THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 249/2010

In the matter between:

AERONEXUS (PTY) LIMITED **Appellant**

and

FIRSTRAND BANK LIMITED T/A WESBANK **Respondent**

Neutral citation:	**Aeronexus v Firstrand Bank Limited** (249/2010) [2011] ZASCA 21 (17 MARCH 2011)
Coram:	LEWIS, MAYA and SERITI JJA
Heard:	28 FEBRUARY 2011
Delivered:	17 MARCH 2011
Summary:	Prescription – Extinctive prescription – meaning of 'debt' in s 15(1) of the Prescription Act 68 of 1969 – whether debt recognisable from original summons.

ORDER

On appeal from: South Gauteng High Court, Johannesburg (Beasley AJ sitting as court of first instance):

1 The appeal succeeds with costs.

2 The order of the court below is set aside and replaced with the following:

'The defendant's special plea of prescription is dismissed with costs and judgment is granted in favour of the plaintiff for –

(a) payment in the sum of R1 959 240.30 together with interest thereon at the rate of 15.5 per cent per annum, as from 20 August 2009 to date of payment; and

(b) the costs of the action.'

JUDGMENT

MAYA JA: (Lewis and Seriti JJA concurring)

[1] This appeal concerns the question whether or not the claim of the appellant, Aeronexus (Pty) Ltd (Aeronexus), against the respondent (the bank) became prescribed under the Prescription Act 68 of 1969.

[2] Aeronexus carries on the business of maintenance and repair of aircraft. During July 2001, it concluded a written agreement (the agreement) with a customer, Million Air Charter Ltd (Million Air), to conduct work on certain aircraft owned by the bank. The agreement commenced on 1 June 2001 and would continue for a period of 12 months whereafter it would endure indefinitely until terminated by either party upon written notice.

[3] As at 29 February 2004, Million Air (which was subsequently placed in liquidation) owed Aeronexus a sum of R1 916 395.56 for services rendered under the agreement, which it was unable to pay. Aeronexus held liens over the aircraft under the agreement.[1] In the exercise of its liens, Aeronexus retained control and possession of the aircraft's logbooks.

[1] Clause 10.1 of the agreement provided:
'Aeronexus shall have a lien over the Aircraft and any other property belonging to Million Air which comes into Aeronexus's possession or control for all amounts and liabilities whatsoever due or becoming due to Aeronexus by Million Air, irrespective of whether or not such amount or liability is incurred as a consequence of Aeronexus so being in possession of such aircraft or property at that time.'

[4] To secure the release of the aircraft the bank, on 12 March 2004, issued to Aeronexus a bank guarantee in the following terms:

'At the instance of WesBank, a division of FirstRand Bank Limited of Bank City, Block E, 9 Kerk Street, Johannesburg, we advise that we hold at your disposal an amount of R1 959 240,30 … which amount or any lesser amount will be paid to you on the terms and conditions stipulated herebelow:-

On the successful conclusion of an action to be instituted by you against WesBank ... in respect of your liens relating to a certain Boeing 727-100 aircraft with registration number ZS-IJF and serial number 18444, a certain McDonnell Douglas DC-932 aircraft with registration number ZS-OLN and a serial number 47218 and a certain Pratt & Whitney JT8D-15 engine with engine number 700189.

This guarantee is irrevocable and neither negotiable nor transferable, and must be returned to us against payment.'

Aeronexus consequently released the logbooks to the bank.

[5] On 30 April 2004, Aeronexus issued a simple summons (the original summons) against the bank in which it claimed from the latter

'Payment in the sum/balance of R1 959 240.30 in respect of services rendered and goods sold and delivered during the period of 31 March 2003 to 29 February 2004, which amount is currently due and payable and which amount the Defendant, notwithstanding demand, failed and/or refused to pay.'

[6] The bank promptly delivered its notice of intention to defend the action on 12 May 2004. Almost three years later, on 18 January 2007,

Aeronexus filed a declaration in which it fully set out the facts underlying its claim and specifically pleaded its reliance on the guarantee therefor, albeit for a somewhat lesser amount. This elicited an exception from the bank in terms of Uniform Rule 23(1) averring that Aeronexus was not entitled to sue it on the basis of the alleged debtor and creditor lien. But nothing turns on this objection as it was subsequently abandoned. However, on 26 March 2007, the bank noted yet another exception which was formulated on a different basis. It now averred that the declaration, which relied on a 'bank guarantee issued … pursuant to a lien exercised ... against a third party', was vague and embarrassing and that its allegations differed materially from those set out in the summons which relied on a debt 'in respect of services rendered and goods sold and delivered'.

[7] In response, Aeronexus gave notice of its intention to amend its summons to claim

'Payment in an amount of R1 959 240,30 which is overdue and payable in respect of services rendered and goods sold and delivered by [Aeronexus] to and/or on behalf of … [Million Air] during the period 31 March – 29 February 2004, which resulted in [Aeronexus] acquiring and exercising a lien over certain Boeing 727-100 aircraft, Registration No. ZS-IJF (serial number 18444) and aircraft McDonnell Douglas DC-932, Registration No. ZS-OLN (serial number 47218) and certain Pratt & Whitney

JT8D-15 engine (engine number 700189). The [bank's] liability in respect of such amount arises by virtue of [its] written undertaking . . . '.

[8] Although the bank delivered a notice of objection to the proposed amendment on the ground that it sought to introduce a new cause of action, namely a claim based on a lien and written undertaking which had prescribed on 11 March 2007, the objection was not pursued. Instead, a plea was filed. This pleading incorporated a special plea in which the bank raised the defence of prescription based on an allegation that the debt claimed in the amended summons was not the same or substantially the same debt claimed in the original summons such that the original summons failed to interrupt prescription in respect of the amended claim.

[9] By agreement between the parties, no evidence was led at the trial proceedings and the matter was decided on the basis of the special plea. The South Gauteng High Court (per Beasley AJ) found that the bank's liability arose not from the debtor and creditor relationship alleged in the original summons but wholly from the guarantee, which was an undertaking to pay the relevant amount upon proof of the legality of Aeronexus' liens. The court found further that the 'prescriptive period of three years ... applie[s] to the written guarantee and not to the contract of goods sold and delivered' and that the amended claim which was not

recognisable in the original summons, was filed beyond the period of prescription. The court then concluded that the latter pleading did not interrupt prescription. The special plea was accordingly upheld but the court subsequently granted Aeronexus leave to appeal to this court against its decision.

[10] The crisp issue on appeal, as foreshadowed above, is whether the original summons interrupted the running of prescription in terms of s 15 of the Act. Central to this question is whether the debt claimed is recognisable from the original summons.

[11] It was contended on the bank's behalf, in support of the judgment of the court below, that the original summons did not interrupt prescription. This was so, the argument went, because the debt claimed in the amended summons based on the guarantee (which was conditional upon Aeronexus instituting an action in respect of its alleged liens) is not the same or substantially the same as the debt claimed in the original summons based on services rendered and goods sold and delivered to which no reference was made in the guarantee. The debt flowing from services rendered and goods sold and delivered, it was argued, did not arise against the bank as there was never a debtor and creditor relationship between the parties arising therefrom. Thus, Aeronexus was precluded by law from

instituting an action against the bank based on the debtor and creditor lien envisaged in the agreement and any lien it had against the bank would be limited to a claim for necessary and useful expenses and only to the extent that the bank was enriched thereby.

[12] In terms of sections 10(1),[2] 11(d),[3] and 12(1)[4] of the Act, a debt shall be extinguished by prescription after the lapse of a term of three years after the date from which the debt becomes due. Section 15(1) provides:

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

[13] The term 'debt' is not defined in the Act. In interpreting it, courts have given it a broad, flexible meaning, capable of different, context-based connotations.[5] This meaning refers more generally to the claim and is wider than the technical term 'cause of action' (the phrase ordinarily used to describe the set of material facts relied upon to establish the

[2] Section 10(1) of the Act provides: '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.'
[3] According to s 11(d) of the Act, 'save where an Act of Parliament provides otherwise, [the period of prescription of debts shall] be three years'. . . .'
[4] Section 12(1) provides: 'Subject to the provisions of subsections (2), (3) and (4), prescription shall commence to run as soon as the debt is due.'
[5] *Cape Town Municipality and another v Allianz Insurance Co Ltd* 1990 (1) SA 311 (C) at 330E-H; *CGU Insurance Ltd v Rumdel Construction (Pty) Ltd* 2004 (2) SA 622 (SCA) para 6.

debt).[6] It is therefore critical to guard against confusing a debt with the cause of action which begets it.[7]

[14] The question whether a summons interrupts prescription requires a comparison of the allegations and relief claimed in the summons with the allegations and relief claimed in the amendment to assess if the debt is the same or substantially the same.[8] In deciding whether prescription was interrupted by legal process – a summons falls within the definition of 'process' set out in s 15(6) of the Act – the right or debt sought to be enforced by means of the amendment must be the same or substantially the same as that alleged in the original process: the substance rather than the form of the original process must be considered.[9]

[15] There is no question that the original summons is defective. It should, preferably, have made it clear that the bank was being sued on the basis of the undertaking it had given under the guarantee. The amendment which introduced the guarantee therefore presented a different basis for the claim. But the attempt to clarify the claim properly (which is what the

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[6] *Evins v Shield Insurance Co Ltd* 1980 (2) SA at 814 (A) at 825F-G; *Standard Bank of South Africa Ltd v Oneanate Investments (Pty) Ltd (In Liquidation)* 1998 (1) SA 811 (SCA) at 826J; *Drennan Maud & Partners v Pennington Town Board* 1998 (3) SA 200 (SCA) at 212F-G.

[7] *Sentrachem Ltd v Prinsloo* 1997 (2) SA 1 (A) at 15A-E; *Associated Paint & Chemical Industries (Pty) Ltd t/a Albestra Paint and Lacquers v Smit* 2000 (2) SA 789 (SCA) at 794.

[8] *Wavecrest Sea Enterprises (Pty) Ltd v Elliot* 1995 (4) SA 596 (SE) at 600H-J; *CGU Insurance Ltd v Rumdel Construction* para 7; *Rustenberg Platinum Mines v Industrial Maintenance Painting Services* [2009] 1 All SA 275 (SCA) para 19.

[9] *Neon and Cold Cathode Illuminations (Pty) Ltd v Ephron* 1978 (1) SA 463 (A) at 471A-B; *Associated Paint* (supra) para 15.

amendment sought to do) is not, in my opinion, tantamount to the introduction of a new debt in the circumstances of this case.[10] It is well to bear in mind that 'it is inaction, not legal ineptitude, which the Prescription Act is designed to penalise'[11] and that even an excipiable summons which does not set out a cause of action can nevertheless serve to interrupt prescription as long as it is not so defective that it amounts to a nullity.[12]

[16] What was sought to be enforced in the original summons was payment of a debt in the sum of R1 959 240.30 accruing originally from 'services rendered and goods sold and delivered' during 31 March 2003 to 29 February 2004. The same relief is sought in the amendment. Apart from the omission of the guarantee – which served as security for payment in respect of the selfsame 'services rendered and goods sold and delivered' averred in the original summons – I can discern no inconsistency between the allegations made in the unamended claim and those set out in the amended claim. A comparison of the *facta probanda* and relief claimed in both pleadings rather shows that whilst portion of the 'allegations or "cause of action" upon which the relief claimed is

[10] *Trans-African Insurance Co Ltd v Maluleka* 1956 (2) SA 273 (A) at 279B-C; *Churchill v Standard General Insurance Co Ltd* 1977 (1) SA 506 (A) at 517C; *Imprefed (Pty) Ltd v National Transport Commission* 1990 (3) SA 324 (T) at 329C-D.
[11] *Mazibuko v Singer* 1979 (3) SA 258 (W) at 266A. See also the minority judgment of Trollip JA in *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 825F-H.
[12] *Standard Bank of SA v Oneanate Investment (Pty) Ltd (In Liquidation)* 1998 (1) SA 811 (SCA) at 825H-I.

based in the amendment differs from the allegations or "cause of action" set out' in the original summons, 'the relief claimed, ie the "debt"' is substantially the same in the broad sense of the meaning of the word.[13] Although flawed, the original summons nonetheless gave a general indication of the claim sought to be enforced sufficient for the bank to understand the nature of the claim made against it. The special plea should therefore have been dismissed.

[17] Finally, it was argued on the bank's behalf that in the event that the appeal succeeded, Aeronexus would not be entitled to interest from 12 March 2004 as claimed, but from the date on which the judgment of the court below was delivered. This argument was based on the guarantee's provision that Aeronexus would be entitled to payment upon the successful conclusion of the action it would institute against the bank in respect of its liens. This, it was contended, showed that the parties contemplated that Aeronexus would first have to prove its claim by way of litigation. I agree. The judgment of the court below was delivered on 20 August 2009 and that is the date from which interest should run.

[18] In the result the following order is made:

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[13] *CGU Insurance Limited v Rumdel Construction (Pty) Ltd* 2004 (2) SA 622 (SCA) para 8. See also *Rustenberg Platinum Mines v Industrial Maintenance Painting Services* [2009] 1 All SA 275 (SCA) para 19.

1 The appeal succeeds with costs.

2 The order of the court below is set aside and replaced with the following:

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(a) payment in the sum of R1 959 240.30 together with interest thereon at the rate of 15.5 per cent per annum, as from 20 August 2009 to date of payment; and

(b) the costs of the action.’

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MML MAYA

JUDGE OF APPEAL

APPEARANCES:

For appellant:	JJ Brett SC
Instructed by:	Schindlers Attorneys, Johannesburg
	Webbers Attorneys, Bloemfontein
For respondent:	CW Jordaan SC with F Becker
Instructed by:	Smit, Jones and Pratt, Johannesburg
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