IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG)

Case number: 10831/2012

In the matter between:

CIRANO INVESTMENTS 307(Pty) Ltd **Plaintiff**

and

EXECUJET AVIATION (Pty) Ltd **Defendant**

JUDGMENT

Carelse J:

[1] Cirano Investments (Pty) Ltd, the Plaintiff sues Execujet Aviation (Pty) Ltd, the Defendant for damages suffered as a result of a breach of an agreement, alternatively the repudiation thereof.

[2] The defendant raised a special plea of prescription. By agreement the parties applied in terms of Uniform Rule 33(4) for the issue of the special plea to be determined separately and that all other issues be postponed sine die. I accordingly granted the order separating the issue of prescription and ordered that all other issues be postponed *sine die.*

Factual Background

[3] On 20 December 2011, the Plaintiff and the Defendant entered into a written aircraft lease agreement ('the agreement'). The relevant and material terms of the agreement for the purpose of this judgment are:

> 3.1 The Plaintiff leased a Hawker 800 XP aircraft to the Defendant.[1]
>
> 3.2 The lease would be for a period of 12 months, commencing on 7 January 2012 and would come to an end on 6 January 2013.[2] The lease would commence upon the delivery of the aircraft
>
> 3.3 The Defendant agreed to pay rental to the Plaintiff as follows:
>
> > 3.3.1 A guaranteed 50 hours per month at a rate of US $ 1850, 00 which is equivalent to US$ 94 250, per month.[3]

[1] Clause 1.1 of the agreement
[2] Clause 1.4 of the agreement
[3] Clause 8.1.1 of the agreement

3.3.2 A rate of US $ 1993, 00 for each and every flight hour that the Defendant operated the aircraft in excess of the said monthly guaranteed minimum of 50 flights per month.[4]

3.4 Before the aircraft departs on 7 January 2012 the Defendant shall pay to the Plaintiff in advance:

3.4.1 The value of one month's rental as a refundable deposit, being US $ 94 250, 00 to secure the aircraft.[5]

3.4.2 The first month's rental as calculated for the minimum of 50 guaranteed flight hours per month, of US $ 94 250, 00 before the aircraft departed from Lanseria.[6]

3.5 The defendant further agreed to pay:

3.5.1 The monthly rental for the subsequent months in advance, by the first day of the relevant month.[7]

3.5.2 The rate in respect of the additional hours flown with the aircraft (in excess of the said monthly guaranteed minimum) in arrears, within 15 days of the date of the invoice of the relevant month.[8]

3.5.3 All payments made the under the agreement shall be in South African rands in terms of the lease, and the exchange rate shall be

[4] Clause 8.1.1 of the agreement

[5] Clause 8.2 of the agreement
[6] Clause 8.2 of the agreement
[7] Clause 8.2 of the agreement
[8] Clause 8.3 of the agreement

determined on the 25th of the preceding month and as determined and published by www.oanda. com.[9](my underlining).

[4] The Plaintiff alleges that on 23 January 2012 it delivered the aircraft at Lanseria to the Defendant. The Plaintiff further alleges that it complied with all its obligations under the agreement.

[5] On 22 March 2012 the Plaintiff instituted action proceedings against the Defendant. In its particulars of claim ('initial particulars of claim') the Plaintiff alleges that the defendant breached the following of its obligations under the agreement namely:

5.1 The Defendant failed to pay the deposit of US $ 94 250, 00 to the Plaintiff on or before 7 January 2012.

5.2 The Defendant failed to pay an amount equal to the first month's rental of US$ 94 250,000 on or before 7 January 2012.

5.3 The Defendant failed or refused to take delivery of the aircraft on or about 23 January 2012.

[6] Because of the Defendant's alleged breaches, alternatively the Defendant's repudiation of the lease, the Plaintiff cancelled the lease[10] and alleges that it

[9] Clause 8.4.1
[10] para 13 of the particulars of claim -22 March 2012

has suffered damages[11] in the amount of US $ 519 187, 50[12] calculated as follows:

> 'rental for the aircraft over the term of the lease, calculated on the minimum monthly of 50 flying hours at the rate of US $ 1885,00 per flight hour , comprising US $ 94 250,00 per month from 23 January 2012 to 6 January 2013 (11,25 months) totalling US $ 1 060, 312,50 less the maintenance costs and all replacement and repairs of components averaging US $ 48, 100 per month over the duration of the terms(11.25 months) totalling US $ 541,125.'

[7] In its initial particulars of claim (22 March 2012) the Plaintiff prayed for payment in the amount of US $ 519 187,50 or the South African rand equivalent (my underlining).[13] The Defendant [14] submits that the Plaintiff did not in terms of clause 8.4.1 of the agreement claim payment in South African rands.

[8] It is common cause that the Plaintiff has effected two amendments to its initial particulars of claim. In its amended plea the Defendant alleged that the Plaintiff's case is for damages arising out of a loss of profits which Plaintiff is precluded from claiming in terms of clause 11.4 of the agreement.[15] This issue was dealt with as a special plea by Wepener J. In a judgment delivered by Wepener J on this issue which issue was put to rest when the Court found that the Plaintiff is not precluded by the provisions of 11.4 to sue for damages

[11] para 13 " " "
[12] para 14 " " "
[13] Prayer (a) initial particulars of claim- 22 march 2012
[14] See para 3.5.3 above

[15] 11.4 of the agreement: The parties shall be exempt from and no Party shall be liable under any circumstances for any direct, special or consequential damages of any nature or any loss of profit loss . . .

it suffered as a result of the cancellation, alternatively the Defendant's repudiation of the agreement.

[9] On 1 December 2016 the Plaintiff served a notice of amendment in which the Plaintiff changed its claim from a dollar amount of US $ 519 187.50 calculated as set out in paragraph [6] above [16] to a rand claim of R4 759 853, 39 calculated as follows:

> ' 14.1 rental for the aircraft over the term of the lease, calculated on the minimum monthly income of 50 flying hours at a rate of US $ 1885,00 per flight hour, comprising US $ 94 250,00 per month, from 23 January 2012 to 6 January 2013, totalling R8909 101,07 in South African rands. (The conversion from US dollars to South African rands is in accordance with clause 8.4.1 of the lease),[17] 14.2 less insurance costs over the duration of term, which the Plaintiff would otherwise be liable for in terms of clause 4 of the lease totalling R2 099 477 01; income which the Plaintiff received from third parties who utilised the aircraft during the contract term in the amount of R 2049 770.67.'[18]

The amendment was effected on 19 December 2016('the first amendment").[19]

[10] On 28 September 2018 the Plaintiff served a further notice to amend its particulars of claim to increase its claim which amendment was effected on 12 October 2018. The Plaintiff increased its claim by R 1 689 520. 94 from R4 759, 853, 39 to R 6 449 374, 33 calculated as follows;

> '14.1 rental on the aircraft over the term of the lease, calculated on the minimum monthly income of 50 flying hours at a rate of US $ 1885,00 per flight hour, comprising US $ 94 250,00 per month, from 23 January 2012 to 6 January 2013, totalling R8 909 1102,07 in South African rands (The conversion from US dollars is in accordance with clause 8.4.1 of the lease) less 14.2.1 insurance costs over the duration of the term , which the Plaintiff

[16] para 14 , 14.1 and 14.2 in the initial particulars of claim 22 March 2012.
[17] Para 14.1 of the first amended particulars of claim
[18] Para 14.2 " " "
[19] First amendment para 14, 14.1 14.2

would otherwise be liable for in terms of clause 4 of the lease totalling R90 121.43 ; income which the Plaintiff received from 3rd parties who utilised the aircraft during the contract term in the amount of R2 114 167, 167,47; less fuel paid by the Plaintiff of R1031012.86; less salaries and expenses towards pilots R848 028,91; less hangerage fess and fees payable to Lanseria airport R369 191, 57. Total – R134 065.87 loss; 14.23 Expenses towards maintenance and repairs and service R2 455 671.18.'[20]

[11] The Defendant raises two objections. The first objection is in respect of the first amended particulars of claim to the extent that the Plaintiff's rand claim of R4 7759 853, 99 is a different debt to the debt claimed in the initial particulars of claim in which a US dollar amount was claimed and which debt arose during March 2020, more than three years prior to the Plaintiff's first amendment (19 December 2016). The Defendant submits that the debt has become extinguished by prescription in terms of section 10(1), 11(d) and 12(1)[21] of the Prescription Act 68 of 1969("The Prescription Act").

[12] The second objection relates to the second amended particulars of claim (12 October 2018). The Defendant submits that the alleged debt owed by the Defendant in the amount of R6 449 374,33 is a different debt to that claimed in the initial and the first amended particulars of claim which arose in March

[20] Para 14.2; 14.2.1; 14.2.2; 14.2.3.

[21] " 10 Extinction of debts by prescription

(1) Subject to the provisions of this Chapter and of Chapter 1V, 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.

11 Periods of prescription of debts shall be the following:

. . .

(d) save where an Act of Parliament provides otherwise, three years in respect of any debt.

12 When prescription begins to run

(1) Subject to the provisions of subsections (2), (3), and (4), prescription shall commence to run as soon as the debt is due. . .'

2012, more than three years prior to the Plaintiff's first amendment. That being so, the debt has become extinguished by prescription, so the Defendant submits. The Defendant submits that the special plea be upheld and the Plaintiff's claim be dismissed, alternatively that the special plea be upheld with costs to the extent of the additional amount R1 689 520.94.

[13] The central issue that I am required to determine is whether or not the debt now being claimed in the second amended (12 October 2018) and in the first amended (19 December 2016) particulars of claim is the same or substantially the same debt that was originally claimed in the initial particulars of claim (22 March 2020).If it is, then then the issue of prescription does not arise. If it is not the same debt or substantially the same debt then the debt now been claimed will have been extinguished by prescription.

The applicable legal principles

[14] I have been referred to a number of judgments dealing with the distinction and meaning of the word 'debt' and the cause of action.' In the case of Sentrachem Ltd v Prinsloo 1997(2) SA 1 (SCA) the court settles this distinction. In Sentrachem *supra* Prinsloo sued Sentrachem for damages sustained in Prinsloo's citrus orchards. Prinsloo initially attempted to recover the damages with a claim formulated as a breach of contract. After a period of more than three years, Prinsloo amended his particulars of claim and introduced a delictual claim. The Court rejected the special plea of prescription raised and found that the Plaintiff was recovering the same debt.

[15] The facts in CGU Ins. Ltd v Rumdel (Pty) Ltd 2004(2) SA 622 (SCA) are that the Plaintiff issued summons against the Defendant for loss caused by storm damage. The amount due was claimed in terms of a single contract of insurance contained in the particulars of claim. The Plaintiff gave notice to amend its particulars of claim in two respects. Firstly, to include an allegation that the Defendant is liable to indemnify it in terms of two contracts. Secondly, to convert the rand currency to a US dollar currency. The amendment to include the new contract was granted, but the conversion was refused. Leave to appeal was only sought on the basis of the inclusion of the second contract. On appeal the portion of the amendment where leave was granted was dismissed. The Supreme Court goes on to mention in a single sentence without any reasons provided that the conversion from South African rands to US dollars was not allowed. We cannot speculate what the reasons of the Court was. It could very well have been a term contained in the agreement between the parties. In this case the Defendant rightly did not seek to rely on CGU *supra* in so far as the issue of the conversion of currency is concerned In CGU *supra* the court held that:

> ' . . . [5] In my view, this argument must fail. It commences with the sound premise that an amendment is permissible provided that <u>the debt which is claimed in the amendment is the same or substantially the same debt as originally claimed . . . (my underlining)</u>
>
> [6] . . . 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 & Partners v Pennington Town Board Harms JA AGAIN emphasised 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 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 Sentrachem Ltd case *supra* and Associated Paint & Chemical Industries (Pty) Ltd t/a Albestra Paint and lacquers v Smit (supra).

[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. ..'

[16] In Deez Realtors CC t/a Firzt Realty Company and Others v South African Securitisation Program (Pty) Ltd and Others (175/2016)[2016] ZASCA 194(2 December 2016) the court held:

> '[11] Counsel were agreed that in order to determine whether the debt sought to be recovered by the plaintiffs prior to and post the amendment is substantially the same, it is necessary to compare the allegations and relief claimed in both instances. . .
>
> [20] As I see it, this appeal raises the fundamental question whether the debt in the amended claim is the same or substantially the same debt as originally claimed by the plaintiffs. If it is, the appeal must fail. But if it is not, then the appeal must succeed . . .
>
> [33] To my mind, the contentions advanced by the defendants are unsustainable. They manifest a misconception of the concept of a 'debt' within the meaning of s 10(1) of the Prescription Act. This court has repeatedly emphasized that the word 'debt' bears a 'wide and general meaning' and that it 'does not have the technical meaning given to the phrase "cause of action" when used in the context of the pleadings.' In Evans v Shield Insurance Co Ltd 1980 (2) SA 814(A) at 825 F-G, Trollip JA was at pains to explain the distinction between a 'debt' on the one hand and ' cause of action' on the other in these terms. (my underlining)

> ‘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, complimentarily, the defendant’s “debt”, the word used in the Prescription Act.’
>
> [34] This meaning of ‘debt’ was, most recently, elaborated upon by the Constitutional Court in Makate v Vodacom Ltd [2016] ZACC 13; 2016(4) SA 121(CC) which withreference to the New Shorter Oxford English dictionary, 3ed (1993) vol 1 at 604, said (para 85):
>
> ‘1. Something owed or due; something (as money, goods or service) which one person is under an obligation to pay or render to another. 2. A liability or obligation to pay or render something; the condition of being so obligated.’
>
> [35] In my view the effect of the amendment of the plaintiffs claim was meant to cure a defective cause of action (namely, mistakenly claiming accelerated rentals when they had already cancelled the contract) by introducing the correct cause of action for liquidated damages pursuant to the election that they had exercised . The nature of the debt claimed remained the same. In substance, the remedies provided for in clause 14.1 both sought to place the plaintiffs in the position in which they would have been, had the breach not intervened. Hence they gave rise to a single debt. As emphasised by this Court in CGU Insurance, ‘the debt is not the set of material facts’ required to sustain the cause of action but rather ‘that which is begotten by the set of material facts.’”

[17] In my view the cases relied on by the Defendant does not assist the Defendant’s case, in particular the matter of Deez *supra.* In Deez *supra the* amendment replaced the claim for accelerated payment of the remaining instalments with a damages claim. The Court even though there is a difference in the two claims found that it remained a claim for the same debt. In Aeornexis (Pty) Ltd v Firstrand (249/2011ZASCA 21 (17March 2011), the Supreme Court of Appeal concluded that after the amendment the Plaintiff was substantially still seeking the same relief which was for services

rendered and for goods sold and delivered. The appeal was upheld and the special plea was dismissed.

[18] Pertinently in Evans v Shield Insurance Company Ltd 1980(2) SA 814 (A) at 836 C-E, the court held:

> 'Where the Plaintiff seeks by way of amendment to augment his claim for damages, he will be precluded from doing so by prescription if the new claim is based upon a new cause of action and the relevant prescriptive period has run, but not if it was part and parcel of the original cause of action and merely represents a fresh quantification of the original cause of action or the addition of a further item of damages.'(my underlining).

[19] I turn now to analyse the initial, first and second amendments, the findings of Wepener J and the agreement which is the foundation of the claim for the purposes of this judgment. Pertinently whether the amendments introduce a new debt and whether such debt has prescribed. The heading in clause 8 of the agreement makes it clear that clause 8 expressly deals with the rental of the aircraft, in other words what the Defendant must pay the Plaintiff over 11.25 months (term of the lease).

[20] It is the Defendant's case and which it strongly argued that the first amended particulars of claim (19 December 2016) where the Plaintiff replaced the amount expressed in US dollars to an amount in South African rands is impermissible in light of prayers 8.4 and 8.4.1 of the agreement.[22]The

[22] See para 3 footnote 9

Defendant further submits that the reason for the amendment was because the Plaintiff realised that it could not claim a dollar amount and more specifically the Plaintiff did not rely on clause 8.4 and 8.4.1 of the agreement. Prescription would start to run from 22 March 2012.

[21] The Defendant places sole reliance on clause 8.4 of the agreement. No mention is made to either clause 8.1 and 8.2 of the agreement by the Defendant. Both the Plaintiff and the Defendant's payment obligations are set out in clause 8.1 and 8.2 of the agreement. The Defendant submits that the foundation of the Plaintiff's amendment can be found in clause 8.4. The Plaintiff submits that clause 8.4 is merely the methodology on how to calculate the claim and the conversion from US dollars to South African rands. I agree. Simply put even though pricing is expressed in dollar currency payments must be made in rands.

[22] The Plaintiff correctly submits that if payment must be made in rands, it does not suddenly create a different debt. The debt remains the same. Payment in rands does not change the nature of the claim which is and has all along been the obligation to pay rental which is the debt.

[23] Paragraphs 14.1 is the same in all three sets of particulars of claim (initial, 19 December 2016 and 12 October 2018). The terms of the contract are extensively pleaded in paragraph 5.7 of the particulars of claim and refers to clause 8.1.1 of the agreement.

[24] The nature of the claim has been determined by Wepener J in his judgment to the extent that the claim is not for consequential damages but is one for direct damages because of the cancellation of the agreement. The direct loss is the failure to pay rent in terms of the agreement. The quantum in US dollars is in the amount of US $519,187, 50. It is incorrect to say that the first amended claim has been increased. In fact, the Plaintiff made certain deductions because the aircraft was not utilised. Prayer (a) of the initial particulars of claim, claimed either in US dollars or South African rands. The Plaintiff did not confine the claim to a dollar currency. The defendant submitted that the reason for the first amendment is because the Plaintiff would have been non-suited. I disagree. There is nothing stopping the Plaintiff at the hearing of the matter to do the conversion.

[25] Turning to the first amended particulars of claim. The question to be answered, is it a new debt or the same debt. The allegations, the names of the parties, the contract and the damages are the same as the initial particulars of claim. The first amendment remains the same debt and 8.4 only deals with the methodology. Furthermore, all that the amendment amounts to is a fresh quantification.

[26] Turning to the second amended particulars of claim (12 October 2018). It is based on the same agreement, the same terms and the same allegations. Paragraph 8 is a mirror image of the initial and the first amended particulars.

Paragraph 13 is the same damages. In paragraph 14 the Plaintiff seeks R 6 497 374, 00, instead of R4 7 59 853, 39. The question again to be answered is whether or not it is a new debt. Paragraph 14 of the second amended particulars of claim is the same as the initial and the first amended particulars of claim. The figures in paragraph 14.2 in the second amended particulars of claim differ from those in the initial and first amended particulars of claim.

[27] In my view the different figures do not create a new debt. The claim remains a claim for damages as a result of the failure to pay rental. There is no merit in the special plea of prescription and cannot succeed.

[28] In the result I make the following order:

28.1 The special plea of prescription is dismissed.

28.2 The Defendant is ordered to pay the Plaintiff's costs, including the costs consequent upon the employment of senior counsel

Electronically transmitted, therefore no signature

_____

Z Carelse

Judge of the High Court, Johannesburg

Counsel for the Plaintiff: **Mr van der Merwe SC**
Instructed by: **Smit & Sewgoolam attorneys'**

Counsel for the Defendant: **Mr L Hollander**

Instructed by: **NSH Inc**

Date of Judgment

The judgment was handed down electronically by circulation to the parties' representative by email on 4 September 2020 at 10h00.