THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable
Case No: 20640/2014

In the matter between:

BERNARD GEOFFREY FISHER **APPELLANT**

and

NATAL RUBBER COMPOUNDERS (PTY) LTD **RESPONDENT**

Neutral citation: *Fisher v Natal Rubber Compounders (Pty) Ltd* (20640/14) [2016] ZASCA 33 (24 March 2016)

Coram: Lewis, Wallis, Willis, Saldulker and Mathopo JJA

Heard: **4 March 2016**

Delivered: **24 March 2016**

Summary: Prescription ─ cession of a claim ─ action instituted by cedent against the debtor ─ claim ceded after *litis contestatio* and substitution of cessionary for cedent not objected to ─ debt not prescribed in terms s 15(2) and (6) of the Prescription Act 68 of 1969.

ORDER

On appeal from: KwaZulu-Natal Local Division of the High Court, Durban (Gyanda J sitting as court of first instance):

The appeal is dismissed with costs including the costs of two counsel.

JUDGMENT

Mathopo JA (Lewis, Wallis, Willis and Saldulker JJA concurring):

[1] This is an appeal against the judgment of the KwaZulu-Natal Local Division of the High Court (Gyanda J) dismissing the appellant, Mr Bernard Fisher's (Fisher) special plea of prescription against the respondent, Natal Rubber Company's (NRC), claim. The appeal is against that finding with the leave of that court. There are no factual disputes. The parties agreed to approach the court a quo on the basis of a stated case and the court ordered a separation of issues in terms of Uniform rule 33(4).

[2] The brief background, is as follows. On 10 November 2010 George Beaton, trading as Meranti and Board (Meranti) issued a combined summons against Fisher claiming payment of the sum of R1 077 377 for goods sold and delivered to a company called Strongwood Manufacturing (Pty) Ltd (now in liquidation). Fisher had stood surety for the latter company. The summons was served on him on 18 November 2010. On 7 January 2011 Fisher filed his plea on the merits and pleadings were closed. On 22 October 2013, Meranti ceded to NRC 'all of its right, title and interest in and to the claims' in relation to its right of action under case number 13172/10 in the court a quo. In terms of clause 2.3 of the deed of cession, it was agreed that NRC would, on fulfilment of the suspensive conditions, apply for its substitution in the stead of Meranti as the plaintiff and that it would thereafter prosecute the case until its final determination. It is not in dispute that the suspensive conditions were fulfilled.

[3] On 9 December 2013 Meranti served a notice in terms of Uniform rule 28(1) to amend the summons and particulars of claim by substituting NRC as the plaintiff. Fisher did not oppose the amendment, which was thus effected. On 22 January 2014, Fisher amended his plea in response to the amended particulars of claim by raising a special plea, contending that, upon cession to NRC after its substitution as the plaintiff, Meranti's interruption of prescription against Fisher had lapsed and that the claim had been extinguished by prescription in terms of ss 15(2) and (6) of the Prescription Act 68 of 1969 (the Act).

[4] Subsections 15(2) and (6) provide as follows:

'(2) Unless the debtor acknowledges liability, the 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.

. . .

(6) For the purposes of this Section, "process" includes a petition, a notice of motion, a *rule nisi*, a pleading in reconvention, a third party notice referred to in any rule of Court, and any document whereby legal proceedings are commenced.'

This appeal turns on whether the substitution of NRC for Meranti amounted to the institution of fresh proceedings, so that the interruption of prescription in terms of s 15(2), effected by Meranti's service of the summons, ceased to be effective. This involved the submission that NRC's action against Fisher only commenced when it was substituted for Meranti as plaintiff.

[5] The argument on behalf of Fisher was the following. The effect of the cession was to substitute NRC for Meranti as creditor. When the order for substitution was made Meranti ceased to pursue the claim and NRC pursued it in its own name and in its own right. Effectively this was a fresh action commenced by the notice of amendment.[1] As Meranti did not prosecute its claim to final judgment the interruption

[1] *Mias de Klerk Boerdery (Edms) Bpk v Cole* 1986 (2) SA 284 (N). On the facts that case is distinguishable. Summons had been issued in the name of Mr de Klerk instead of the company. A notice of amendment to substitute the company for Mr de Klerk was served within the three-year prescriptive period. The respondent contended that this was not process in terms of s 15(6) and therefore that the claim prescribed. The court rejected the contention on the basis that the company commenced proceedings by way of the notice of amendment and that this constituted a process.

of prescription effected by the service of summons fell away. By the time NRC was substituted for Meranti more than three years had elapsed since the claim arose. Accordingly the claim had prescribed.

[6] The counter-argument on behalf of NRC was the following. Prescription was properly interrupted in terms of s 15(2) of the Act by service of the original summons by Meranti. The substitution of NRC for Meranti was purely procedural and after substitution NRC continued to pursue the same claim under the same process. Its substitution did not involve the commencement of a fresh action but the continuation of existing proceedings in respect of the same debt. Accordingly prescription was interrupted by service of the summons and the claim had not prescribed.

[7] Fisher relied strongly in this regard on *Silhouette Investments Ltd v Virgin Hotels Group Ltd*.[2] *Silhouette* is clearly inapplicable to the problem in this case. In that case, the action had been instituted by Silhouette. It later gave notice of intention to amend its particulars of claim by the substitution of one Dyer as plaintiff on the ground that he had taken cession of Silhouette's claim against the defendant. That amendment was effected. A plea was then filed in which reliance was placed upon a provision in the contract that precluded the cession of Silhouette's right. Consequently, Silhouette attempted to re-amend the particulars of claim by substituting itself in the place of Dyer as the plaintiff in the action. As this was done after the expiry of the prescription period, the defendant raised a special plea of prescription, relying on the proposition that the process by which prescription had originally been interrupted had not, within the meaning of s 15(2), been prosecuted to finality, because the original plaintiff, Silhouette, had withdrawn and ceased to pursue the action while still vested with the claim.

[8] The rationale of *Silhouette* is the following. Silhouette ceased to pursue the claim and Dyer stepped in when the summons was amended. But Dyer had not acquired the claim that Silhouette had been pursuing, so there was no continuity in pursuing the claim as there is in this case. Instead the party in whom the claim vested at all times simply withdrew and someone who had no claim continued the

[2] *Silhouette Investments Ltd v Virgin Hotels Group Ltd* 2009 (4) SA 617 (SCA).

action. Accordingly the interruption of prescription lapsed because the claim was not prosecuted under the process in question to final judgment. When it was restored to its position as plaintiff that occurred in terms of the notice of amendment, which became a process under which it was pursuing the claim. The correct view of *Silhouette* is that the party that had the claim ceased to pursue it when Dyer was substituted as plaintiff and, as Dyer had no claim capable of being pursued, the claim was not prosecuted to finality in terms of s 15(2). When Silhouette was substituted for Dyer, it was in effect commencing proceedings afresh. That is wholly different from the present case, where the same claim has been pursued throughout.

[9] In *Waikiwi Shipping Co Ltd v Thomas Barlow & Sons (Natal) Ltd & another*[3] where there was a cession of the claim but no application for substitution, this court held that there was nothing to prevent the cedent from continuing with the claim in its own name. Jansen JA said the following at (678G):

'In practice any purported transfer after *litis contestatio* could only become effective if the court allowed the cessionary to be substituted as the plaintiff. This is a matter apparently within the discretion of the court and the court will refuse the substitution if there is any prejudice to the other side. . . . The transfer is, therefore, only perfected when the court gives its seal of approval by granting the substitution.'

And in *Government of the Republic of South Africa v Ngubane,*[4] an earlier judgment of this court concerned with the question whether an action for pain and suffering could be ceded prior to *litis contestatio*, Holmes JA observed that (at 608B):

'. . . it seems to me that, in regard to a cession after *litis contestatio*, you are not ceding your interest in the claim but in the result of the litigation.'

Jansen JA in *Waikiwi* said the following, when commenting on this dictum (at 677G-678A):

'The "interest in the claim" and the "interest in the result of the litigation" are contrasted. However, there may be three factors involved: (i) the original founding right, (ii) the right arising from *litis contestatio* to proceed with the action to its conclusion, (iii) the *spes* in respect of the benefits that will flow from the successful conclusion of the proceedings. (As to this last, it may be pointed out that a *spes* may also be "ceded". There is, however, a difference of opinion in respect of the nature and precise effect of such a "cession": De Wet and Yeats *Kontrakreg en Handelsreg* 3 ed at 180; *Schreuder v Steenkamp* 1962 (4) SA 74

[3] *Waikiwi Shipping Co Ltd v Thomas Barlow & Sons (Natal) Ltd & another* 1978 (1) SA 671 (A).
[4] *Government of the Republic of South Africa v Ngubane* 1972 (2) SA 601 (A).

(O) at 76A-D. But this dispute does not affect the present issues.) It would seem that in *Ngubane's* case this court by "interest in the result of the litigation" meant the *spes*, and by "interest in the claim", right (ii) (perhaps including right (i)). No doubt a cession may be framed to relate explicitly to the *spes* (cf the cession in *Hall v Howe* [1929 TPD 591], and *Schreuder v Steenkamp* (*supra*)), but the *dictum* seems to imply that even in other cases a cession after *litis contestatio* must be construed as a cession of the *spes*.'

[10] This view was endorsed by Nienaber JA in *Brummer v Gorfil Brothers Investments (Pty) Ltd en andere*,[5] where he expressed himself as follows at (410F):
'Die beginsel wat na my mening uit die *Waikiwi*-beslissing te abstraheer is, is dit: waar 'n vorderingsreg wat die onderwerp van 'n geding is na *litis contestatio* sedeer word, moet die sessionaris, as hy die geding in eie naam wil voortsit, by the Hof aansoek doen om as eiser gesubstitueer te word; alvorens hy dit doen, beskik hy nie oor die nodige *locus standi* nie; die keersy is dat die sedent, tot tyd en wyl sodanige substitusie plaasvind, nie sy *locus standi* verbeur nie. Dit is 'n suiwer prosesregtelike aangeleentheid waarvoor daar gesonde praktiese redes bestaan.'[6]

[11] What Nienaber JA said in effect about cession after *litis contestatio* is that the cessionary stepped into the shoes of the cedent, but that the cedent did not lose his locus standi until the cessionary has been substituted. In other words in the absence of substitution, Meranti would still have been entitled to pursue the action in its own name and obtain judgment. See also *Van Rensburg v Condoprops 42 (Pty) Ltd*,[7] where Leach J held that because there had been no objection to substitution it was no longer open to the defendant to raise prescription. In the same judgment he said the following (para 12):
'When *litis contestatio* was reached, the rights of the defendant . . . in regard to such debt were frozen, and the subsequent cession of Nissen's right, title and interest in the debt did not divest her of her right to prosecute that claim until such time as Van Rensburg was substituted as plaintiff.'

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[5] *Brummer v Gorfil Brothers Investments (Pty) Ltd en andere* 1999 (3) SA 389 (SCA).
[6] To my mind the principle to be extracted from *Waikiwi* is this: where a claim that is the subject of proceedings is ceded after *litis contestatio*, the cessionary must, if he wants to continue the proceedings in his own name, apply to court to be substituted as plaintiff; before he does that, he lacks the necessary locus standi; the converse is that the cedent, until such substitution takes place, does not lose his locus standi. This is a purely procedural matter for which there are sound practical reasons. (My translation.)
[7] *Van Rensburg v Condoprops 42 (Pty) Ltd* 2009 (6) SA 539 (E).

I fully accept the rationale in *Waikiwi* and *Brummer*, that subject to the need for the cessionary to be substituted as plaintiff, a right of action may be ceded after *litis contestatio*. This is what Leach J found in *Van Rensburg*. Where a cession of a claim takes place after *litis contestatio*, the cessionary cedes his or her interest not in the claim but in the result of the litigation.

[12] The cession alone does not transfer the right to prosecute the action to the cessionary. That right only accrues to the cessionary when it is substituted for the cedent as plaintiff. The subject matter of pending litigation can be ceded freely and fully until *litis contestatio*. Such a right may be ceded subject to one limitation: the cessionary is not entitled subsequently to pursue concurrent litigation in its own name. The corollary is that the cedent may continue the existing litigation in its own name. The cession would not divest the cedent of its locus standi nor vest the cessionary with it unless the court on application permits the substitution of the parties. Such an application will not succeed if the substitution will prejudice the debtor.[8] On substitution, the cessionary can pursue the action in its own name.

[13] This review of the law dealing with the implications of a cession after *litis contestatio* highlights an absurdity in the argument on behalf of Fisher. If Meranti had simply continued to pursue the action in its own name, either because that was so agreed with NRC, or because the court refused to authorise a substitution, the point of prescription would not have arisen. But in those circumstances the claim would still have been pursued for the benefit of NRC, albeit the named plaintiff remained Meranti. It would be absurd to hold that the effect of a substitution was to create a defence of prescription where none previously existed.

[14] This approach is reinforced by *Tecmed*.[9] There the original plaintiff, after having issued summons in respect of its claim, merged with another entity and a new entity was formed. The original plaintiff ceased to exist and all its rights and obligations were transferred to the new entity by operation of law. It was then sought

[8] *Devonia Shipping Ltd v MV Lius (Yeoman Shipping Co Ltd Intervening)* 1994 (2) SA 363 (C); *Rosner v Lydia Swanepoel Trust* 1998 (2) SA 123 (W) para 8.
[9] *Tecmed (Pty) Ltd & others v Nissho Iwai Corporation & another* 2011 (1) SA 35 (SCA).

to substitute the new entity in the place of the original plaintiff. A plea of prescription was raised. Brand JA said the following in para 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.'

That case was no different from the present one. A claim vested in one legal entity passed by operation of law to another and that party was substituted as plaintiff in the action. Central to the court's rejection of the argument that the claim had prescribed was the finding that there was an essential continuity in pursuing the claim.

[15] It follows that since the underlying debt was not altered, the cessionary was entitled to proceed with the claim. As the cessionary, NRC stepped into the shoes of the cedent, Meranti, the right of the cedent to pursue the claim fell away. Upon substitution, the cessionary acquired by way of cession, all rights and obligations vested in the cedent at the time of the substitution. What was bestowed on NRC by cession was a claim in respect of which the running of prescription had been interrupted by the service of the summons. In my view the original interruption of prescription by the timeous service of the summons was not affected in any way by the cession or subsequent amendment. The amendment was a mere procedural step followed to effect the substitution. (See *Tecmed* and *Van Rensburg*.)

[16] To demonstrate the fallacy in Fisher's argument one has to look at the 'debt' and the 'process' (summons) – in terms of the Act – under which the debt was pursued. To my mind the debt remains the same throughout. It is illogical to contend that when the cessionary sues on a ceded claim the underlying debt changes. All that happens is that the identity of the person entitled to enforce the debt changes, but not the debt itself.

[17] It seems to me clear that the process under which the debt was being pursued remained the same throughout. To suggest that the summons operated to interrupt the running of prescription when it was initially served but ceased to fulfil that function when there was a notice of amendment or substitution is clearly not consistent with the Act. Any judgment that is granted in favour of NRC in this case will be granted in terms of the original summons and particulars of claim, not in terms of the application for substitution. In the result the original process that interrupted prescription will be prosecuted successfully. That is what is required by s 15(2) of the Act. There is no doubt that it is only the identity of the party (NRC) now pursuing the debt that changes. The debt remains the same and unaffected by prescription.

[18] For these reasons, the special plea must fail. In the result the following order is made:

The appeal is dismissed with costs including the costs of two counsel.

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R S Mathopo
Judge of Appeal

Appearances

For Appellant:	K J Kemp SC (with him L E Combrink) Instructed by: Shepstone & Wylie Attorneys, Durban Matsepes Inc, Bloemfontein
For Respondent:	C P Hunt SC Instructed by: Evershed Attorneys, La Lucia Ridge E G Cooper & Majiedt Inc, Bloemfontein