IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE

Case no: 442/2002

In the matter between

BLAAUWBERG MEAT WHOLESALERS CC **APPELLANT**

and

ANGLO DUTCH MEATS (EXPORTS) LIMITED **RESPONDENT**

Coram: **HARMS, FARLAM, BRAND, HEHER JJA and MLAMBO AJA**

Heard: **18 November 2003**

Delivered: **28 November 2003**

Summary: **Prescription – s 15(1) of Prescription Act 1969 – whether prescription interrupted by service of summons in which the creditor is wrongly described but which is rectified after prescriptive period.**

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JUDGMENT

HEHER JA

HEHER JA:

[1] The issue in this appeal is whether an action mistakenly instituted in the name of A as creditor served to interrupt prescription where it appeared, after the prescriptive period, that B was the true creditor, and the summons was duly amended.

[2] On 12 April 1996 a summons was served on the appellant in which Anglo-Dutch Meats (UK) Limited claimed payment of the price of beef flanks allegedly sold and delivered by it to the appellant during March to June 1995, the last due date for the payment of the price by instalments, being 23 August 1995. The appellant claimed in reconvention for return of an amount said to have been overpaid and for payment of damages for breach of contract. Since the claim in reconvention was dismissed at the trial and leave to appeal was refused it will be unnecessary to refer to this aspect again.

[3] During November 1998, while evidence in the trial was being taken on commission in England, the South African legal representatives of the plaintiff became aware that the 'true' seller of the meat had been Anglo-Dutch Meats

(Exports) Limited, (the present respondent), a wholly-owned subsidiary of the plaintiff. (For purposes of distinction between the two companies in this judgment I shall refer to them simply as 'UK' and 'Exports'.) By then more than three years had already passed since the cause of action arose.

[4] An application was brought to amend the citation of the plaintiff to reflect the reality. The appellant opposed the application but Cleaver J granted the relief and the respondent was substituted as the plaintiff in the action on 10 December 1998. Cleaver J granted the amendment because he found that the plaintiff had been wrongly described in the summons. Prescription, he said 'will not be a consideration if the amendment is granted on the basis that the plaintiff was incorrectly described or that the description of the plaintiff amounted to a misnomer, for in such event the service of the summons on the defendant will have interrupted prescription'.

[5] Various amendments were effected to the pleadings, by one of which the appellant raised a special plea of prescription against the respondent's claim.

[6] The trial proceeded before Hodes AJ in the Cape Provincial Division. At its

conclusion the learned judge ruled that he was entitled to reconsider the application for the amendment of the citation of the plaintiff. Having done so, he concluded that Cleaver J had been clearly wrong in granting the amendment because the summons did not constitute a process whereby the creditor claimed payment of the debt and, accordingly, the running of prescription had not been interrupted by service of the summons. He added, 'I am, however, of the opinion that it is not correct that the description of the plaintiff amounted to a misnomer or that it was incorrectly described in the pleadings.' He upheld the special plea of prescription.

[7] The respondent appealed to the Full Court. Van Zyl J (Louw J and Ngwenya J concurring) upheld the appeal. The judgment is reported at 2002 CLR 292 (C).

[8] The brief summary of the facts which I have provided suggests a strong similarity with those considered in *Associated Paint and Chemical Industries (Pty) Ltd t/a Albestra Paint and Lacquers v Smit* 2000(2) SA 789 (SCA). It was there decided that where an action was instituted on behalf of company A and it was proposed, after the onset of prescription, to substitute the plaintiff by company B, the

amendment could not be granted as the claim of B had prescribed because B had not taken the steps contemplated by s 15(1) of the Prescription Act 68 of 1969 to claim payment within the prescriptive period. This precedent was relied on by the trial Judge and formed the cornerstone of the appellant's submissions on appeal. The Full Court distinguished it on the ostensible ground that *Albestra* concerned the introduction of a new plaintiff whereas, so it found, the case before it was one of misnomer. The Court referred particularly to the judgments in *Dawson and Fraser (Pty) Ltd v Havenga Construction (Pty) Ltd* 1993 (3) SA 397 (B), *Devonia Shipping Ltd v M V Luis (Yeoman Shipping Co Ltd Intervening)* 1994 (2) SA 363 (C), *O'Sullivan v Heads Model Agency CC* 1995 (4) SA 253 (W) and *Du Toit v Highway Carriers and Another* 1999 (4) SA 564 (W), commenting that it was 'most unfortunate' that the Court in the *Albestra* case was apparently not referred to those judgments, and adding

'I am of the respectful view that, if he [F.H. Grosskopf JA] had had occasion to consider the judgments in these cases, he might well have come to a different conclusion on the facts. I say that

with particular reference to the fact that both parties at all relevant times appear to have regarded the "proposed new plaintiff" as the correct plaintiff. In terms of the said decisions this might indeed have been a case of an erroneous description of the correct plaintiff, rather than a substitution of the correct plaintiff for the wrong one. This underscores once again the well-established principle that each case must be considered on its own merits and with reference to its own peculiar facts and circumstances.'

[9] Van Zyl J continued

'If it should be held that a plaintiff has been wrongly described and that such description may be rectified, it follows that the wrong description of the creditor, for the purposes of section 15(1) of the 1969 Act, may likewise be rectified. . . To non-suit a creditor as plaintiff because his description is not exactly correct would result in a degree of formalism and inflexibility reminiscent of the *ius strictum* of ancient Roman Law. This would certainly not accord with practical common sense or with the community's perception of justice and its concomitant values. . . In view of his finding that the amendment in the case before him had introduced a new plaintiff, it was not necessary for F.H. Grosskopf JA to consider what the position would have been if he had held that it had merely rectified an incorrect description of the plaintiff.'

[10] The learned Judge discussed and considered *Embling and Another v Two*

Oceans Aquarium CC 2000 (3) SA 691 (C), a judgment to which I shall return in due course. He proceeded to assess the facts of the appeal before the Court *a quo* taking into account as material that

(a) the relevant invoice and proof of payment showed that the defendant had paid Exports and thereby acknowledged that company as its creditor;

(b) Exports gave the instructions to institute action against the defendant;

(c) the South African attorney, Mr. van Gend, had been understandably confused by the relationship between the companies and the fact that both had the same registered address;

(d) as a result of Van Gend's *bona fide* error, Exports, the true creditor, was not cited as plaintiff in the summons and subsequent pleadings.

(As I understand the evidence given by Mr. van Gend during the trial, the error arose from the receipt of instructions from Exports under cover of a fax sheet bearing the name of UK; his supposition was that the names had become transposed during the

preparation of the instructions to counsel to settle the particulars of claim. To this extent the correctness of (c) may be debatable, but as will be seen, the difference is immaterial in the decision of the appeal.)

[11] Van Zyl J criticized the approach of Hodes AJ as not taking cognizance of 'the fact that the rectification of a misnomer of the plaintiff is not, and cannot be, restricted by the wording of s 15(1) of the 1969 Act. This was an aspect not considered in the *Associated Paint* case.'

He concluded:

'After consideration of the various arguments and authorities in support of the opposing approaches to the current issue, I respectfully incline to the view that Cleaver J was indeed correct in finding that the citation of ADM (UK) as plaintiff in the summons and subsequent pleadings was no more than a misnomer for ADM (Exports). This was the legal persona identified and accepted by both parties as the seller of the meat products and hence as the true creditor and plaintiff. The correction of its description does not mean that it was being substituted as plaintiff and creditor by a different entity or persona. In principle it is irrelevant whether it was wrongly described as an existing entity or as a non-existent one. In either case the question is simply whether the summons served on the

defendant was a "process whereby the creditor claims payment of the debt".' [para 45]

'I am in respectful disagreement with Hodes AJ as to the points of distinction raised by him between the present case and those relied on by Cleaver J. It is, in my view, irrelevant whether the misnomer relates to a plaintiff or a defendant. The applicable principles remain the same. It is likewise irrelevant whether prescription is an issue raised by the defendant. It is merely a factor to be taken into account in deciding whether or not an amendment will cause the opposing party prejudice or injustice.' [para 46]

'Accepting the incorrect citation as a misnomer accords, in my respectful view, with the need to take cognizance of the substance rather than the form of the process (*Neon and Cold Cathode Illuminations (Pty) Ltd v Ephron* 1978(1) SA 463(A) 471B). It also accords with consideration of justice, fairness and reasonableness, while giving due regard to the requirement of good faith between contracting parties and to the policy considerations underlying the justice system. . . Peace-loving and justice-seeking members of the community do not take kindly to what they perceive as "technical" defences that allow debtors to escape liability and accountability.' [para 47]

[12] The approach adopted by the Court *a quo* reveals confusion. There seems to have been no consideration of whether a difference in approach is called for between applications for amendment of pleadings and the determination of whether there is

compliance with a statutory provision such as s 15(1). The cases referred to in paragraph [8], which related to the first problem, were willy-nilly applied to the second. It is clear that there are fundamental differences between the two situations. Amendments are regulated by a wide and generous discretion which leans towards the proper ventilation of disputes and are granted according to a body of rules developed in that context. Whether there has been compliance with a statutory injunction depends upon the application of principles wholly unrelated to the rules just mentioned and without the exercise of a discretion, principles which were expressed by Van Winsen AJA in the well-known passage from *Maharaj and Others v Rampersad* 1964 (4) SA 638 (A) at 646C-E as follows:

'The enquiry, I suggest, is not so much whether there has been "exact" or "substantial" compliance with this injunction but rather whether there has been compliance therewith. This enquiry postulates an application of the injunction to the facts and a resultant comparison between what the position is, and what according to the requirement of the injunction it ought to be. It is quite conceivable that a court might hold that, even though the position as it is is not identical with that which it ought to be, the injunction has nevertheless been complied with. In deciding whether there

has been compliance with the injunction the object sought to be achieved by the injunction and the question of whether the object has been achieved are of importance. Cf *J.E.M. Motors Ltd v Boutle and Another* 1961 (2) SA 310, at pp. 327-8.'

[13] For obvious practical reasons the legislature ordained certainty about when and how the running of prescription is interrupted. That certainty is of importance to both debtors and creditors. It chose an objective outward manifestation of the creditor's intentions as the criterion, *viz* the service on the debtor of process in which the creditor claims payment of the debt. That is not a standard which allows for reservations of mind or reliance on intentions which are not reasonably ascertainable from the process itself. Nor does it, as a general rule, let in, in a supplementation of an alleged compliance with s 15(1), the subjective knowledge of either party not derived from the process, such as, for example, the content of a letter of demand received by the debtor shortly before service of the process. Cf *Standard Bank of SA Ltd v Oneanate Investments (Pty) Ltd* 1995 (4) SA 510 (C) at 553E-G. The question whether this general rule allows for an exception where both parties have been *ad*

idem at all times as to the true identity of the plaintiff, does not arise on the facts of this case.

[14] Applying these considerations to the facts of the case, the question which requires answering is 'Was a summons served on the defendant before prescription in which the creditor who asked for judgment, *viz* Exports, claimed payment?' That there was no exact compliance is beyond dispute because the original plaintiff was not the creditor and did not seek judgment. Of course the identity of a creditor does not depend only on its name. Place of residence or business, registered office, occupation or nature of business, details of some or all of which one would expect to find in a process, may also serve to establish identity or clarify an ambiguous or incorrectly-stated name. (There may be other indicators, such as a previous name of a company, company registration details or an identity number, which are sometimes encountered.) In the present instance, however, the only possibly pertinent details in the summons are that UK was 'a company with limited liability registered in accordance with the laws of England with registered office at Arkwright Road,

Highfield Industrial Estate, Eastbourne, East Sussex, United Kingdom'. When Exports was later introduced into the summons exactly the same description was applied to it. Of itself that is insufficient to assist Exports. The fact remains that the summons served on the appellant failed entirely to communicate to it the intention of Exports to claim payment. The summons did not, therefore, achieve the objects of s 15(1) and was not effective to interrupt prescription.

[15] From what I have said it will be apparent that the importance attached to a misnomer or misdescription by all three of the Courts which previously considered this matter, while appropriate in the context of an amendment, was misplaced in relation to the interruption of prescription.

[16] There is no unfairness in this conclusion, as the Court *a quo* seemed to think. Prescription penalizes negligence and inactivity. Judged according to the legislative intention the respondent remained absent and inert for more than three years. Both shortcomings are ascribable to the failure to take reasonable precautions from the time of preparing the summons to the belated awakening. The power of correction

always lay with the respondent.

[17] There are, no doubt, a great variety of factual possibilities which may arise in the context of deciding whether s 15(1) has been complied with. It is, however, unnecessary to go beyond the facts of this appeal in order to decide its fate.

[18] It is, nevertheless, desirable, because of the approach adopted by the Court *a quo*, to allude to certain other considerations. The first is that, in the context of s 15(1), though not necessarily in relation to the amendment of pleadings, the existence of another entity which bears the same name as that wrongly attributed to a creditor in a process is irrelevant. That is not the creditor's concern or responsibility. Second, an incorrectly named debtor falls to be treated somewhat differently for the purposes of s 15(1). That that should be so is not surprising: the precise citation of the debtor is not, like the creditor's own name, a matter always within the knowledge of or available to the creditor. While the entitlement of the debtor to know it is the object of the process is clear, in its case the criterion fixed in s 15(1) is not the citation in the process but that there should be service on the true debtor (not necessarily the named

defendant) of process in which the creditor claims payment of the debt. The section does not say '. . . claims payment of the debt *from the debtor*'. Presumably this is so because the true debtor will invariably recognize its own connection with a claim if details of the creditor and its claim are furnished to it, notwithstanding any error in its own citation. Proof of service on a person other than the one named in the process may thus be sufficient to interrupt prescription if it should afterwards appear that that person was the true debtor. This may explain the decision in *Embling supra* where the defendant was cited in the summons as the *Aquarium Trust CC* whereas the true debtors were the trustees of the Aquarium Trust. Service was effected at the place of business of the Trust and came to the knowledge of the trustees. In the light of what I have said such service was relevant to proof that s 15(1) had been satisfied and was found to be so by Van Heerden J (at 700D, 701D).

[19] The third matter relates to the judgment of this Court in *Albestra*, *supra*. The Court *a quo*, in impliedly criticizing the conclusion and the manner in which it was arrived at (of which more below) overlooked the clear dichotomy in the judgment

between issues of amendment and prescription. Discussion of the former concluded in para [11] of the judgment. The Court then proceeded to deal with the question of interruption of prescription. The test which it applied (at para [18]) was a purely objective one consistent with what I have set out in this judgment: it concluded that the claim made in the summons was, on a plain reading, not that of the true creditor, a conclusion which was binding upon the Court *a quo*.

[20] With regard to the criticism of the conclusion arrived at in *Albestra* expressed by the Court *a quo*, this Court has only recently had reason to administer a gentle rebuke to a Judge of the High Court who to use the words of Schutz JA 'considered that this Court should be given the opportunity of mending its earlier judgment': *S v Kgafela* 2003 (5) SA 339 (SCA) at 341A-D, and, with reference to the judgment of the House of Lords in *Cassell and Co Ltd v Broome and Another* [1972] AC 1027 at 1054E, to remind courts on a lower tier of the necessity 'to accept loyally the decision of the higher tiers'. It is unfortunate that the occasion to repeat this admonition has occurred again. Also relevant to the misplaced criticism by the Court below are the

remarks of Cloete J in *Dischem Pharmacies (Pty) Ltd v United Pharmaceutical Distributors (Pty) Ltd v United Pharmaceutical Distributors (Pty) Ltd* 2003 CLR 9 at para [13] concerning the very judgment now under appeal:

'In the absence of a constitutional challenge, to which other considerations would apply, perceived equities are not a legitimate basis to depart from a decision of a higher court or to avoid the strictures of a statute'.

See also *Ex parte Minister of Safety and Security and Others*: *In re S v Walters and Another* 2002 (4) SA 613 (CC) at para [61], *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) at paras [25]-[26] and *Credex Finance (Pty) Ltd v Kuhn* 1977 (3) SA 482 (N) at 485F.

[21] The result is that:

(1) The appeal succeeds with costs.

(2) The order of the Court *a quo* is set aside with costs and substituted with an order dismissing the appeal from the trial Court with costs.

J A HEHER

JUDGE OF APPEAL

HARMS JA)Concur
FARLAM JA)
BRAND JA)
MLAMBO AJA)