THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Reportable
Case No 323/2002

In the matter between

CGU INSURANCE LIMITED Appellant

and

RUMDEL CONSTRUCTION (PTY) LIMITED Respondent

Coram Marais, Scott & Cloete JJA, Jones et Shongwe AJJA

Heard: 14 March 2003

Delivered: 16 May 2003

Summary: Amendment to pleadings – substitution of one contract for another - prescription – whether amended pleading introduces a prescribed debt.

JUDGMENT

JONES AJA:

[1] This appeal raises the issue of whether or not an amendment to the plaintiff's particulars of claim has the effect of introducing a new claim which had become prescribed.

[2] I shall for convenience refer to the parties as they are referred to in the pleadings. The plaintiff (respondent on appeal) is Rumdel Construction (Pty) Ltd, an engineering concern which was engaged in building roads and bridges in Mozambique during 1996 and 1997. The defendant (appellant on appeal) was its insurer in respect of storm damage to the works in terms of contracts of insurance which were in force and effect during separate periods in 1996 and 1997. In September 2000 the plaintiff issued summons against the defendant for payment of R1 641 968-00

and R3 454 576-77 for loss alleged to be caused by storm damage which occurred during the periods 13 March to 15 March 1996 and 22 February to 26 February 1997 respectively. These amounts are alleged to be due and payable in terms of a single contract of insurance identified in and annexed to the particulars of claim as “contract works policy No CW 654262”. On 29 February 2001 the plaintiff gave notice of its intention to amend the particulars of claim in two respects. The first was to insert an allegation that the defendant is liable to indemnify it by reason of two contracts of insurance and not a single contract as originally pleaded. The amendment alleges that the contract of insurance identified in and annexed to the particulars of claim prior to the amendment, contract works policy No CW 654262, which was in force for the period 31 October 1996 to 1 July 1997, is the basis for liability for the second occurrence of storm damage sustained in February

1997; and that a different contract, contract works policy No CW 628025, which was in force for the period 6 June 1995 to 1 April 1996, is the basis of liability for the first occurrence of storm damage sustained in March 1996. The second leg of the amendment was to convert the amount of the claims from rands to United States dollars. The application for the amendments was opposed. Goldstein J in the court *a quo* did not allow the amendment converting the claim from rands to dollars. That part of his decision is not on appeal. But he allowed the application for the other amendment. The defendant now appeals against that decision, with leave from the court *a quo*.

[3] The defendant's objection to the amendment and its argument on appeal is summarized in the notice of objection. It says that the amendment seeks to introduce a new contract,

contract works policy No CW 628025, which had not been alleged before and which provides indemnity cover for loss for the period 13 to 15 March 1996. The amendment is thus said to introduce ‘a new cause of action or right of action’ based upon the newly alleged contract. This ‘cause of action or right of action’ arose more than three years before the notice of intention to amend, which is the applicable period of prescription laid down by the Prescription Act 68 of 1969, and the defendant accordingly contended that the amendment sought to introduce a prescribed claim.

[4] In developing this argument counsel for the defendant began with the submission that a plaintiff is not precluded from amending his claim provided that the debt which is claimed in the amendment is the same or substantially the same debt as

originally claimed. Counsel's further submissions may be summarized as follows. The debt in the amended claim is not substantially the same debt as originally claimed because the plaintiff confused two different rights arising from two different sources, and that the summons which interrupted prescription of the right originally enforced did not interrupt prescription in respect of the essentially different right in the amendment. The right which the plaintiff originally sought to enforce had its source in the contract numbered CW 654262, and the summons only operated to interrupt the running of prescription of rights which arise from that contract. It did not operate to interrupt the running of prescription of other rights flowing from the second contract alleged for the first time in the amendment. Thus, where there are two separate and different rights to payment arising from two separate and different contracts, and where one is apparent from

the earlier pleadings and the other not, the earlier summons did not interrupt prescription of the other or second right. Counsel pointed out that if the plaintiff succeeded in proving all the allegations in the original particulars of claim it would inevitably fail in respect of the claim for the loss which occurred on 13 to 15 March 1996 because the contract upon which it relied did not provide cover for that period.

[5] In my view this argument must fail. It commences with the sound premise that an amendment is permissible provided that the debt which is claimed in the amendment is the same or substantially the same debt as originally claimed (*Mazibuko* v *Singer;*[1] *Associated Paint & Chemical Industries (Pty) Ltd t/a Albestra Paint and Lacquers* v *Smit;*[2] *Sentrachem Ltd* v *Prinsloo*[3]*).*

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1 1979 (3) SA 258 (W) 265 D – 266 C.
2 2000 (2) SA 789 (SCA) 794 C – G.
3 1997 (2) SA 1 (A) 15 A – 16 D.

The fallacy in the argument lies in the development which followed. It overlooks the broad meaning given by this court to the word 'debt' in the Prescription Act and in doing so in effect equates the debt with the plaintiff's cause of action. The defendant's argument is that by introducing a new contract, the plaintiff has introduced a new cause of action. But it does not follow that by curing a defective cause of action by introducing the contract upon which it really relies, the plaintiff's summons necessarily claims a different debt. Indeed, it is settled law that a summons which sets out an excipiable cause of action can interrupt the running of prescription provided that the debt is cognisable in the summons and is identifiable as substantially the same debt as the debt in the subsequent amendment (*Sentrachem Ltd* v *Prinsloo supra,*[4] *Churchill* v *Standard General Insurance Company Ltd*[5]).

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[4] Footnote 3 at 15 H – 16 D.

[6] The Prescription Act 68 of 1969 uses different wording from its predecessor, the Prescription Act 18 of 1943. Section 3(1) of the 1943 Act provided that 'extinctive prescription is the rendering unenforceable of a right by lapse of time'. Sections 10(1)[6], 11(d)[7] and 12(1)[8] of the 1969 Act provide that a debt shall be extinguished by prescription after the lapse of a period of three years from the date upon which the debt is due. Section 15(1)[9] provides that the running of prescription shall be interrupted by the service of any process whereby the creditor claims payment of the debt. The date upon which the debt in issue became due is 15 March 1996 when the storm damage occurred (*Cape Town*

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5 1977 (1) SA 506 (A) 517 B – C.

6 Section 10(1): 'Subject to the provisions of this Chapter and of Chapter IV, a debt shall be extinguished by prescription after the lapse of the period which in terms of the relevant law applies in respect of the prescription of such debt.'

7 Section 11 lays down the periods of extinctive prescription.

8 Section 12(1): 'Subject to the provisions of subsections (2) and (3), prescription shall commence to run as soon as the debt is due.'

9 Section 15(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.'

Municipality and another v *Allianz Insurance Co Ltd*),[10] and the period of three years elapsed at midnight on 14 March 1999. This date was extended by agreement between the parties to 15 March 2000. The plaintiff's summons and particulars of claim were issued and served before that date. In them the plaintiff claimed payment of a debt, to use the language of the new Act, or enforcement of a right to payment in the language of the old Act. While these concepts are 'merely opposite poles of one and the same obligation' (*Cape Town Municipality and another* v *Allianz Insurance Co Ltd*),[11] it is important to bear in mind that the courts are now specifically concerned with prescription of a 'debt' within the meaning of the 1969 Act. The Act does not define 'debt' and 'there is . . . a discernible looseness of language' in its use thereof with the result that 'debt' means different things in different

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10 1990 (1) SA 311 (C) 324 E-G.

11 Footnote 10 *supra* at 331 C – D.

contexts. For this reason 'debt' in the context of section 15(1) must bear ‘a wide and general meaning’.[12] It does not have the technical meaning given to the phrase ‘cause of action’ when used in the context of pleadings (*Standard Bank of South Africa Ltd* v *Oneanate Investments (in liquidation)*).[13] In *Evins* v *Shield Insurance Co Ltd*[14] Trollip JA made a point of the distinction between ‘debt’ and ‘cause of action”, and describes the latter in the following way:

‘ “Cause of action” is ordinarily used to describe the factual basis, the set of material facts, that begets the plaintiff's legal right of action and, complementarily, the defendant's 'debt', the word used in the Prescription Act.’

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[12] *Cape Town Municipality and another* v *Allianz Insurance Co Ltd* footnotes 10 and 11 *supra* at 330 E – G, quoting *Evins* v *Shield Insurance Co Ltd* 1979 (3) SA 1136 (W) at 1141 F - G; *Oertel en Andere NNO* v *Direkteur van Plaaslike Bestuur en andere* 1983 (1) SA 354 (A) at 370 B.

[13] 1998 (1) SA 811 (SCA) at 826 J.

[14] 1980 (2) SA 814 (A) at 825 F - G. ‘Cause of action’ is also defined in *McKenzie* v *Farmers’ Co-op Meat Industries Ltd* 1922 AD 16 at 23; *Abrahamse & Sons* v *SA Railways and Harbours* 1933 CPD 626; *Evins* v *Shield Insurance Co Ltd supra* per Corbett JA at 838 D – G; *Imprefed (Pty) Ltd* v *National Transport Commission* 1990 (3) SA 324 (T) at 328 G – 329 A.

The debt is not the set of material facts. It is that which is begotten by the set of material facts. This court has, furthermore, recently considered the meaning of the word 'debt' in the Prescription Act on a number of occasions. In *Drennan Maud and Partners* v *Pennington Town Board*[15] Harms JA again emphasized that 'debt' does not mean 'cause of action', and indicated that the kind of scrutiny to which a cause of action is subjected in an exception is inappropriate when examining the alleged debt for purposes of prescription. In *Provinsie van die Vrystaat* v *Williams NO*[16] Olivier JA warned against the danger of being misled by cases which fail to distinguish properly between the debt and the cause of action upon which it is based. See also the *Sentrachem Ltd* case *supra*[17]

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15 1998 (3) SA 200 (SCA) 212 G –I.
16 2000 (3) SA 65 (SCA) 74 E.
17 Footnote 3 at 15 A – 16 D.

and *Associated Paint & Chemical Industries (Pty) Ltd t/a Albestra Paint and Lacquers* v *Smit supra.*[18]

[7] When a court is called upon to decide whether a summons interrupts prescription it is necessary to compare the allegations and relief claimed in the summons with the allegations and the relief claimed in the amendment to see if the debt is substantially the same (*Wavecrest Sea Enterprises (Pty) Ltd* v *Elliot*[19]). In this case there is no amendment to the relief claimed.

[8] I accept that the amendment introduces a new insurance contract as the basis for the claim for the loss which occurred in March 1996. But an objective comparison between the original particulars of the claim and the particulars of claim as amended

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18 Footnote 2 at 794.

19 1995 (4) SA 596 (SE) 600 H – J.

leaves me in no doubt that although part of the cause of action is now a different contract, the debt is the same debt in the broad sense of the meaning of that word. The original pleadings convey, in that broad sense, that the debt was payable by reason of a contractual undertaking to indemnify the plaintiff for the loss which occurred in March 1996, a loss which is fully particularized and of which notice was allegedly given after the occurrence as required by the policy. That is also how it is described in the amendment. I can find no grounds for concluding in this case that a change in the contract relied upon means that a different debt was claimed.

[9] The defendant placed considerable reliance on the case of *Neon and Cold Cathode Illuminations (Pty) Ltd* v *Ephron.*[20] That case involved two contracts with two different parties, and the

[20] 1978 (1) SA 463 (A).

plaintiff initially sued the wrong party on one of the contracts. The court held that the original summons did not operate to interrupt the running of prescription on a subsequent claim based on the second contract. The defendant in this case argued, by parity of reasoning, that the plaintiff did not interrupt the running of prescription on a claim based on contract CW No CW628025, which provided cover for an occurrence in March 1996, by issuing summons on contract No CW654262, which did not. In my opinion this is an invalid argument based upon superficial similarities between this case and the *Ephron* case. It ignores points of distinction that go to the root of the matter. The original summons in *Ephron* was for a claim by a landlord for the recovery of rent from his tenant. The claim failed because the defendant was not the tenant. He was a surety for the obligations of the tenant. The plaintiff then issued summons against him as surety under the

suretyship agreement, and, in order to meet a defence of prescription, he argued that the previous summons for payment of rent had interrupted the running of prescription. The court held that it had not. This was because the claim against the surety was not the same as the claim against the tenant. The judgment lays emphasis[21] on the contractual relationship and the reciprocal rights and obligations flowing from a contract of lease which are essentially entirely different from the relationship and the rights and obligations flowing from a contract of suretyship. This enabled the court to conclude[22] that in the first summons the plaintiff sued to enforce a right which was non-existent because the defendant was not a tenant and could never be liable for payment of rent. The first summons would not interrupt the running of prescription on the claim for rent against the real tenant, and did not interrupt

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21 At 471 C – 472 E.

22 At 472 F.

the running of prescription on the claim against his surety. These points of distinction are differences of principle. They do not arise in the present case, which must be decided in the light of its own facts and circumstances. The contractual relationship alleged in this summons and this amendment was and remains one of insurer and insured, and the debt was and remains the same debt for the same loss, notwithstanding that it became payable by reason of an earlier contract of insurance and not the one originally pleaded.

[10] The defendant also placed reliance on the judgments in *Imprefed (Pty) Ltd* v *National Transport Commission*[23] and *Evins* v *Shield Insurance Co Ltd.*[24] I believe that both cases are distinguishable on the facts and do not assist the plaintiff. In the

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[23] See footnote 14.
[24] See footnote 14.

Imprefed (Pty) Ltd case the court held that a claim for payment of an amount due under a contract was different from a claim for damages based upon breach of contract so that pursuance of the one debt did not interrupt the running of prescription on the other. The nature of the other debt was different. So also in *Evins*'s case which held that a claim for compensation for bodily injury sustained by the plaintiff was not substantially the same as her claim for damages for loss of support following the wrongful killing of her breadwinner, with the result that a summons claiming one did not interrupt the running of prescription on the other.

[11] In the result the appeal is dismissed with costs.

RJW JONES
Acting Judge of Appeal

CONCUR:

MARAIS JA
SCOTT JA
CLOETE JA
SHONGWE AJA