

(Inlexso Innovative Legal Services) of
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2327/2005

DATE: 2021.12.08

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED

10 In the matter between

DE ABREU AND FERNANDES

and

PESTANA FAMILY MEAT AND CHICKEN CC AND ANOTHER

J U D G M E N T

VICTOR, J: This is an objection to a special plea on the basis of the amendment of the plaintiffs' claim has prescribed.

20 This matter has a long history. The litigation started off in 2005. The essence of the claim is as follows. The plaintiff pleaded that on 13 May 2003 and at Carletonville the parties entered into a written agreement. In terms of the agreement the first defendant sold to the plaintiff a business conducted at Carletonville Extension under the name and style of the

Sportsmen's Bar and Restaurants. The sale included the goodwill, stock in trade, fixtures and fitting. It was sold as a growing concern. The plaintiff would pay to the first defendant the sum of R1.5 million payable as follows: R300 000 prior to signature. That R300 000 was paid over. The balance of R1.2 million would be paid by way of 60 post-dated cheques to the value of R20 000 for each cheque. The possession of the business and occupation and transfer of the business would be 1 April 2003. On that date, the first defendant would be
10 entitled to all income and would be liable for all expenditure of the business. The business would be at the sole risk of the plaintiffs who would be entitled to all their income and liable for any expenditure. As part of the agreement, the plaintiff undertook to keep the premises open and maintain the business in a clean and proper manner. There would be adequate supervision of the business. Of importance is that within a reasonable time after signature of the agreement the defendants would transfer the existing liquor licence pertaining of the business to the plaintiffs, failing which the agreement
20 would lapse and would no longer be of force or effect. The prayer sought in the original particulars of claim was for payment of the sum of R1 500 00 plus payment of R630 000.

The amendment refers to a prior written document which records a "declaration of sale." It records that an amount of

R1 500 000 has already been received and that the outstanding balance of R2.3 million will be paid in 60 months with no interest.

The liquor licence was never transferred. The plaintiff alleges that the first defendant is in breach of the agreement and a reasonable time had elapsed for the transfer of the liquor licence.

The first defendant accepted the tender of the business and is in possession of the business. However, the defendants
10 failed to repay the plaintiffs being the deposit of R1 500 00 plus the submitted post-dated cheques in the R630 000.

The plaintiff claims payment of the sum of R1 500 000 and payment in the amount of R630 000 and interest and costs on those amounts.

The trial commenced and seemed to have stopped and start to the consternation and frustration of all the parties including the learned Judge that was seized with the matter. For reasons of illness by the parties and the learned judge being called away for a number of work related issues there
20 have been endless postponements. In order to speed up the completion of the trial I was requested to deal with one aspect and that is this special plea of prescription.

The plaintiff introduced an amendment in 2013 after the first plaintiff had testified. The amendment is encapsulated in

a new paragraph 7 to the particulars of claim. The amendment asserted that on or about 31 March 2003 the plaintiffs and the second defendant entered into a written declaration of sale simply recording payments which the plaintiffs had made. The plaintiffs paid a deposit to the second defendant in the amount of R1 500 00 and provided post-dated cheques in the amount of R3 800 000. In paragraph 8 of the amendment the plaintiffs pleaded that they paid the plaintiffs paid the sum of R1 200 00 in cash and thereby ensuring the conclusion of the agreement.

10 Presumably the difference between R1 200 000 and the amount of R1 500 000 reflected in the declaration of sale will be explained in the trial.

The defendants raised the special plea based on the fact that the plaintiffs amended their particulars of claim and thereby introduced a new cause of action by averring that on or about 31 March 2003 the plaintiff of the second defendant acting personally entered into a written agreement and reiterated the claim as set out in the original summons.

The plaintiffs plead in their amendment that they informed the
20 first defendant on 31 August 2004 in writing that the agreement had lapsed. Of course, this is based on the failure to effect the transfer of the liquor licences and claimed their money back. The amendment claims the exact same amount as was pleaded in the original particulars of claim of R1.5 million being the deposit and R630 000 in exchange for

the cheques.

The defendants allege that by introducing this amendment it amounted to a new cause of action. By virtue of that fact that the defendants now plead that that new cause of action was introduced at least 8 years after it arose.

The claim constitutes a debt as defined in terms of the Prescription Act 68 of 1996 and in terms of section 11 of the Prescription Act the plaintiff's claim has prescribed.

10 It is necessary to assess whether the amendment introduces a new cause of action. In the case of *Imperial Bank Ltd v Barnard NNO and Others* 2013 (5) SA 612 (SCA) the question for analysis is whether the amendment introduces a new cause of action or simply an amplification of existing debt".

Mpati P stated in paragraph 8:

20 "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 costs or by some other suitable order such as a postponement'. 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. 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
30 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:

10 'In Churchill's case, *supra* at p. 517B – C, this Court, through Rumpff, CJ, 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.', reference is made to the fact that an amendment would always be allowed unless it would cause prejudice to the other party that cannot be compensated or by an order of costs. One of the examples would be if the amendment does not allow a plea of prescription. The question to be determined is what exactly a defence of prescription is. A plaintiff is not precluded from amending his or her claim provided that the debt which is claimed in the amendment is the same or substantially the same debt as originally claimed and provided for."

20 In *Neon and Cold Cathode Illuminations (Pty) Ltd v Ephron* 1978 (1) SA 463 (A) Trollip JA referring to the case of *Churchill v Standard General Insurance Co Ltd* 1977 (1) SA 506 (A) pointed out that in that case:

"... the previous summons need not set out 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 as in the previous cause of action.'

In *Sentrachem Ltd v Prinsloo* 1997 (2) SA 1 (A) Eksteen JA
30 expressed himself as follows:

"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 .."

Therefore, in applying the above principles to this case, the plaintiffs have argued that the claim and cause of action is
40 essentially the same as originally pleaded and submit the plea of prescription must fail. The plaintiffs point out that the cause of action although initially was based on either one written contract and now two written contracts as set out in the

amended particulars of claim are essentially the same claim.

It is for this Court to determine whether the second written contract is really a form of evidence supporting the initial cause of action. The plaintiff also points out that the prayers and the amounts are exactly the same. The parties and the prayers are identical. The plaintiffs are pursuing the same debt. The debt has not become prescribed since it is the same debt as set out in the initial particulars of claim.

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In this regard, the plaintiff relies on *Sentrachem Ltd v Prinsloo* 1997 (2) SA 1 (A) at 16A. Reference is also made to the case of *Mokoena v SA Eagle Insurance Co Ltd* 1982 (1) SA 780 (O) at 786B-D, with specific reference to s 15(1) of Act 68 of 1969 where Colman J held:

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'The words "any process whereby action is instituted" in s 6(1)(b) refer to any proceedings of a civil nature for the enforcement of a right. The right referred to is obviously a right to claim payment of a debt, using the word "debt" in its wide sense. In s 15(1) the Legislature is more explicit and speaks of "service on the debtor of any process whereby the creditor claims payment of a debt" from which it appears, as stated by Corbett JA in the *Evins* case supra, that Act 68 of 1969 views prescription from the point of view of the debtor. It is accordingly sufficient for the purposes of interruption of prescription that the process by means whereof action is instituted should seek to enforce the same or substantially the same right which would otherwise cease to exist as a result of the correlative debt being extinguished by the lapse of time.'

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The defendants rely on a number of cases including *Miller v HL Shippel & Co (Pty) Ltd* 1969(3) SA 447(T). The defendants contend that the plaintiffs now rely on a second

written agreement. This they contend differs substantially from the alleged first agreement originally pleaded. Based on the provisions of the Prescription Act according to the defendants the cause of action has prescribed.

The defendants also rely on the case of *Frieslaar NO v Ackerman* (1242/2016) [2017] ZASCA 03 where Petse JA reiterated the dictum in *Drennan Maud & Partners V Pennington Town Board* 1998 (3) SA 200 (SCA) where Harms JA stated,

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“In short, the word ‘debt’ does not refer to the ‘cause of action’, but more generally to the ‘claim’. There is in my view no reason to give the word another meaning in s 12(3)

The issue for determination is whether, as must be determined at the point of exception, the plaintiffs’ particulars of claim sustain a new cause of action or not. For the purposes of determining a special plea, the Court has to take into account the facts as pleaded by the plaintiffs. There has
20 obviously been a lot of evidence led. The evidence led related to the claim which must be determined in the main trial.

The defendants also plead that the second sale agreement really embodies the new cause of action.

In my view, this submission cannot be sustained. The facts supporting the claim are the same. The very case relied on by the defendants being the finding by Harms JA where he said

“ In short, the word `debt' does not refer to the `cause of action', but more generally to the `claim'.

In my view, the second agreement really supports the initial claim or cause of action pleaded in the first agreement that the sale failed. That much is common cause because the liquor licence could not be transferred. It is the components of the two agreements that are differently comprised but the “claim” is essentially the same.

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The defendants also submit that the plaintiffs have delayed in prosecuting their amendment. They delayed from 15 June 2005 to 2013 and they have not explained their delay. The evidence of the first plaintiff as already led explains the scenario requiring the amendment. Nothing turns on this as the purpose of litigation is not a game, but it is to place the full facts before the court and in this the plaintiffs have succeeded.

ORDER

20 In the result, the special plea is dismissed with costs.

I do not deal with the application for absolution. In that regard, the parties must either address me on it on a different date. In any event, in the light of the fact that the plea of prescription has not succeeded the parties may well wish to

continue with the trial. That is my order.

A handwritten signature in black ink, appearing to read 'Victor J.', is positioned above the printed name.

VICTOR, J

JUDGE OF THE HIGH COURT

DATE: 30 December 2021

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