bayerischer Lloyd, instituted arbitration proceedings against Eurosteel in London. Thereafter Bayerischer entered into a merger agreement with another German company, Stinnes AG, under German law. In terms of s 20 of the German Umwandlungsgesetz or Transformation Law, the merger had the effect, first, that all the assets and liabilities of Bayerischer passed over to Stinnes by operation of law and, secondly, that Bayerischer was dissolved and ceased to exist.

[23] Eurosteel thereupon brought an application before the Queen's Bench for an order declaring that the arbitration proceedings initiated by Bayerischer had lapsed because that entity had ceased to exist and that they could not be continued for the benefit and in the name of Stinnes. In dismissing Eurosteel's application, Longmore J inter alia expressed himself as follows (at 969):

'English law is, in my judgment, not so impotent at least in cases of universal succession. The whole point of universal succession is that the successor is treated as the same person as the person to whom he succeeds. The law of the forum in which the universal successor seeks to gather in his assets may or may not require him to give formal notice of his existence before award or judgment will be given but the idea that any pending arbitration (or indeed action) begun by his predecessor must, of necessity, come to an end would mean that this succession was particular not universal and would be contrary to the term of s 20 of the German transformation law.'

(See also eg *Harper Versicherungs AG v Indemnity Marine Assurance Co Ltd* [2006] 2 Lloyd's Rep 263 (QB) para 34; *Republic of Kazakhstan v Istil Group Inc* [2006] EWHC 448 (Comm) paras 53 and 54.)

[24] What Longmore J said about the effect of the German Code, in my view, also applies to the almost identical provisions of the Japanese Code that concern us. It means that Sojitz stepped into the shoes of Nissho Iwai by operation of law. In effect, the plaintiff therefore remained the same entity. The fact that our law of procedure requires a formal substitution of Sojitz for Nissho Iwai does not change the principle. The result of all this, as I see it, is that the court a quo was right in granting the substitution application. I also agree with the court a quo's approach that the other interlocutory applications before it were so closely linked to the substitution application that it would make no sense to decide them separately. Once the substitution application was brought, the defendants should not have proceeded with the authority application. On the other hand, the plaintiff should never have launched the intervention application. But it all resulted from the defendants' opposition to the substitution application which opposition turned out to be unwarranted. In consequence I find no reason to interfere with the judgment of the court a quo in any respect.

[25] The appeal is dismissed with costs, including the costs occasioned by the employment of two counsel.

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F D J BRAND
JUDGE OF APPEAL

Counsel for the Appellants:	A Subel SC J Peter
Instructed by:	Schindlers Attorneys Johannesburg
Correspondents:	Webbers Attorneys Bloemfontein
Counsel for the Respondents:	C Cohen SC N J Graves
Instructed by:	Bowman Gilfillan Attorneys Johannesburg
Correspondents:	McIntyre & Van der Post Bloemfontein