



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

Case no: **1340/2011**

In the matter between:

LIZELLE JACOBS

APPLICANT

COTTON KING MANUFACTURING (PTY) LIMITED

PLAINTIFF

(in liquidation)

(Registration number: 1962/00738/06)

and

GARLICKE AND BOUSFIELD INC

DEFENDANT/RESPONDENT

and

PKF (DURBAN) INCORPORATED

FIRST THIRD PARTY

PATRICK ROBERT

SECOND THIRD PARTY

NERAK FINANCIAL SERVICES (PTY) LTD

THIRD THIRD PARTY

SANTAM LIMITED

FOURTH THIRD PARTY

LOMBARD INSURANCE COMPANY LIMITED

FIFTH THIRD PARTY

UNDERWRITER AT LLOYD'S

SIXTH THIRD PARTY

Coram: Mossop J

Heard: 15 August 2023

Delivered: 13 September 2023

ORDER

The following order is granted:

1. The application is dismissed with costs.
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JUDGMENT

Mossop J:

Introduction

[1] In a summons that was issued on 1 February 2011 under case number 1340/2011 (the summons), the plaintiff is cited as being Cotton King Manufacturing (Pty) Ltd (Cotton King) and the defendant is identified as being Garlicke and Bousfield Incorporated, a firm of attorneys based in Durban. Before me is an application for substitution in which the applicant, who is the previous chief financial officer of Cotton King, seeks an order that she be substituted as the plaintiff in the action in the place and stead of Cotton King.

Representation

[2] When the matter was called, Mr Iles appeared for the applicant and Mr Harpur SC appeared for the defendant. Both counsel are thanked for their insightful submissions and the other assistance that they have provided to the court.

Background

The particulars of claim

[3] The particulars of claim allege that a representative of Cotton King and a Mr Colin Cowan (Mr Cowan), allegedly representing the defendant,

concluded an agreement on or about 12 October 2010.¹ In terms of that agreement, Cotton King agreed to invest R2,5 million with the defendant which money was to be employed to advance bridging finance to clients of the defendant. The money was to be repaid to Cotton King by the defendant with interest at the rate of 30 percent per annum by 31 January 2011. The money was duly paid over to the defendant by Cotton King, but it was not repaid by the defendant by the due date. The summons thus sought the repayment of the R2,5 million together with interest and costs.

The amended plea

[4] On 10 October 2011, in an amended plea, the defendant pleaded that Cotton King had been placed in voluntary liquidation as from 9 December 2010, a date prior to the date upon which the summons was issued, and that the investment referenced in the particulars of claim had not been between Cotton King and the defendant but had been between the applicant and Mr Cowan. Other issues were raised in the amended plea, but they need not detain us. No replication was delivered to the amended plea.

Security

[5] On 19 October 2011, the registrar of this court directed Cotton King to put up security in the amount of R400 000 for the defendant's costs by close of business of 2 November 2011. Cotton King never put up that security.

The substitution application

[6] On 27 March 2013, the applicant launched the substitution application. It was met with an answering affidavit from the defendant.

¹ Mr Cowan was an attorney of this court and an executive consultant associated with the defendant. Mnguni J summed up aspects of Mr Cowan's conduct in his judgment in *Stols v Garlicke and Bousfield (PKF (Durban) Incorporated and others as third parties)* [2020] ZAKZPHC 47; [2020] 4 All SA 850 (KZP) para 3 when he said: 'On 24 November 2010, around 6h50am, Mr Cowan committed suicide. He left a suicide note dated 22 November 2010, wherein he admitted to having committed fraud and misrepresented facts to G and B's directors by inducing them to authorise certain fraudulent transactions'.

The founding affidavit

[7] In her founding affidavit in the substitution application, which is brief and scarcely fills three pages, the applicant explains that Cotton King sold its business and, acting upon the advice of its accountants, it then placed itself into voluntary liquidation. Two liquidators were appointed to wind-up the plaintiff and, according to the applicant, the liquidators:

‘... did not wish to become embroiled in long and protracted litigation with the Defendant and accordingly the Plaintiffs (sic) claim in and to the said action against the Defendant was duly sold, transferred and ceded to me. I must point out that I was at all times a minority shareholder in the company in any event.’

[8] That explanation would seem to be at odds with what the defendant had pleaded, namely that the investment was made by the applicant personally and not by Cotton King. The fact that the applicant indicated that Cotton King’s claim had been sold to her would tend to indicate that it was not her claim to start with.

[9] The cession referred to by the applicant was in writing (the deed of cession) and the applicant has attached a copy of that document to her founding affidavit. It reveals that it was concluded on 21 November 2011. She claims further in her founding affidavit that:

‘I duly assumed all rights and obligations in and to the said claim. In particular I refer to paragraph 4.1 of the Deed of Cession.’

Paragraph 4.1 of the deed of cession provides that the applicant intended to substitute herself as plaintiff in the action.

[10] The deed of cession records that the liquidators ceded to the applicant:

‘[t]he claim of Cottonking (sic) Manufacturing (Proprietary) Limited against Garlicke and Bousfield Incorporated and others, for an amount of R2 500,000.00 (two million five hundred thousand rand), plus all interest and costs which accrue

in respect of such claim, in respect of the recovery of funds invested, and in respect of which action has been instituted under KwaZulu-Natal High Court, Durban, Case Number 1340/2011.'

[11] The deed of cession goes on to explain why the cession occurred:

'2.1 Cottonking (sic) Manufacturing (Proprietary) Ltd has instituted legal proceedings against Garlicke & Bousfield Incorporated and others, under KwaZulu Natal High Court, Durban, Case Number 1340/2011, in respect of the recovery of an investment of R2,500,000 (two million, five hundred thousand rand).

2.2 The Cedents² acknowledge that the investment in 2.1 was in relation to funds paid by the Cessionary³ in her personal capacity, and was not an investment by the Company,⁴ notwithstanding that the investment was paid through the bank account of the Company.

2.3 The Plaintiff in the claim has erroneously been cited as Cottonking Manufacturing (Proprietary) Limited and not the Company.⁵

2.4 The Plaintiff in the claim is required to be substituted by the Company, alternatively Cessionary, pursuant to the cession.

2.5 The Cedents have agreed to cede the claim to the Cessionary on the terms of this agreement.'

[12] The deed of cession, contrary to what the applicant states in her founding affidavit, seems to confirm what the defendant pleaded in its amended plea, namely that the investment was the applicant's all along.

The answering affidavit

[13] The answering affidavit in the substitution application was delivered on 23 May 2013. Its essential thrust was that the security ordered by the

² Defined in the deed of cession as being the two liquidators.

³ Defined in the deed of cession as being the applicant.

⁴ Defined in the deed of cession as being Cotton King Manufacturing (Pty) Ltd.

⁵ This clause makes no grammatical sense. The deed of cession defines 'the company' as being Cotton King. Using the real names of the parties, this sentence would read: 'Cotton King Manufacturing (Pty) Ltd has erroneously been cited as Cotton King Manufacturing (Pty) Limited and not Cotton King Manufacturing (Pty) Ltd.' Mr Harpur suggested that what this clause was intended to mean was that the action should have been brought in the name of 'Cotton King Manufacturing (Pty) Ltd (in liquidation)' and not simply in the name of Cotton King Manufacturing (Pty) Ltd. Mr Iles thought that explanation likely, but nothing turns on it and I need not hammer some meaning into the sentence.

registrar had not been put up and it explained why the guarantees that had been put up consequent upon the registrar's order were unacceptable to the defendant. The answering affidavit otherwise generally opposed the substitution of the applicant for Cotton King.

The supplementary answering affidavit

[14] This was delivered by the defendant, without objection from the applicant, on 16 October 2014. By the time of its delivery, the applicant had not delivered her replying affidavit. The supplementary answering affidavit suggested that the cession had been brought into existence to permit Cotton King to avoid having to put up the security ordered.

[15] The supplementary answering affidavit went on to raise further grounds upon which the substitution was opposed, namely that the party who invested with Mr Cowan (not with the defendant) was the applicant in her personal capacity, that Cotton King never had a claim against the defendant and that the applicant's personal claim had prescribed.

The replying affidavit

[16] Nearly six and a half years (or 78 months) after the supplementary answering affidavit was delivered by the defendant, the applicant delivered her replying affidavit on 14 May 2021.

The applicant's supplementary affidavit

[17] On 28 July 2023, just over two years after she delivered her replying affidavit, the applicant caused to be delivered a further affidavit (the supplementary affidavit) in which, through the evidence of her attorney, she brought it to the court's attention that she had personally put up the security that Cotton King had been ordered to put up by the registrar nearly 12 years earlier.

General observations

[18] Those are the essential facts of the matter. Nearly ten and a half years after it initially commenced, the applicant's substitution application is before me for determination.

[19] Before getting to grips with the essence of the matter, I make two observations. The first relates to the inordinately long period of time that the substitution application has taken before it was sufficiently complete to be argued. Such an extraordinary delay generally makes the proper adjudication of the matter more difficult. While the defendant has contributed to this delay, delivering its supplementary answering affidavit 16 months after it had delivered its answering affidavit, the fact of the matter is that it was able to do so because the applicant had been inactive and had not delivered her replying affidavit. There can be no doubt that the significant delay in the matter was occasioned solely by the applicant.

[20] The second observation that I make is that the applicant has not at any stage attempted to press her own claim as the investor. She makes it plain that her entire case against the defendant is dependent on the rights that she acquired from the deed of cession and not from any original right that she personally possesses. This in itself is curious but may be explicable if reference is made to the spectre of prescription that presents itself in this matter. That issue will be considered further later in this judgment.

Litis contestatio

[21] It is common cause that the deed of cession was concluded after *litis contestatio* had been reached in the action between Cotton King and the defendant. By my calculation, with no replication having been delivered, pleadings closed on 31 October 2011. The deed of cession, as previously stated, was concluded on 21 November 2011. It is trite that *litis contestatio* is reached when the pleadings are closed.⁶

⁶ Uniform rule 29(1); *Jankowiak and another v Parity Insurance Co Ltd* 1963 (2) SA 286 (W).

Substitution

[22] Substituting one party for another is a procedural matter⁷ and it can occur in either one of three ways: by an amendment of the pleadings, by invoking Uniform rule 15 or at common law. Uniform rule 15 applies where the substitution of a party is required because of a change in status of a party and the common law applies where there is no such change in status. While Cotton King may have been liquidated, that fact did not make the cession necessary. This is accordingly not a matter involving a change of status. The common law approach thus applies.

[23] As to how these applications should be approached and considered, Brand JA stated in *Tecmed v Nissho Iwai*⁸ that:

'The settled approach to matters of this kind follows the considerations in applications for amendments of pleadings. Broadly stated, it means that, in the absence of any prejudice to the other side, these applications are usually granted . . . As is pointed out in *Devonia Shipping* at 369H, the risk of prejudice will usually be less in the case where the correct party has been incorrectly named and the amendment is sought to correct the misnomer, than in the case where it is sought to substitute a different party. But the criterion remains the same: will the substitution cause prejudice to the other side, which cannot be remedied by an order for costs or some other suitable order, such as a postponement?'

[24] Continuing, Brand JA went on to state that:

'... the legal effect of a cession after *litis contestatio* is to terminate the proceedings instituted by the cedent, with the corollary that the substitution of the cessionary as the plaintiff must be regarded as the institution of new proceedings.'⁹

[25] The applicant did not deliver a notice in terms of Uniform rule 15 but delivered only the application upon which I am required to adjudicate which means, following *Tecmed*, it is to be considered on a wide basis, which includes the grounds mentioned in rule 15(3), and broadly considers the presence or otherwise of prejudice.¹⁰

⁷ *Brummer v Gorfil Brothers Investments (Pty) Ltd en andere* 1999 (3) SA 389 (SCA) at 410F.

⁸ *Tecmed (Pty) Ltd and others v Nissho Iwai Corporation and another* [2010] ZASCA 143; 2011 (1) SA 35 (SCA) para 14.

⁹ *Ibid* para 20.

¹⁰ *Ibid* paras 13-14.

The issues

[26] I was presented with a joint list of issues shortly before the matter was heard. I

am indebted to counsel for compiling it. Six issues are mentioned in that list as requiring determination and I shall now consider each of those issues.

The first issue: whether the applicant's supplementary affidavit ought to be admitted into evidence

[27] The parties seek a ruling on the admissibility of the supplementary affidavit delivered by the applicant on 28 July 2023, in which it was reported that she had put up the security fixed by the registrar in 2011.

[28] In that supplementary affidavit, deposed to by the applicant's current attorney, it is disclosed that she has paid an amount of approximately R420 000 into her attorney's trust account, of which R400 000 is to be utilised in respect of the security previously ordered. There is no order in place requiring her to put up that security: what is in place is an order by the registrar directing Cotton King to deliver security in that amount.

[29] It will be manifestly clear that this application has an unfortunately long history that has spanned at least a decade. It seems to me likely that in that span of time things will happen of which the court will not be aware but of which it should, perhaps, be made aware. The supplementary affidavit is intended to fulfil that purpose. Despite an indication in the supplementary affidavit that the applicant would not object to an answering affidavit being delivered by the defendant dealing with the allegations raised in that supplementary affidavit, no such answering affidavit was delivered by the defendant. In truth, there is not much that could have been said in relation thereto by the defendant: the applicant was not obligated to put up security but chose to do so, a fact that is not

really contestable. In my view, given the absence of an order requiring the applicant to provide such security, the facts that are contained in the supplementary affidavit are neutral in their effect and I am inclined therefore to accept it. Condonation is therefore granted.

The second issue: whether the late filing of the applicant's replying affidavit ought to be condoned

[30] The second issue is whether the court should accept the applicant's replying affidavit. As noted earlier, it was delivered late. Very, very late - some 78 months late.

[31] That being the case, one would have anticipated that the applicant would have clearly sought condonation for her failure to deliver the replying affidavit within the time frames contemplated by the Uniform Rules of Court. In doing so she would have had to address:

'... the extent and cause of the delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation for the delay, the importance of the issue to be raised in the intended appeal and the prospects of success.'¹¹

[32] Yet, inexplicably, she has brought no such clear application for condonation. All she has done is to provide a general explanation in her replying affidavit of the delays that have beset the substitution application.

[33] I make reference to the facts disclosed by the applicant. At the outset, she states that before finalising the replying affidavit, she left South Africa and emigrated to the United States of America, where she still resides, and states that instructions were given to counsel to draw the replying affidavit in April 2013. She, however, puts up no proof of that

¹¹ *Van Wyk v Unitas Hospital and another (Open Democratic Advice Centre as Amicus Curiae)* [2007] ZACC 24; 2008 (2) SA 472 (CC) para 20.

instruction nor does she state to which counsel the instruction was given. She proceeds to state that before the replying affidavit could be drawn: '... the security for costs issue had to be addressed, as that formed the crux of the dispute in the substitution application.'

[34] The applicant is mistaken in suggesting that this was the only impediment to the substitution application being granted. She appears not to have addressed the further issues raised in the supplementary answering affidavit, namely that the investment was between the applicant in her personal capacity and Mr Cowan and not between Cotton King and the defendant, that Cotton King never had a claim against the defendant and that any claim that the applicant may have had against the defendant had prescribed by no later than 2 February 2014. None of these allegations have ever been addressed by the applicant.

[35] It is difficult to understand what the security for costs issue had to do with the applicant. She had not been ordered to provide it and the effect of the intended substitution was to remove Cotton King, which had been ordered to provide it, as a participant in the action. Nonetheless, the applicant states that she put up the deposit necessary to secure the issuing of a guarantee for the security which was ordered to be put up by the registrar. Three different forms of the guarantee were put up, each of which attracted an objection from the defendant.

[36] The applicant goes on to explain that she was then advised by her legal representative that the particulars of claim would have to be amended before the reply in the substitution application could be delivered. The amendment was duly formulated and delivered but was objected to by the defendant. The applicant states that she was apparently not aware of this objection at the time that it was received. The defendant then amended its plea and thereafter delivered a notice of an irregular step regarding the non-delivery of the security ordered by the registrar.

[37] The years 2014 and 2015 slip by in the applicant's narrative with barely a mention. She apparently sought information from her attorneys in Durban in sporadic emails sent to them. In February 2016, she sent an email to her attorneys and in April 2016 she gave them instructions to try and settle the matter. She followed up on this issue during the remainder of 2016 and in 2017. A number of emails are put up between her and her attorneys. In mid-2018, she instructed her brother-in-law to attend upon her attorney's offices and ascertain what was going on. She was then told that the money that she had put up for the security that the registrar had ordered Cotton King to put up had been stolen by an employee of her attorneys.

[38] By the end of July 2018, she states that she had come to the end of her tether with her attorneys in Durban. She appointed new attorneys. She, fairly, concedes that she ought to have terminated the mandate of the first set of attorneys earlier than she did. She explains as follows: 'Apart from setting myself and my businesses up in the United States, I did not have ready or easy means to follow up with my attorneys other than by way of messages. I am not a lawyer and, although I have contacts in South Africa, I did not know another attorney who I could appoint instead of my present attorneys of record.'

[39] She appointed her current attorneys and consulted with them in late November 2018. They provided her with a memorandum on 5 December 2018. She then consulted with her new attorneys 'in around February or March 2019'. Given the ease and relative immediacy of modern digital communications it is not clear why it took so long for her to consult with her new attorneys.

[40] Acting upon advice received, the applicant then instituted an action against her erstwhile attorneys. That action apparently proceeds and appears not yet to have been resolved. In her particulars of claim in the action against her erstwhile attorneys, she explains that it was pleaded

that her claim against the defendant had prescribed. In November 2019, her erstwhile attorneys pleaded to those particulars of claim and denied that her claim had prescribed. It appears that the applicant has unquestioningly now accepted that to be the case. Not much happened thereafter due to the Covid-19 pandemic but the applicant had a telephone conversation with her new attorney in August 2020.

[41] Despite the acknowledgment that she ought to have changed attorneys much earlier than she did and her criticism of the decisions and pace at which her erstwhile attorneys worked, it appears that the new attorneys appointed by the applicant displayed no greater haste in progressing the substitution application than the erstwhile attorneys. Regard being had to the fact that she first contacted her new attorneys in late November 2018, the replying affidavit in the substitution application was only delivered some two and a half years later, on 14 May 2021.

[42] The law expects litigants to act with all due and necessary haste when litigating. Where there is a prolonged lack of speed and an ignoring of prescribed time limits, the defaulting party must provide compelling reasons why their failure to act with the required swiftness should be overlooked. The applicant does not explicitly seek that condonation. I suppose that it is conceivable that her description of what occurred over the past decade could, charitably, be considered as an attempt at seeking condonation, without labelling it as such. But it appears to me that what the applicant has engaged in is what was contemplated in *Independent Municipal and Allied Trade Union on behalf of Zungu v SA Local Government Bargaining Council and others*,¹² where the court held that: 'In explaining the reason for the delay it is necessary for the party seeking condonation to fully explain the reason for the delay in order for the court to be in a proper position to assess whether or not the explanation is a good one. This in my view requires an explanation which covers the full length of the delay. The mere listing of significant events which took place during the period in question

¹² *Independent Municipal and Allied Trade Union on behalf of Zungu v SA Local Government Bargaining Council and others* (2010) 31 ILJ 1413 (LC) para 13.

without an explanation for the time that lapsed between these events does not place a court in a position properly to assess the explanation for the delay. This amounts to nothing more than a recordal of the dates relevant to the processing of a dispute or application, as the case may be.'

[43] There is no real explanation why there were such prolonged delays between the signal events recounted by the applicant in her replying affidavit. Because she has not sought condonation, the applicant has also not addressed her prospects of success should condonation be granted. Those prospects will come into focus when some of the remaining issues are addressed.

[44] I am not satisfied by the partial explanation provided by the applicant for the prolonged delay in the preparation and delivery of her replying affidavit. Her explanation is characterised by a lack of concern for the time limits applicable. Large chunks of time are simply glossed over by her. Her attitude almost borders on an abandonment of the substitution application in preference to pursuing her erstwhile attorneys. Her lethargy in advancing the matter has not been satisfactorily explained. To the extent that condonation was sought for the late filing of the replying affidavit, it is refused.

The third issue: whether Cotton King has a valid claim against the defendant, and whether it could have ceded such claim to the applicant

[45] The wording of this issue asks whether Cotton King 'has' a claim against the defendant. I shall assume that what was intended was whether Cotton King 'had' a claim against the defendant, as it is common cause that Cotton King purported to cede its rights to the applicant. Having ceded that claim, it follows that Cotton King no longer has a claim against the defendant.¹³

¹³ *Standard General Insurance Co Ltd v Eli Lilly (SA) (Pty) Ltd (FBC Holdings (Pty) Ltd, third party)* 1996 (1) SA 382 (W) at 385F-G.

[46] The deed of cession is the fulcrum around which the applicant's claim rotates. It is essential to the survival of her claim against the defendant. It is also, in my view, explicit in what it states.

[47] Whilst the deed of cession is generally unremarkable and contains provisions that one would expect to find in such a document, it is remarkable in one particular respect: it acknowledges that Cotton King was not the investor that had paid the money to the defendant. According to the two liquidators and the applicant, being the parties to the deed of cession, the investor was the applicant. It follows that the monies invested with the defendant were not Cotton King's but belonged to the applicant. The deed of cession need not have mentioned these details. But it did. However, Cotton King's particulars of claim, even after they were amended, are entirely predicated on Cotton King being the investor.

[48] The admission in the deed of cession that it did not advance the investment to the defendant raises a troubling question for the applicant: what could Cotton King then cede to the applicant? It is a matter of logic that a party who concedes that it has no claim in law, as the liquidators have done on behalf of Cotton King, has no legal right to cede.

[49] In *Grobler v Oosthuizen*,¹⁴ Brand JA stated that a cession cannot stand without

the existence of a principal debt and that:

'... it matters not whether the principal debt is extinguished or never existed at all'.¹⁵

The learned judge relied for this conclusion upon *Kilburn v Estate Kilburn*,¹⁶ where Wessels ACJ stated:

¹⁴ *Grobler v Oosthuizen* [2009] ZASCA 51; 2009 (5) SA 500 (SCA); [2009] 3 All SA 508 (SCA).

¹⁵ *Ibid* para 21.

¹⁶ *Kilburn v Estate Kilburn* 1931 AD 501 at 506.

'It is therefore clear that by our law there must be a legal or natural obligation to which the hypothecation is accessory. If there is no obligation whatever there can be no hypothecation giving rise to a substantive claim.'

[50] Watermeyer J in *Standard Bank of SA Ltd v Neethling NO*,¹⁷ referring to *Estate Kilburn* with approval, stated that:

'*Kilburn's* case was not a case where a principal obligation subsequently became extinguished. It was a case where there never had been a principal obligation. It seems to me however that there is no distinction in principle between the two cases . . . After . . . the principal debt was extinguished . . . there remained no obligation to support the cession by way of security.'¹⁸

[51] In the more recent decision of *Brayton Carlswald and another v Brews*,¹⁹ Theron JA stated that:

'Transfer of a "right" which has been extinguished is a nullity as there is nothing which can be transferred. I agree with the principle that as a matter of logic, a non-existent right can never in law be transferred as the subject-matter of a cession.'

Following the reasoning applied in *Neethling*, the same principle must apply where the right never existed in the first place.

[52] It seems to me that the deed of cession acknowledges that Cotton King never had a valid claim against the defendant. The liquidators state clearly that the investment that is referenced in the particulars of claim was not Cotton King's but was the applicant's in her personal capacity. It follows therefore that Cotton King never had a right to cede to the applicant.

[53] I appreciate, as Mr Iles drew to my attention, that where a cession occurs after *litis contestatio* has been reached, that what is ceded is the outcome of the litigation and that as the subject-matter of the cession is

¹⁷ *Standard Bank of SA Ltd v Neethling, NO* 1958 (2) SA 25 (C).

¹⁸ *Ibid* at 30A-D.

¹⁹ *Brayton Carlswald (Pty) Ltd and another v Brews* [2017] ZASCA 68; 2017 (5) SA 498 (SCA) para 20, referencing *First National Bank of SA Ltd v Lynn NO and others* 1996 (2) SA 339 (A) at 346C.

res litigiosa, the cession itself does not transfer the right to prosecute the action to the cessionary. That right only accrues when the court grants an order substituting the cessionary as plaintiff.²⁰ It is at that juncture that the court will exercise its discretion based upon the facts known to it. The question of such a discretion is dealt with when the fifth issue is considered.

[54] As a cessionary steps into the shoes of the cedent, the cessionary cannot acquire a greater right than the right possessed by the cedent.²¹ The cession therefore could not, and did not, transfer a right to the applicant that would entitle her to be substituted for Cotton King in the action.

The fourth issue: whether the substitution of the applicant for the plaintiff would prejudice the respondent

[55] It is worth repeating that at no stage has the applicant ever proceeded against the defendant on the basis that she was the investor who invested R2,5 million with it. Her right to proceed is strictly confined to her claim that she is the cessionary of Cotton King's rights against the defendant.

[56] The action instituted by Cotton King, in its present form, appears to have no future. It cannot succeed as Cotton King invested nothing with the defendant and, consequently, is not due anything back from the defendant. There is no suggestion in the particulars of claim, as they are presently framed, that the applicant is due anything from the defendant. As was stated by Majiedt JA in *Sentrachem Limited v Terreblanche*:²²

'Once a substitution as plaintiff occurs, there can be no dispute concerning the legal standing to sue. A substitution sanctioned by the court is a legal procedural step to formalise the transfer of the claim to the cessionary in terms of the

²⁰ *Van Rensburg v Condoprops 42 (Pty) Ltd* 2009 (6) SA 539 (E).

²¹ *General Finance Co (Pvt) Ltd v Robertson* 1980 (4) SA 122 (ZA) at 124A.

²² *Sentrachem Limited v Terreblanche* [2017] ZASCA 16 para 17.

cession. After substitution the cedent [should read cessionary] is entitled, and is in fact in law obliged, to continue the suit in its own name.'

[57] That being the case, the applicant will be required to continue with Cotton King's non-existent claim against the defendant. The defendant will be put to the expense of participating in proceedings that have no prospects of success and are an exercise in futility. To my mind that constitutes prejudice.

The fifth issue: whether it is appropriate to determine the prospects of success on the plaintiff's claim in this substitution application

[58] In *Van Rensburg v Condoprops 42 (Pty) Ltd*,²³ Leach J stated that: 'In considering whether to allow such a substitution the court would be called on to exercise discretion ...'.²⁴

[59] In his heads of argument, Mr Iles echoed Leach J's words and, in my view, correctly acknowledged that a court hearing a substitution application exercises a discretion when arriving at its judgment on that issue. A judicial discretion refers to a judicial officer's power to make a decision based upon his or her individualised evaluation of a matter, guided by the principles of the applicable law. The judicial officer will apply reason and judgment to choose from several alternatives that may be acceptable, due regard being had to all the relevant facts pertaining to the matter.²⁵ Decisions taken involving the exercise of a discretion may thus be based on the case's particular circumstances rather than upon a rigid application of law but should not be arbitrary in nature and should be based upon what is right and equitable in the circumstances of the matter.

²³ *Van Rensburg v Condoprops 42 (Pty) Ltd* 2009 (6) SA 539 (E).

²⁴ *Ibid* para 4.

²⁵ *Kemp t/a Centralmed v Rawlins* [2009] ZALAC 8; [2009] 11 BLLR 1027 (LAC); (2009) 30 ILJ 2677 (LAC) para 4.

[60] Mr Iles submitted further that if there was a valid cession of a claim to the cessionary that had not yet prescribed, the application for substitution should be granted. He submitted that this was the position in this case: litigation was properly commenced by Cotton King before its claim had become prescribed, after *litis contestatio* had been reached the claim was ceded to the applicant and the agreement to cede was reduced to writing for ease of proof. The substitution sought should therefore be granted. He submitted that it was of no concern to the court whether the applicant, having been substituted for Cotton King, was ultimately likely to be successful in the action.

[61] Perhaps the flaw in this reasoning is the premise that Cotton King had entered into a valid cession with the applicant. Cotton King had no right and had made no investment with Mr Cowan. Yet it commenced action against the defendant and then purported to cede its rights to the applicant.

[62] Furthermore, the mechanistic, tick-box approach that Mr Iles proposes does not seem to me to allow for the exercise of the discretion referred to by Leach J in *Van Rensburg*, or for the consideration of prejudice to the other side. The prospects of the success of the action may influence the issue of prejudice. For me to properly exercise my discretion I must consider all that is relevant. In my view, that would, at the very least, require me to carefully consider the nature of the right that was ceded. Based upon the unique facts of this matter, what was ceded was not a valid right at all. That having been recognised, it seems to me that I should have some regard to the eventual outcome of the action in the light of the admission that the investment was not Cotton King's when exercising my discretion and considering the question of prejudice to the defendant.

The sixth issue: whether the applicant's claim against the respondent has prescribed

[63] As a general proposition, based upon the similarity of the approaches to applications for amendments and substitution referred to by Brand JA in *Tecmed*,²⁶ a court would not ordinarily permit an amendment where the occurrence of prescription was common cause or in any other situation where a claim would be known to have prescribed.²⁷

[64] We now know that Cotton King never had a claim against the defendant. The applicant did have a claim but did not enforce it for some unknown reason. In terms of section 12(1) of the Prescription Act 68 of 1969 (the Act), prescription begins to run when the debt becomes due. The issuing and serving of summons in the name of an incorrect plaintiff does not stop the running of prescription.²⁸ The wording of section 15(1) of the Act makes this plain:

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

The operative word in that extract is ‘creditor’: Cotton King, by its own admission, was not a creditor of the defendant when it issued the summons against it. The issuing of the summons accordingly did not interrupt the running of prescription insofar as Cotton King’s claim is concerned and certainly not as far as the applicant’s claim is concerned. A substitution application, which may be viewed as a joinder application in which one party is added and one is removed, is not a process in terms of which a creditor claims payment of a debt and accordingly does not interrupt the running of prescription.²⁹

[65] I do not lose sight of the decision in *Sentrachem v Terreblanche*.³⁰ In that case, a valid claim was ceded several times and the cessionary on

²⁶ *Tecmed (Pty) Ltd and others v Nissho Iwai Corporation and another* [2010] ZASCA 143; 2011 (1) SA 35 (SCA) para 14.

²⁷ *Grindrod (Pty) Ltd v Seaman* 1998 (2) SA 347 (C) at 351D-E.

²⁸ *Solenta Aviation (Pty) Ltd v Aviation @ Work (Pty) Ltd* [2013] ZASCA 103; 2014 (2) SA 106 (SCA) para 17.

²⁹ *Peter Taylor and Associates v Bell Estates (Pty) Ltd and another* [2013] ZASCA 94; 2014 (2) SA 312 (SCA) para 16; *Nativa Manufacturing (Pty) Ltd v Keymax Investments 125 (Pty) Ltd and others* 2020 (1) SA 235 (GP) paras 10-42.

³⁰ *Sentrachem Limited v Terreblanche* [2017] ZASCA 16.

each occasion was substituted as the plaintiff in the action, with the final substitution occurring after the completion of the three-year prescriptive period. A special plea of prescription was upheld by the lower court. On appeal, the Supreme Court of Appeal found that the claim had not prescribed: all that had changed on each occasion was the identity of the plaintiff, not the nature of the debt. In delivering his judgment, Majiedt JA approved³¹ the following extract from *Fisher v Natal Rubber Compounders (Pty) Ltd*:³²

‘Upon substitution the cessionary acquired, by way of cession, all rights and obligations vested in the cedent at the time of the substitution. What was bestowed on NRC by cession was a claim in respect of which the running of prescription had been interrupted by the service of the summons. In my view the original interruption of prescription by the timeous service of the summons was not affected in any way by the cession or subsequent amendment. The amendment was a mere procedural step followed to effect the substitution.’

The facts of this matter are distinguishable. Cotton King’s claim was non-existent and the issuing of summons therefore did not interrupt the running of prescription. The substitution of the applicant for Cotton King, if such was ordered, would result in the introduction of a different plaintiff and a different cause of action and such action, it is submitted by the defendant, has prescribed.

[66] There is clear evidence that the applicant’s claim has prescribed. In a letter written by Mr Cowan and addressed to the applicant, dated 14 October 2010, it was recorded that the investment was to be repaid by no later than 31 January 2011. Absent any admission made by the defendant regarding its liability for the investment, and none have been mentioned in this matter, the applicant’s claim against the defendant became prescribed at midnight on 30 January 2014. The applicant’s claim has on the face of it prescribed and nine years later it remains prescribed. Mr Iles ultimately conceded as much in his argument. It was a necessary admission.

³¹ Ibid para 13.

³² *Fisher v Natal Rubber Compounders (Pty) Ltd* [2016] ZASCA 33; 2016 (5) SA 477 (SCA) para 15.

Summation

[67] It appears to me that the applicant's attempt to litigate against the defendant has come to an end. Her claim in her personal capacity has prescribed, and she has not taken cession of anything from Cotton King that could improve her position. To allow her to be substituted in the place and stead of Cotton King would accordingly serve no purpose and would not advance her position³³ but would prejudice the defendant who would have to endure the inconvenience and expense of this essentially hopeless action limping on.

[68] The applicant is, however, not without a remedy. Her true cause of action is against her erstwhile attorneys in respect of which she has already issued summons.

Costs

[69] Mr Harpur, in urging the dismissal of the application, sought a costs order that included the costs of senior counsel. Mr Iles resisted this with a reference to *Hangar v Robertson*.³⁴ In that matter, Leach JA stated the following: 'Counsel for the respondent asked for an order for costs, to which the respondent is of course entitled. However, he specifically requested that the costs order should include the costs "consequent upon the employment of senior counsel". This court has previously observed that such an order is inappropriate and that, where a single counsel is employed no special order is required, it being for the taxing master to determine a fair and reasonable fee on taxation - see *City of Johannesburg Metropolitan Municipality v Chairman of the Valuation Appeal Board for the City of Johannesburg & another*. Although the employment of senior counsel in the present case appears to have been a wise and reasonable

³³ *Stroud v Steel Engineering Co Ltd and another* 1996 (4) SA 1139 (W) at 1142C-F.

³⁴ *Hangar and others v Robertson* [2016] ZASCA 102.

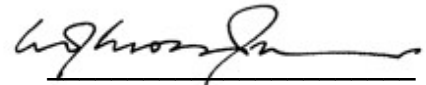
precaution, it would be wrong for this court to fetter the taxing master's discretion.³⁵ (Footnote omitted.)

I am of the view that the employment of senior counsel in this matter likewise appears to have been a sensible precaution.

Order

[70] In the circumstances, I grant the following order:

1. The application is dismissed with costs.

A handwritten signature in black ink, appearing to read 'Mossop J', is written over a solid horizontal line.

MOSSOP J

³⁵ Ibid para 21. See also *GR Sutherland and Associates (Pty) Ltd v V & A Waterfront Holdings (Pty) Ltd and others* [2023] ZAWCHC 67 para 40.

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Date of argument : 15 August 2023

Date of Judgment : 13 September 2023