IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case No: AR 292/2018
KZNLD Case No: 13560/2014

In the matter between:

HERAMONEY SALLIGRAM	First Appellant
HERAMONRY SALLIGRAM N.O.	Second Appellant
RUBENDRA ASKRAN BHAGWANDEEN N.O.	Third Appellant
NARENDRA KASIEPRASAD PATTUNDEEN N.O.	Fourth Appellant

and

NALIN SALLIGRAM	First Respondent
NALIN SALLIGRAM N.O.	Second Respondent
NIRVANA SALLIGRAM N.O.	Third Respondent
SHAZEL INVESTMENTS CC	Fourth Respondent
THE COMMISSIONER: COMPANIES & INTELLECTUAL PROPERTY COMMISSION	Fifth Respondent
PRESHILLA SINGH	Sixth Respondent

JUDGMENT

Vahed J (Mnguni *et* Steyn JJ concurring):

[1] The appellants, as plaintiffs, sued the first to fourth and sixth respondents, as similarly numbered defendants. The particulars of claim describe

five discrete claims against the respondents. Originally the five claims were mounted against the first respondent, the second and third respondents in their capacities as the trustees of the Shivriya Trust, and the fourth respondent. Originally, also, the sixth respondent was not joined as a defendant and the N S Trust did not feature in the litigation.

[2] After the respondents raised a plea of non-joinder to one of the claims the appellants joined the sixth respondent and amended the particulars of claim. The sixth respondent was cited in her capacity as a trustee of the N S Trust and the particulars of claim, as amended, now cited the second and third respondents additionally in their capacities as trustees of the N S Trust.

[3] This appeal concerns a further attempt to amend the particulars of claim. The proposed amendment was opposed and an application for leave to amend was argued before Kruger J, who, in large part, refused same with costs. The learned judge also directed that those costs be paid by the appellants and their attorney, jointly and severally. He also refused leave to appeal. This appeal, confined only to a defined and circumscribed portion of the Order made *a quo*, serves before us with leave having been granted to the full court by the Supreme Court of Appeal ("the SCA").

[4] As I mentioned earlier, five separate claims were set out in the particulars of claim. This appeal relates only to the refusal by the learned judge *a quo* to grant leave to amend claim two. Claims four and five were irrelevant to the issues at hand, but claims one and three had some bearing on claim two.

[5] In claim one the appellants pleaded an oral agreement concluded during March 2007 between the first appellant and the first respondent wherein, *inter alia*, it was agreed that the first appellant would transfer to the first respondent what were referred to as "the Jacobs properties" upon certain terms and conditions. In the particulars of claim this agreement was referred to as "the first agreement".

[6] In claim two the appellants relied on certain further aspects of the first agreement in terms of which it was agreed that a certain Discovery life policy would be ceded to the first respondent who would hold same in trust for the H S Family Trust and return the benefits under that policy to the H S Family Trust when called upon to do so.

[7] In claim three the appellants pleaded that a further oral agreement (referred to as "the second agreement") was concluded between the first appellant and the first respondent during May or June 2009. In terms thereof it was agreed that certain properties described as "the Harrismith properties" would, through transfers of shares in companies or members' interests in close corporations, be transferred to the N S Trust.

[8] In terms of a Notice of Intention to Amend delivered on 26 September 2016 the appellants sought, *inter alia*, to amend claim two by alleging that the agreement to cede the policy was concluded during May or June 2009. In the notice to amend it was referred to as "the cession agreement" but in the exchange of affidavits when leave to amend was sought from the court *a quo* it was made clear that the agreement to cede the policy formed part and parcel of the second agreement, which was accordingly alleged to support both claims two and three.

[9] The three claims relevant to this appeal (claims one, two and three) essentially related to assets transferred by the first appellant to his son, the first respondent, who, according to the appellants, was to hold same for certain defined purposes and thereafter re-transfer them to the first appellant (either upon demand or when the defined purpose had been achieved). The claims were for the return of those assets. During argument this was loosely referred to as a "warehousing arrangement".

[10] Concluding its judgment refusing leave to amend the court below issued, inter alia, the following Order:

> "2. (a) The [Appellants'] application for leave to amend as set out in paragraphs 2, 8, 9, 10 and 12 of the notice to amend is dismissed with costs.
>
> (b) Such costs are:
>
> (i) to include the costs of senior counsel.
>
> (ii) to be paid by the [Appellants] and the attorney Mr Chadwick, jointly and severally, the one paying the other to be absolved, on the attorney and client scale."

[11] I pause to mention that paragraph 1 of that Order related to the delivery of certain supplementary affidavits and related costs and is irrelevant for present purposes.

[12] I pause additionally to observe that paragraph 2 of the notice to amend concerned the proposed amendments to claim two.

[13] In the Notice of Appeal and in the heads of argument delivered on behalf of the appellants it was suggested that the Order for costs as set out in paragraph 2(b) of the Order made by the learned judge formed part of the subject matter of this appeal. During argument Mr *Pammenter* SC, who appeared for the appellants, sought to further advance that case.

[14] Before the court *a quo*, the application for leave to appeal addressed *only* paragraph 2 of the notice to amend and the Order for costs. That was refused. The application to the SCA addressed *only* paragraph 2 of the notice to amend and was silent as to the Order for costs. The Order sought from the SCA was in the following terms:

> "The [Appellants] are granted leave to appeal against paragraph 2(a) of the Order contained i

[15] The SCA granted "[l]eave to appeal … as prayed to the Full Court…", and directed that the costs of both applications for leave to appeal be costs in this appeal.

[16] That recount of the matter demonstrates that the appellants, in the SCA, neither sought, nor were they granted, leave to appeal against the Order for costs made by the court *a quo* on 8 September 2017. The issue is simply not before us.

[17] Claim two, prior to the amendments sought, was pleaded as follows:

> "SECOND CLAIM
>
> 24.
>
> The further material terms of the first agreement concluded between the First [Appellant] and the First [Respondent] in March 2007, and which are referred to above, were that:
>
> 24.1. Discovery Life Policy No. 500006691 which the First [Appellant] had taken out on and return the benefits under that policy to the HS Family Trust when called upon to do so;

24.2. the First [Respondent] was to pay the premiums as and when they fell due under the policy from the proceeds of the Jacobs properties referred to above."

[18] Paragraph 2 of the notice to amend proposed that the preamble to paragraph 24 of the particulars of claim be substituted with the following:

"In or about May or June 2009 a further oral agreement (cession agreement) was concluded b

[19] Amongst others, that proposed amendment was objected to by the respondents, was subsequently refused by the court below, and is the subject matter of this appeal.

[20] In refusing paragraph 2 of the notice to amend (ie. the proposed amendments to claim two) the learned judge *a quo*, in summary, held that:

a. an amendment to a pleading should not be allowed if it is clear that the pleading, as amended, has prescribed. For this finding he relied upon the decision in *Evins v Shield Insurance Company Ltd* 1980 (2) SA 814 (A) at 836 D;
b. whether prescription was interrupted by legal process, the rights sought to be enforced by means of the amendment should be the same or substantially the same right as alleged in the original process. In this regard Kruger J relied upon the decision *Neon Cathode Illuminations (Pty) Ltd v Ephron* 1978 (1) SA 463 at 463 A;
c. claims one and two as originally pleaded by the appellants were interrelated because they were both underpinned by the first agreement alleged to have been concluded during March 2007;
d. the amendment sought to be introduced meant that claim two was based on a different and separate agreement to the first agreement. It was not simply a confusion as to the date on which that agreement was concluded. Therefore, a different debt was now sought to be claimed;

e. the right of action in respect of the proposed amended claim two was not recognisable as the same or substantially the same as the right of action disclosed in the unamended particulars of claim.

[21] Essentially, the learned judge *a quo* found that the claim sought to be introduced by the proposed amendment had prescribed and that for that reason the amendment ought not to be allowed.

[22] The issues, with regard to claim two, to be determined in this appeal were crystallised in the appellants' practice note as follows:

a. whether the appellants' claim against the respondents for the re-cession of the Discovery life policy constitutes a *debt* for the purposes of the Prescription Act, 1969 ("the first issue");
b. whether the claim which the appellants sought to introduce by way of the proposed amendment to claim two was substantially the same claim as contained in the unamended particulars of claim ("the second issue");
c. whether the court *a quo* ought to have determined the issue whether the proposed amended claim two had prescribed or whether it ought to have left that aspect of the matter to be determined at trial ("the third issue").

[23] The first issue was not raised when the application to amend was argued before the court *a quo* but it was raised at the stage when leave to appeal was sought.

[24] The argument on this issue, at the stage when leave to appeal was initially sought, was based on the decisions in *Makate v Vodacom Ltd* 2016 (4) SA 121 (CC) and *Offbeat Holiday Clubs and Another v Sanbonani Holiday Spar Shareblock Ltd and Others* 2017 (5) SA 9 (CC). Relying on those decisions it was contended that although the word "*debt*" was not defined in the Prescription Act, 1969 it had to be interpreted as meaning "…that which is owed or due, anything (as money, goods or services) which one person is under an obligation to pay or render to another." (See para 44 in *Offbeat Holiday Clubs*).

[25] It was submitted that the transfer of incorporeal rights attaching to an insurance policy do not amount to "…money, goods or services…". On that basis

the submission was that the claim (ie. claim two) was not a debt for the purposes of the Prescription Act, 1969. An examination of the claim demonstrates that the first respondent was to hold the policy in trust for the H S Family Trust. In other words, he was given a mandate of trust. It was not pleaded that the first respondent was to hold the policy as owner. The call for the first respondent to return the benefits under the policy was effectively a termination of that trust mandate. It was submitted that that was something different from claiming "…money, goods or services…".

[26] The court *a quo* was not persuaded by that argument.

[27] During the argument when leave to appeal was sought and in his heads of argument in this appeal, Mr *Singh* SC, who appeared for the respondents submitted that this new ground, which he contended was an after-thought, resulted from a misconceived reliance on *Makate*. He suggested that the appellants had misconstrued *Makate* to mean that if a claim is not for the payment of money, the delivery of goods or for services, then the claim is not a debt for the purposes of the Prescription Act, 1969. That understanding, he contended, was flawed and submitted that *Offbeat Holiday Clubs* made it clear that *Makate* was not to be narrowly construed and that a claim for something due or owed, albeit incorporeal as in the present matter, was indeed a debt that could prescribe. In his heads of argument Mr *Singh* called into aid the decision in *eThekwini Municipality v Mounthaven (Pty) Ltd* 2018 (1) SA 384 (SCA) which held that a contractual claim for the retransfer of land was a debt for the purposes of the Prescription Act, 1969.

[28] At the time the heads of argument were exchanged in this appeal *Mounthaven* had been argued in an application for leave appeal before the Constitutional Court and judgment in that application (and in the appeal itself if granted) was awaited.

[29] Both Mr *Pammenter* and Mr *Singh* argued (in their respective heads of argument) that the then anticipated judgment ought not to stand in the way of a decision either way. The Constitutional Court judgment in *Mounthaven* was delivered on 31 October. See *eThekwini Municipality v Mounthaven (Pty) Ltd* 2019 (4) SA 394 (CC). Leave to appeal was refused thus leaving undisturbed the finding by the Supreme Court of Appeal that claims, such as involved here, are indeed debts capable of becoming prescribed.

[30] The first issue thus fails.

[31] The second issue relates to whether, pre and post amendment, claim two was essentially the same. In my view it must be remembered that the claim remained a claim for the return of the benefits under the Discovery policy and that character of it being held in trust for the H S Family Trust remained unaltered. What changed was that instead of the two terms pleaded in sub-paragraphs 24.1 and 24.2 of the particulars of claim being contended as forming part of a wider agreement concluded in March 2007, those very same two terms were being contended as being the material terms of a separate agreement concluded between the identical parties during May or June 2009.

[32] In my view there is a real and distinct difference between that which is being claimed (ie. the debt or the claim) and those facts and circumstances which are not materially connected to that claim. In arriving at the conclusion that the amendment sought to introduce a different claim (ie. a claim for a different debt) the learned judge agreed with a submission made on behalf of the respondents that "…[the matter went] beyond …[the appellants' attorney making] an error [of] inserting the incorrect date in the particulars of claim … [and that instead] … that it was an error in pleading the incorrect agreement … and not merely an error in pleading the incorrect date.".

[33] Claim two was originally pleaded as forming part of the first agreement and that the premiums due (for the Discovery policy) would be derived from the Jacobs properties. As part of the package of amendments (at the same time as the amendment in issue) sought by the appellants an amendment was sought to paragraph 24.2 of the particulars of claim so as to insert the words "…and/or Harrismith…" between the words "Jacobs" and "Properties". That amendment was not opposed by the respondents. The effect thus was that the premiums payable would be derived from the "…Jacobs and/or Harrismith properties…". This rendered the intended amendment to the preamble entirely consistent with an agreement concluded during 2009 but inconsistent with an agreement concluded during March 2007 because the involvement of the Harrismith properties only occurred later (in 2009).

[34] As an aside it is instructive to note that the respondents' then existing plea, which was delivered before the amendments were sought, contained an admission that the cession of the Discovery policy occurred and a copy of the

document of cession was put up as an annexure to that plea. That document was signed by both the first appellant and the first respondent on 3 July 2009.

[35] I am in respectful disagreement with the learned judge *a quo*. I propose quoting liberally from few of the leading authorities to demonstrate why, in my view, the amendment relates to substantially the same debt.

[36] *Mazibuko v Singer* 1979 (3) SA 258 (W) concerned an action against an attorney for his negligent failure to serve a claim form which was required to be served before the expiry of the prescriptive period. An earlier process had been served before the expiry of the prescriptive period and the question was whether the same cause of action (ie. the same debt) had been claimed. It was discussed and held as follows:

> "It seems to me that in an inquiry of this kind the expression "cause of action" can be misleading. Its most common use is as a technical term relating to pleading, and in that sense it carries a connotation which is inapposite when one is looking to see whether or not the running of prescription has been interrupted. It is true that TROLLIP J (as he then was) used the term "cause of action" when dealing with a question of prescription and its interruption in *Schnellen v Rondalia Assurance Corporation of SA Ltd* 1969 (1) SA 517 (W). But, he was not, I think, using the expression in its narrow technical sense; what he meant by it was, I think, something of a broader nature which is sometimes referred to as a plaintiff's "right of action" or as "the basis of his claim". It may be correct to say that, in a sense, the claim in which the plaintiff relies on a failure to serve form MVA 22 on the Fund embodies a different cause of action from the claim in which he relies on a failure to serve form MVA 13 on an insurer. Similarly, it may be said, in an ordinary running-down case, that a claim based on driving with defective brakes rests on a different cause of action (in one sense of that term) from a claim based on driving at an excessive speed. But "cause of action" in that sense cannot be the criterion here.
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> That the test in relation to an interruption of prescription cannot be based on an identity between the cause of action (in the narrow sense) which was previously relied on by the plaintiff and the cause of action which he now seeks to rely upon, is perhaps best illustrated by the cases in which it was held that a summons may interrupt the running of prescription even if it discloses no cause of action. It was so held in *Trans-African Insurance Co Ltd*

v Maluleka 1956 (2) SA 273 (A), in *Van Vuuren v Boshoff* 1964 (1) SA 395 (T) and in *Rooskrans v Minister van Polisie* 1973 (1) SA 273 (T).

The effect of those cases, as I understand them, was that in deciding whether prescription was interrupted, in relation to a particular claim, by prior process served during the prescriptive period, one looks to see whether in the earlier process the same *claim* was preferred, not whether the same cause of action (or any cause of action) was made out in the earlier process. As pointed out in one of the cases, it is inaction, not legal ineptitude, which the Prescription Act is designed to penalise. But, as none of those cases was decided under the current Prescription Act 68 of 1969, it will be appropriate to see what that Act lays down in respect of interruption. Section 15 (1) of the Act provides that:

> "The founding of prescription shall... be interrupted by the service on the debtor of any process whereby the creditor *claims payment of the debt"*.
>
> (Words not presently relevant omitted, and emphasis supplied by me).

The question to be asked, therefore, is this one: "Did the plaintiff, in the earlier process, claim payment of the same debt as now forms the subject-matter of the claim which is said to be prescribed?" If the answer is in the affirmative, prescription has been interrupted, even if one of the grounds upon which the claim is now based differs from the ground or grounds relied on at the earlier stage.

That approach is in conformity with the cases which I have cited. It is in conformity, also, with the test for *res judicata* propounded by Spencer-Bower and Turner *Res Judicata* 2nd ed at 160 para 197. The concept of *res judicata* is, if course, closely related to the concepts involved in the instant problem."

[37] *Cgu Insurance Ltd v Rumdel Construction (Pty) Ltd* 2004 (2) SA 622 (SCA) was argued by counsel to be a case very similar to the one at hand. There Rumdel Construction was engaged in engineering works (building bridges and roads) in Mozambique. CGU insured the works against storm damage. Storm

damage occurred and Rumdel sued, contending that the amounts due to it for two separate incidents of damage arose out of a single contract of insurance identified by a specific policy number and annexed to the particulars of claim. A subsequent attempt to amend to contend for two separate contracts of insurance, one for each incident. The court of first instance allowed the amendment and on appeal by CGU it was contended that the amendment introduced a new cause of action, which by then had prescribed. The appeal was dismissed, the appeal court holding, *inter alia*, as follows (Footnotes omitted):

> "[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), 11(d) and 12(1) 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) 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 Municipality and another* v *Allianz Insurance Co Ltd*), 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*), 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 contexts. For this reason 'debt' in the context of section 15(1) must bear 'a wide and general meaning'. 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)*). In *Evins* v *Shield Insurance Co Ltd* 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.’

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* 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* 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* 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 (*Wavecrest Sea Enterprises (Pty) Ltd* v *Elliot*). 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 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.* That case involved two contracts with two different parties, and the 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 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 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 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."

[38] The principles were restated in *Firstrand Bank Ltd v Nedbank (Swaziland) Ltd* 2004 (6) SA 317 (SCA). Nedbank, as cessionary of a debt due to Swazi Timber, sued Firstrand. After prescription had elapsed Nedbank effected amendments removing from the particulars all references to cession and to Swazi Timber. The effect of the amendment was that Nedbank was no longer suing as cessionary of a debt due to Swazi Timber but instead on a debt alleged to be due to it in its own right. A special plea to the effect that the claim had prescribed because the original summons did not interrupt prescription in respect of the amended claim was dismissed. This was reversed on appeal. The appeal court had this to say:

> "[4] Section 15(1) of the Prescription Act 68 of 1969 provides:
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> > '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.'
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> As observed by Corbett JA in *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 842E - F, 'it is clear that the ''debt'' is necessarily the correlative of a right of action vested in the creditor, which likewise becomes extinguished simultaneously with the debt'. The distinction between 'right of action' and 'cause of action' has been repeatedly emphasised by this Court. More recently in *CGU Insurance Ltd v Rumdel Construction (Pty) Ltd* [2003] 2 All SA 597 (SCA), para [6], at 601*c – d* 'debt' (and hence its correlative 'right of action') was noted to bear 'a wide and general meaning'; and not the technical meaning given to 'cause of action', being the phrase ordinarily used to describe the set of material facts relied upon to establish the right of action. Even a summons which fails to disclose a cause of action for want of one or other averment may therefore interrupt the running of prescription provided only that the right of action sought to be enforced in the summons subsequent to its amendment is recognisable as the same or substantially the same right of action as that disclosed in the original summons. (See Sentrachem Ltd v Prinsloo 1997 (2) SA 1 (A) at 15H - 16B; Churchill v Standard General Insurance Co Ltd 1977 (1) SA 506 (A) at 517B - C.)"

[39] *Rustenburg Platinum Mines v Industrial Maintenance Painting Services* [2009] 1 All SA 275 (SCA) is also instructive and the following discussion from the case bears repeating (Footnotes omitted):

> "[17] Counsel for the plaintiff argued, however, that *CGU Insurance* was wrongly decided and relied for this proposition on another decision of this Court in *Neon and Cold Cathode Illuminations* (*Pty*) *Ltd v Ephron*. The respondent in that case, a director of a company which had a lease agreement with the appellant, had stood surety for the payment of rent owing to the appellant by the company. When arrear rental became owing the appellant sued the respondent for its recovery. The respondent was, however, sued not as surety but as lessee. The claim was dismissed on the ground that the respondent had been incorrectly sued on the lease as the lessee. Thereafter, approximately four years after the arrear rental had become due, the appellant again sued the respondent, this time as surety and co-principal debtor. The respondent's defence was that the claim had become prescribed. In upholding that defence this Court reasoned that the appellant in *Neon and Cold Cathode* (*supra*):
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> > "had two separate different rights for payment of the [arrear rental] each of which it could enforce by action: the one against respondent as surety and co-principal debtor."
>
> The court said the following:
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> > "In the previous action appellant chose to sue respondent on the lease as the lessee. The two different rights were therefore completely confused. The cause of action as pleaded was not merely defective, it was non-existent, and consequently the process was completely devoid of legal effect
> >
> > . . .
> >
> > That is why the previous action was correctly dismissed."
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> Trollip JA suggested, however, that the previous action could possibly have been amended "to substitute a cause of action against respondent based on the contract of suretyship, for the court has wide powers to amend pleadings".

> [18] To my mind, Trollip JA could have made this comment about a possible amendment only because, although the cause of action would be different, *viz* liability being based on the contract of suretyship, the "claim" or "debt" or "right of action" would still have been the same: arrear rental which had become due and payable. The significant distinction between *Neon and Cold Cathode*, on the one hand, and *CGU Insurance* and this case on the other, is that the plaintiff in *Neon and Cold Cathode* had not sought to amend the claim. The claim was dismissed. A new action was instituted against the defendant as surety and co-principal debtor. As Trollip JA indicated, had the plaintiff attempted to amend its first claim against the defendant as lessee, so as to claim against the defendant as surety, the amendment might have been allowed. I am accordingly not persuaded that the decision in *CGU Insurance* is in conflict with that in *Neon and Cold Cathode*, nor that it was wrongly decided.
>
> [19] At the risk of repetition, in *CGU Insurance* Jones AJA said that in deciding 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 ... When this test is applied to the facts of the present matter, the result seems to me to be that the plaintiff seeks throughout to recover the same debt. The relief claimed originally is payment of the sum of R392 160, being the balance of the excess amount, the defendant having repaid part of it. The relief claimed in the amendment sought to be effected is for payment of the sum of R392 160 plus VAT, the capital amount being the balance of the excess amount after the defendant had repaid part of it. It is so, as I have mentioned above, that the allegations or "cause of action" upon which the relief claimed is based in the amendment differs from the allegations or "cause of action" set out in the particulars of claim, but the relief claimed, ie the "debt" is, in my view, the same. It follows that Willis J erred in upholding the defendant's objection, based on prescription, to the proposed amendment."

[40] Against that line of authority Mr *Singh* has sought to argue that the case is not about the termination of the trust relationship established between the parties and that reliance on these authorities is misplaced because they do not support the appellants' contention that there was a misdescription or a misnomer

when the matter was originally pleaded. I pause here to mention that the appellants' attorney (who argued the matter in the court *a quo*) contended on oath that the mistake was his, resulting in the error in the original pleading. In refuting that proposition it was argued that there was nothing to suggest that claim two ought properly to have referred to a 2009 agreement instead of a 2007 one. I am unable to grasp the import of that submission, particularly against the backdrop of an admitted reference to the Harrismith properties and to the date of signature of the admitted cession document.

[41] In his customary forthright approach to the problem Mr *Singh* acknowledged that the matter presented significant complexities and that ultimately the dividing line was a difficult one to draw. In deciding where to draw that dividing line, he suggested, with reference to *Associated Paint & Chemical Industries (Pty) Ltd v Smit* 2000 (2) SA 789 (SCA), that one ought to question whether the manner in which the debt was originally described was sufficient to interrupt prescription.

[42] In my view that answer to that question is in the affirmative. It was the same debt. Given the appellants' attorney's acceptance of responsibility for the error in pleading, in the light of the facts of the matter, in the language of *Mazibuko's case*, this case is precisely about not using prescription to punish legal ineptitude as opposed to inaction.

[43] For those reasons the second issue falls to be decided in the appellants' favour.

[44] As for the third issue Mr *Pammenter* fairly drew our attention to the very interesting discussion on the commencement of and the running of prescription in *Trinity Asset Management (Pty) Ltd v Grindstone Investments 132 (Pty) Ltd* 2018 (1) SA 94 (CC). If I am wrong in my view of the second issue, that decision may ultimately have some bearing on the matter. In my view, and for reasons related to the third issue, the questions raised therein do not arise for present consideration.

[45] Although he resisted the impact of the third issue in his heads of argument, Mr *Singh* did not press the matter during argument. It, in any event, requires brief consideration.

[46] The discussion commences with what was said in *Rand Staple-Machine Leasing (Pty) Ltd v ICI SA Ltd* 1977 (3) SA 199 (W) where an application

to amend was resisted because it attempted to introduce a claim that was said to have prescribed. The court said (at 202 B–H):

> "In spite of opposition an amendment will usually be granted where there is no prejudice to the other side. Although the defendant signified the ground of its objection to the amendment to be that claims for rental in excess of R8 040 are prescribed, the plaintiff need not, in my view, have dealt with the matter of prescription in the affidavit filed in support of the application. It need only have set out facts showing that the defendant would not be prejudiced by the amendment. The long delay between the date of institution of the action and the application for amendment might, *prima facie*, have prejudiced the defendant and, as it was obliged to do, the plaintiff relied on an alleged arrangement between the parties that the matter would be held in abeyance and that the claims, impliedly, to the extent it might have increased in the meantime, would only be proceeded with after the conclusion of the Optilon matter. It obviously intended the possible prejudice occasioned by the delay and not the prescription to be the main issue. Prescription can always be raised by way of plea. The introduction of *prima facie* prescribed claim cannot, therefore, prejudice the defendant. It has not been submitted that the delay itself caused prejudice. By not confining itself to this issue of prejudice or potential prejudice and by raising the matter of prescription in this application for amendment, the defendant has done so improperly and irregularly.
>
> It is possible that the last word on the issue of prescription has been said in these interlocutory proceedings and that the facts which emerged from the papers supplied the complete answer to plaintiff's claim in the form of a bar to it based on prescription. But it remains an answer and not a fatal weakness present in the claim itself at its inception, like a bad cause of action. Herein lies, in my view, the distinction between the matter of *Cross v Ferreira,* [1950 (3) SA 443 (C)], and the present matter. The main proceedings in this matter are trial proceedings. The proper way to raise this issue of prescription is to do so by way of a special plea. Although this type of special plea is often referred to as a peremptory exception (see *The Civil Practice of the Superior Courts in South Africa*, Herbstein and Van Winsen, 2nd ed., p. 307E), this term was used in the Courts of Holland not in the narrow sense applied to it in South Africa, but as covering a number of what would have been called special pleas. (*Western Assurance Co*. v *Caldwell's Trustee*, 1918 AD 262 at p. 270.)

By raising the issue in the manner it did, the defendant has, in my view, misconceived its remedy."

[47] That view was refined in *Union Finance Holdings (Pty) Ltd v Bonugli and Another NNO* 2013 (2) SA 449 (GSJ) thus:

"[6] The core issue raised by the plaintiffs is that the conditional counterclaims have become prescribed. Before I deal with it any further, it is necessary to decide whether prescription can be raised in these proceedings, being interlocutory in nature. The defendant, with reliance on the judgment of Viljoen J (as he then was) in *Rand Staple-Machine Leasing (Pty) Ltd v ICI (SA) Ltd* 1977 (3) SA 199 (W), submitted that the defence of prescription can only be raised by way of a special plea in the main action and therefore not in an interlocutory application as the plaintiffs have done. In *Rand Staple-Machine* the learned judge, in dealing with an application for an amendment with reference to the proceedings envisaged in s 17(2) of the Prescription Act 68 of 1969 (the Prescription Act), held that prescription could only be raised in main proceedings, such as trial proceedings, and not in intermediate or interlocutory proceedings. The judgment has not been referred to in subsequent cases dealing with this aspect. The opposite view was expressed by Foxcroft J in *Grindrod (Pty) Ltd v Seaman* 1998 (2) SA 347 (C), where in regard to an application for amendment the learned judge held that prescription could be raised either if it were common cause or in situations where the claim or right to claim were 'known to have prescribed'. The last-mentioned phrase is a quotation from the judgment of Fleming DJP in *Stroud v Steel Engineering Co Ltd and Another* 1996 (4) SA 1139 (W) at 1142, where the leaned judge, in regard to an application to amend by substituting the existing cause of action with a new cause of action, held that 'it would make no sense to permit a claim which is known to have prescribed'. I prefer, and agree with, the approach adopted in *Grindrod* which, as correctly pointed out by counsel for the plaintiffs, is in line with the judgment of the Supreme Court of Appeal in *Associated Paint & Chemical Industries (Pty) Ltd t/a Albestra Paint and Lacquers v Smit* 2000 (2) SA 789 (SCA) para 9 where Grosskopf JA, in regard to an opposed application for amendment, remarked:

> 'By raising the question of prescription in his opposing affidavit the defendant, in my view, complied with the provisions of s 17(2) of the Prescription Act 68 of 1969.'

The judgment in *Rand Staple-Machine* therefore has been overruled, at least by implication, and can no longer be considered as binding authority. It follows that the defendant's objection cannot be sustained and that the issue of prescription was properly raised in these proceedings."

[48] The reference to the passage in *Stroud v Steel Engineering Co Ltd and Another* 1996 (4) SA 1139 (W) is relevant:

"There remains the contention that because the claim is prescribed, it should not be allowed. I accept that the Court normally would not permit an allegation which has no possibility of advancing the situation of a litigant and can at best serve as basis for the need to hear evidence which leads nowhere. Accordingly it would make no sense to permit a claim which is known to have prescribed. But if the supervening of prescription is not common cause, the application for amendment is normally not the proper place to attempt to have that issue decided. Technically speaking, in fact, prescription is not an issue until it has been pleaded. I say 'normally' because there may be special cases, for example where only legal interpretation makes the difference to facts which are common cause. However, except in such special situations, once prescription is not common cause, the plaintiff should not be deprived of his chance to put his claim before the Court because of apparent probabilities at the time when amendment is considered. Considerations of effectiveness and fairness confirm that propriety. The present defendant ought to raise its proposed defence (prescription) in the same way that it would raise any other defence which becomes appropriate after an amendment is granted.

In all the circumstances the defendant should not have opposed the amendment."

[49] All of that suggests to me that, in the circumstances of this case, the issue of prescription is best left to the pleadings and ultimate resolution at trial. It is, in my respectful view, inappropriate to resolve such questions, in this case, at the present stage.

[50] The third issue then also falls to be decided in the appellants' favour.

[51] There remains the question of costs.

[52] The appellants have achieved partial success on appeal. They, however, persisted in the appeal as to costs in circumstances where it was abundantly clear that leave to appeal in that regard had not been sought from or granted by the SCA.

[53] In all the circumstances of the present appeal it seems to me that it would be proper to declare that neither side be entitled to an award of the costs of the appeal and that each side bear its own costs. Given that the SCA directed that the costs of both applications for leave to appeal (ie. before the court *a quo* and before the SCA) were to be costs in this appeal, nothing further need be said in those regards.

[54] I make the following Order:

a. The appeal is upheld.

b. Paragraph 2(a) of the Order made by Kruger J on 8 September 2017 is set aside and replaced with the following:

> ***"The Plaintiffs' application for leave to amend as set out in paragraph 2 of the notice to amend is granted, and the application for leave to amend as set out in paragraphs 8, 9, 10 and 12 of the notice to amend is dismissed with costs."***

c. The appellants and the respondents shall each bear his or her own costs of the appeal.

Vahed J

Mnguni J

Steyn J

Case Information:

Date of Hearing:	31 May 2019
Date of Judgment:	20 September 2019
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