THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 349/12

In the matter between: Reportable

IMPERIAL BANK LIMITED **Appellant**

and

HENDRICK JACOBUS RUST BARNARD N.O. **First Respondent**

NORMAN KLEIN N.O. **Second Respondent**

FAROUK SHARIEF N.O. **Third Respondent**

THEMBA BENEDICT LANGE N.O. **Fourth Respondent**

ITUMELENG BRENDA MOHALE N.O. **Fifth Respondent**

Neutral citation: *Imperial Bank Limited v Hendrick Barnard NO* (349/12) [2013] ZASCA 42 (28 March 2013)

Coram: MPATI P, CACHALIA, and PILLAY JJA, SCHOEMAN and SALDULKER AJJA

Heard: 22 February 2013

Delivered: 28 March 2013

Summary: **Company Law – winding-up – Liquidators – Proceedings brought by liquidators in representative capacities – s 386(4)*(a)* of Act 61 of 1973 - whether process served on company's debtor interrupted prescription.**

ORDER

On appeal from: South Gauteng High Court, Johannesburg (Weiner J, sitting as court of first instance).

The appeal is dismissed, with costs.

JUDGMENT

MPATI P (CACHALIA and PILLAY JJA and SCHOEMAN and SALDULKER AJJA CONCURRING):

[1] On 3 August 2007 the respondents, acting in their representative capacities as the duly appointed joint liquidators in the estate of Pro Med Construction CC (in liquidation)[1] (Pro Med), instituted action against the appellant, as first defendant, and Land for Africa (Pty) Ltd (Land for Africa), as second defendant, claiming payment, from the appellant, of an amount of R25 million, together with interest and costs of suit. The amount claimed was said to be 'in lieu of transfer' of certain fixed property allegedly purchased by Pro Med, prior to its liquidation, from the appellant, in terms of an agreement of purchase and sale concluded on 27 February 2003. Subsequent to the conclusion of that agreement the appellant apparently sold the property to Land for Africa. However, no order was sought against Land for Africa, which, consequently, does not feature in this appeal.

[1] Pro Med Construction CC was finally liquidated on 8 December 2004.

[2] In the particulars of claim the first respondent is described as 'Hendrick Jacobus Rust Barnard, an adult male liquidator and practising attorney . . .'. The rest of the liquidators are also cited in their own names and the fourth and fifth respondents are similarly described as adult male and female liquidators and practising attorneys respectively, while the second and third respondents are described as adult male liquidators practising as such. While admitting the names of the respondents the appellant has denied in its plea, which was delivered on 13 November 2007, that the respondents are 'properly cited in compliance with the provisions of section 386(4) of the Companies Act 61 of 1973 (the Act), or that they are entitled to bring [the] action in their own name'. Section 386(4)*(a)* of the Act, which applies *mutatis mutandis* to the liquidation of close corporations by virtue of the provisions of section 66 of the Close Corporations Act, 69 of 1984, empowers liquidators -

'to bring or defend in the name and on behalf of the company any action or other legal proceedings of a civil nature. . .'.

[3] On 17 February 2011 the respondents served on the appellant a notice of intention to amend their particulars of claim 'in the following respects':

'Replacing paragraphs 1.1 to 1.5 of their particulars of claim with the following:-

1. "The Plaintiff is Pro Med Construction CC (In Liquidation) ("Pro Med"), Master's reference G2750/04 duly represented herein by:-

1.1 Hendrik Jacobus Rust Barnard N.O.,
1.2 Norman Klein N.O.,
1.3 Farouk Sharief N.O.
1.4 Themba Benedict Langa N.O.,
1.5 Itumeleng Brenda Mohale N.O.,

who bring this action in the name and on behalf of Pro Med pursuant to the provisions of section 386(4) of the Companies Act 61 of 1973."'

The appellant objected to the proposed amendment on the basis that the notice of intention to amend was served more than three years after the debt became due; that Pro Med's claim had become prescribed in terms of s11 of the Prescription Act 68 of 1969 (the

Prescription Act) and that it would be prejudiced (in the sense that it would be deprived of the opportunity to raise the defence of prescription) were Pro Med to be substituted 'as the new plaintiff for the existing plaintiffs', being the respondents. The respondents thereafter sought leave from the court a quo to effect the proposed amendment. On 1 November 2011, and despite the appellant's opposition, the court (Weiner J) granted the amendment. This appeal is with its leave.

[4] There are two issues in the appeal. The first, raised by the respondents, is whether the order granting the amendment is purely interlocutory and thus not appealable. The second is whether the amendment amounted to a substitution of parties or whether it merely involved a correction of a misdescription of the plaintiff. Although it appears to me, at least prima facie, that the order granting the amendment is appealable, I shall, for purposes of the appeal, assume without deciding, that the order is indeed appealable.

[5] It was argued on behalf of the appellant that leave to amend the particulars of claim should have been refused for the reasons that the liquidators did not have the necessary *locus standi* to issue the summons in their own name; that accordingly any attempt to now substitute the liquidators with the Corporation amounts to the introduction of a new plaintiff; that the Corporation's claim has become prescribed since the issue was drawn to the attention of the liquidators by the appellant in its plea more than three years before the notice of intention to amend was served; and that, in the circumstances, granting the amendment at this stage would prejudice the appellant by irreversibly depriving it of the defence of prescription.

[6] In granting the amendment the court a quo, with reference to judgments of the South Gauteng High Court[2] and of other High Courts,[3] observed that the authorities 'are

[2] See *Fey NO v Lala Govan Exporters (Pty) Ltd* 2011 (6) SA 181 (W) and *Airborne Express CC v Van den Heever NO* unreported case no. 05/18568 – WLD.
[3] See *Shepstone and Wylie v Geyser NO* 1998 (1) SA 354 (N) and compare *Fundstrust (EDMS) Bpk (in likwidasie*) *v Marais* 1997 (3) SA 470 (C).

divided on the point as to how the plaintiff should be cited' in claims such as the one instituted by the liquidators in this matter. It reasoned that until this point is authoritatively decided 'it would not be equitable [for it] to refuse the amendment on the basis that the liquidators did not have *locus standi* when they brought this action and thus that such action did not interrupt prescription'. Having said that, however, the court continued:

'It is clear that a company being wound up never has standing; the *locus standi* is always conferred on the liquidator who litigates on the company's behalf. Therefore, at the time that proceedings were instituted the plaintiffs did have *locus standi*, although, according to the defendants (and some authorities) such citation was defective.'

The court a quo concluded that the citation of the respondents, 'even based upon a strict interpretation of section 386(4)*(a)'*, was a mere misdescription.

[7] Counsel for the appellant submitted that because the assets of a company being wound up do not vest in the liquidator, but remain vested in the company, ie unlike the estate of an insolvent, which is vested in the trustee, the company in liquidation retains its *locus standi* to institute its own actions. Its liquidator, so the argument continued, is in the same position as its directors were in prior to its winding up. The liquidator, therefore, has no *locus standi* to institute action in his or her own name to recover debts owed to the company. Counsel accordingly argued that the statement in *Commentary on the Companies Act*, Vol 3, by M S Blackman *et al*,[4] that '[a] company being wound up never has standing' and that 'standing is always conferred on the liquidator', is erroneous. As will become apparent below, the present is not an appropriate case for a consideration of the question whether or not a liquidator has standing where a debt owed to a company in liquidation is sought to be recovered. This is therefore not the occasion for a discussion on the conflicting decisions referred to in paragraph 6 above.

[8] An application for amendment will always be allowed 'unless it is made *mala fide* or would cause prejudice to the other party which cannot be compensated for by an order for

[4] At 14 – 335.

costs or by some other suitable order such as a postponement'.[5] An amendment would cause prejudice if, for example, its effect would be to deprive the other party to the action of the opportunity to raise an otherwise good plea of prescription.[6] Thus, a late amendment which has the effect of introducing a new cause of action or new parties would inevitably cause prejudice to the other party in the action, as it would defeat an otherwise good defence of prescription. However, a plaintiff is not precluded by prescription from amending his or her 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'.[7] In *Neon and Cold Cathode Illuminations (Pty) Ltd v Ephron* 1978 (1) SA 463 (A) Trollip JA, referring to *Churchill v Standard General Insurance Co. Ltd* 1977 (1) SA 506 (A), said the following at 474A:

'In *Churchill's* case, *supra* at p. 517B-C, this Court, through Rumpff, C.J., pointed out that, while the previous summons need not set out an unexcipiable cause of action, nevertheless, for its service on the debtor to interrupt prescription of a right of action, the latter must at least be recognisable or identifiable ("kenbaar") in the previous cause of action.'

[9] In *Sentrachem Ltd v Prinsloo* 1997 (2) SA 1 (A) Eksteen JA expressed himself as follows (at 15J-16D) with regard to an application for amendment to a summons:

'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 517B-C; *Maluleka* se saak *supra* op 279C; *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

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[5] *Four Tower Investments (Pty) Ltd v André's Motors* 2005 (3) SA 39 (N) para 15; *Dumasi v Commissioner, Venda Police* 1990 (1) SA 1068 (V) at 1071B; *Devonia Shipping Ltd v MV Luis (Yeoman Shipping Co Ltd Intervening)* 1994 (2) SA 363 (C) at 369F-I.

[6] *Trans-African Insurance Co. Ltd v Maluleka* 1956 (2) SA 273 (A) at 279A-B. See also *Four Towers Investments*, fn 5 para 16 and *Dumasi*, fn 5 at 1071C-D.

[7] *Associated Paint & Chemical Industries (Pty) Ltd t/a Albestra Paint and Lacquers v Smit* 2000 (2) SA 789 (SCA) para 13.

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).)'

Thus, when faced with an opposed application for an amendment to a summons the fundamental question a court should consider is 'whether or not the service of the summons in the previous action on the respondent interrupted the running of prescription of the applicant's rights against the respondent'.[8] And in considering whether or not prescription was interrupted by service of the previous summons the right sought to be enforced by means of the amendment must be the same or substantially the same right as originally sought to be enforced, '(f)or the substance rather than the form of the previous process must be considered in determining whether or not it interrupted prescription'.[9]

[10] Section 15(1) of the Prescription Act provides that-

'[t]he running of prescription shall . . . be interrupted by service on the debtor of any process whereby the creditor claims payment of the debt.'

For prescription to be interrupted by service of a summons on the debtor, therefore, the entity claiming payment of the debt must be the *creditor*. Where the claimant cited in the process by which payment is claimed is not the creditor, service of the process will not interrupt prescription.

[11] In *Associated Paint & Chemical Industries (Pty) Ltd v Smit*[10] the plaintiff caused a simple summons to be served on the defendant. When the declaration was filed subsequent to the granting of leave to the defendant to defend, it transpired that the plaintiff cited in the summons was not the defendant's creditor. The name of the correct creditor appeared in the first paragraph of the declaration. It was conceded in an affidavit in support of an application for an amendment that the wrong company had been cited in the summons and that the defendant had at no stage concluded any contract or had any dealings with the plaintiff cited in the summons. It was thus common cause that no debtor-creditor relationship ever existed between the plaintiff and the defendant. This court held

[8] *Neon and Cold Cathode Illuminations (Pty) Ltd v Ephron* 1978 (1) SA 463 (A) at 470F-G.
[9] *Ephron*, fn 8, at 471A-C.
[10] Above, fn 7.

that the summons 'did not constitute a process whereby *the creditor* claimed payment of the debt' and that the running of prescription in respect of the debt 'was accordingly not interrupted by service of the summons on the defendant'.[11]

[12] In the present matter the particulars of claim disclose that the right sought to be enforced against the appellant arose from an agreement of purchase and sale allegedly concluded between the appellant and Pro Med on 27 February 2003 and in terms of which the appellant sold to Pro Med certain immovable property. That an agreement was concluded as alleged is admitted in the plea, but it is pleaded further that the agreement had lapsed. The agreement provided, inter alia, that the purchase price of R10 million was payable against registration of transfer of the property into the name of Pro Med. Paragraph 7 of the particulars of claim reads as follows:

'7.1 Pro Med has complied with all its obligations in terms of the agreement of sale . . . .

7.2 In particular, Pro Med has tendered payment of the purchase price of R10 million and all costs which Pro Med is obliged to pay to Imperial Bank, and repeats, alternatively makes such tender herein.'

The conclusion in paragraph 8 is to the effect that Pro Med 'is accordingly entitled to transfer of the property into its own name'.

[13] It appears from the particulars of claim that subsequent to the conclusion of the sale agreement the appellant sold the same property to another entity (the second purchaser). In paragraph 11.3 of the particulars of claim the following allegation is made:

'In the event that transfer of the property (or any portion thereof) is registered in the name of [the second purchaser], it will not be an innocent purchaser, and Pro Med would be entitled to transfer of the property . . . to it by [the second purchaser].'

The conclusion is then set out as follows:

'12.1 In the premises, Pro Med is entitled to transfer of the property . . . by [the second purchaser].

12.2 Pro Med tenders payment of the purchase price of R10 million and such costs as are due.'

The main prayer sought in the particulars of claim is in the following terms:

'An order declaring that the plaintiffs were, as at date of transfer to [the second purchaser], entitled to the transfer of the immovable . . . into the name of Pro Med Construction CC (in liquidation)

[11] Para 2 and 18.

against payment by [Pro Med] to [the appellant] of the purchase price of R10 million . . . .'

In lieu of transfer of the property, payment is sought in the sum of R25 million to the appellants, less such costs as may be due, together with interest and costs of suit.

[14] Counsel for the appellant submitted in this court, with reference to s 386(4)*(a)* of the Act, that a liquidator acts 'in the name of' and 'on behalf of the company' and therefore it is the company that is acting and not the liquidator in his own name. That is why, so the argument continued, a company in compulsory liquidation must be cited by its own name with the sub-joined expression '(in liquidation)'. Counsel submitted further, correctly so, that upon the winding-up order becoming operative the company's corporate identity remains and its property remains vested in it even though the control of its affairs passes out of the hands of its directors upon the appointment of a liquidator.[12] To cement their argument that the liquidators in the present case were not entitled to institute action 'in their own name' to recover a debt allegedly owed to Pro Med, counsel placed reliance on the following passage from the judgment of Kirk-Cohen J in *De Villiers and others NNO v Electronic Media Network (Pty) Ltd* 1991 (2) SA 180 (W):

'Thus, where a liquidator wishes to sue for a debt owing to a company in liquidation he only represents the company in that litigation. It is the company in liquidation which litigates and, if the claim is upon a cheque marked not transferable, the company in liquidation is the payee of the cheque and it, and only it, can sue as holder thereof.'[13]

[15] In that case the three plaintiffs had been appointed liquidators of a company, GBS South Africa (Pty) Ltd (GBS), but were later appointed as receivers for creditors in terms of a compromise subsequently sanctioned by the high court. One of the consequences of the compromise was that GBS was discharged from liquidation, but the receivers were granted 'all such powers as the liquidators would have had, including the right to take action against any debtors of the company, other than in respect of the designated debts . . .'. In their capacities as joint receivers for the creditors of GBS the plaintiffs sued the defendant, by way of a provisional sentence summons, on a dishonoured cheque that had been

[12] See *Letsitele Stores (Pty) Ltd v Roets* 1958 (2) SA 224 (T) at 227A-C.
[13] At 184I-J.

drawn in favour of GBS prior to its liquidation. The words 'or bearer – of toonder' where they appeared after the payee's name were deleted from the cheque, which was then marked, in capitals, 'NOT TRANSFERABLE'. The *causa* upon which the plaintiffs relied was that they were the legal holders of the cheque drawn by the defendant in favour of GBS and they were in physical possession thereof. When the matter came before Kirk-Cohen J two points *in limine* were raised on behalf of the defendant, namely (1) that the plaintiffs had no right to claim provisional sentence on, or payment of, the dishonoured cheque; and (2) that the summons did not set out allegations to establish the *locus standi* of the plaintiffs or an enforceable *causa*. The learned judge found in favour of the defendant on the first point *in limine* and, consequently, found it unnecessary to consider the second. In finding for the defendant on the first point the learned judge rejected the submission by counsel for the plaintiffs, which was to the effect that, as receivers for the creditors, the plaintiffs had the same powers as they had as liquidators of GBS and that those powers included the right to sue for and recover payment of the amount of the dishonoured cheque. He held that the powers and rights conferred upon the receivers in terms of the agreement of compromise 'cannot and do not alter the drawer's obligations and rights on a dishonoured cheque marked not transferable'.[14] The learned judge emphasised the distinction between a liquidator, whose powers and rights are regulated by the Act, read with the relevant provisions of the Insolvency Act, and a receiver, who derives his or her powers and rights from a compromise, which remains a contract.[15] A receiver appointed in terms of a compromise, he said, does not represent the company.[16]

[16] In the present matter, however, the respondents are cited, on the face of the summons, in their names, followed by the letters 'N.O.'. After the names of the fifth respondent the following words appear, in brackets:

'in their representative capacities as the joint liquidators in the estate of PRO MED CONSTRUCTION CC (IN LIQUIDATION)'.

These words, read together with the reference that the respondents are acting in their official capacities (*nomine officii*) clearly indicate, in my view, that the respondents are not

[14] At 184J-185A.
[15] At 185B-D.
[16] At 184J.

acting in their personal capacities, but rather represent Pro Med in the litigation.[17] The allegations made in the particulars of claim relating to the agreement of sale; the conclusions that Pro Med is entitled to transfer of the property and the tender made by Pro Med to pay the purchase price clearly show that the claim is, and has always been, that of Pro Med and not the respondents'. And because the respondents litigate in their representative capacities, judgment in their favour will not enure for their personal benefit, but for the benefit of creditors.[18]

[17] In their founding affidavit in support of the application for amendment the respondents, as the liquidators, aver that at the first meeting of creditors held on 26 January 2005 they 'were authorised in general terms to institute any civil action in the name and on behalf of Pro Med, pursuant to resolution no. 6 of the list of resolutions adopted by the creditors at that meeting . . .'. Resolution no. 6, which forms part of the list of resolutions annexed to the founding affidavit, reads:

'THAT the Liquidator be and is hereby authorised to bring or defend in the name and on behalf of the Close Corporation any action or other legal proceedings of a civil nature and subject to the provisions of any other law relating to criminal procedure, and criminal proceedings.'

The allegations made and conclusions drawn from them in the particulars of claim, as quoted above, are in accordance with the authority granted to the respondents by the meeting of creditors, because, as has been said, the claim is that of Pro Med.

[18] It is true that in lieu of transfer of the property the respondents claim payment to them in the amount of R25 million less such costs as are due, but this must be viewed in the context of them accepting the payment in their representative capacities and, as such, on behalf of Pro Med. The payment will not be accepted for their own benefit. It will be an asset in Pro Med, collected for the benefit of creditors. It follows, in my view, that the amendment sought and granted by the court below does not have the effect of substituting a different plaintiff. It merely corrects a misnomer in the first paragraph of the particulars of claim, where it is not made clear that the respondents are not acting in their personal, but representative, capacities. No new cause of action will be introduced by the amendment. It is clear from the summons and particulars of claim that Po Med is the creditor, represented

[17] See the passage in *De Villiers* quoted in para 14 above.

by the respondents, which claims payment of the debt, viz transfer of the property, or, in lieu thereof, payment of a sum of money, from the appellant, the debtor. The claim sought to be enforced in the original summons and particulars of claim will remain the same after the amendment has been effected. It is not in dispute that the combined summons was served on the appellant. Prescription was therefore interrupted in terms of s 15(1) of the Prescription Act. The question of prejudice which would otherwise be caused by the amendment does not arise.

[19] In the result the appeal must fail and the following order is made:

The appeal is dismissed, with costs.

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President

[18] Compare *Rosner v Lydia Swanepoel Trust* 1998 (2) SA 123 (W) at 127B-C.

APPEARANCES

For the Appellants:	P G Robinson (with him A Botha) Instructed by: The State Attorney, Pretoria The State Attorney, Bloemfontein
Respondent	W J Vermeulen Instructed by: Riaan Meyer Inc, Pretoria McIntyre & van der Post, Bloemfontein