***THE SUPREME COURT OF APPEAL***
***OF SOUTH AFRICA***

Case No: 448/07

RUSTENBURG PLATINUM MINES LIMITED Appellant

and

INDUSTRIAL MAINTENANCE PAINTING SERVICES CC Respondent

**Neutral citation:** *Rustenburg Platinum Mines v Industrial Maintenance Painting Services* (448/2007) [2008] ZASCA 108 (23 September 2008)

**Coram :** MPATI P, CAMERON, LEWIS, JAFTA JJA and BORUCHOWITZ AJA
**Heard :** 15 AUGUST 2008

**Delivered :** 23 SEPTEMBER 2008

**Summary :** Prescription – Extinctive prescription – meaning of 'debt' in Prescription Act 68 of 1969 – 'debt' refers generally to 'claim' and not 'cause of action' – Amendment to particulars of claim to introduce new 'cause of action – does not necessarily introduce new 'debt'.

## *ORDER*

**On appeal from:** High Court, Johannesburg (Willis J sitting as court of first instance).

1 The appeal is allowed with costs.

2 The order of the court a quo is set aside and replaced with the following:

'(a) The plaintiff is granted leave to amend its particulars of claim in accordance with its notice of amendment dated 5 June 2007.

(b) The defendant is ordered to pay the costs of the application for leave to amend, including the costs of the appearances on 17 July 2007.'

## JUDGMENT

MPATI P (CAMERON, LEWIS, JAFTA JJA and BORUCHOWITZ AJA concurring):

[1] This appeal mainly concerns the question whether an amendment sought to be effected to the appellant's particulars of claim would, if granted, introduce a different debt to the one payment of which was originally claimed. If so, says the respondent, then the debt now sought to be introduced or claimed has become prescribed. For convenience, I shall refer to the parties as in the court below.

[2] The plaintiff sued the defendant in the Johannesburg High Court for payment of the sum of R392 160, together with interest. It is common cause between the parties that during 2002 and in terms of an agreement/s entered into between them the defendant undertook certain work and supplied certain materials in relation to such work for and on behalf of the plaintiff. From time to time during this period the defendant submitted to the plaintiff tax invoices for payment to it of moneys due for work allegedly performed and materials supplied. The plaintiff paid the amounts reflected on the invoices. It is alleged in the particulars of claim that the plaintiff effected the payments believing them to be due, owing and payable to defendant. Subsequent to making payment during December 2002 the plaintiff discovered, so the particulars aver, that certain of the claims by the defendant were not valid and that payments made

in settlement of them were not due, owing and payable, because the defendant had not performed all the work nor supplied all the materials as reflected in the invoices. The excess payments, which the plaintiff alleges were made in the bona fide but mistaken and reasonable belief that the defendant was entitled to them, totalled R719 897.76 (excess amount).

[3] It is further alleged in the particulars of claim that during June 2003 the defendant repaid the sum of R327 137.76 (the refund) following the plaintiff's demand for payment of the excess amount. The plaintiff consequently avers that the defendant has been enriched at its expense, the latter having failed or refused to pay the sum claimed, which is the difference between the excess amount and the refund.

[4] In its plea the defendant states that during the relevant period it submitted to the plaintiff 'tax invoices and *pro forma* invoices in connection with work done and materials supplied or to be supplied . . . in terms of the agreement or agreements between the parties'. The plea continues that 'with full knowledge that the *pro forma* invoices rendered at the end of 2002 related to work to be done during 2003, plaintiff made payment on this invoice and/or invoices'. It is pleaded further that the defendant paid the refund of its own volition. That payment of the excess amount was made by the plaintiff to the defendant in respect of work that has not as yet been done, and materials not yet supplied, is therefore common cause.

[5] The trial of the matter commenced before Willis J on 22 May 2007. After three witnesses had testified on its behalf, the plaintiff sought to amend its particulars of claim by adding two alternatives to its cause of action as pleaded, allegedly so as to accord with the evidence already tendered. The defendant objected to the proposed amendment. The matter was accordingly postponed to 17 July 2007 to enable the plaintiff to invoke the provisions of Rule 28 of the Uniform Rules of Court. The plaintiff was ordered to pay the costs occasioned by the postponement.

[6] A formal notice of application to amend the particulars of claim was subsequently delivered by the plaintiff. The proposed amendment sought to add the following averments to the pleaded cause of action:

'6 Alternatively to paragraphs 3.2, 3.3, 3.4, 3.5, 4 and 5:

6.1 From time to time during the period 2002, the Defendant performed certain work and supplied certain materials and submitted to the plaintiff invoices in terms of which it recorded monies that were payable to it in respect of work performed by it and material supplied by it as well as work and material to be performed and

supplied in the future, all of which were in terms of the aforesaid agreement/agreements, alternatively accepted by the Plaintiff.

6.2 Having received the said invoices:

6.2.1 The Plaintiff paid to the Defendant the amounts reflected as payable in terms thereof;

6.2.2 The parties, represented by their duly authorised representatives, orally agreed at Plaintiff's premises during or about January/February 2003 that the Defendant would not attend to certain of the work and supply certain materials which were to be performed and supplied in the future to the value of R719 897,76 plus VAT, it being implied, alternatively tacitly agreed to by the parties that the Defendant would repay to the Plaintiff the amount paid by the Plaintiff in respect of work and material to be done and supplied by the Defendant in the future and which was not done and supplied in the aforesaid sum of R719 876,76 plus VAT;

6.2.3 Alternatively, the Plaintiff instructed the Defendant not to attend to certain of the work and the supply of material which were to be performed and supplied in the future to the value of R719 897,76 plus VAT, which instruction the Defendant accepted and agreed to, it accordingly and by virtue thereof being implied, alternatively tacitly agreed to by the parties that the Defendant would repay to the Plaintiff the amount paid by the Plaintiff in respect of work and material to be done and supplied by the Defendant in the future and which was not done and supplied in the aforesaid sum of R719 876,76 plus VAT;

6.2.4 The Plaintiff accordingly paid to the Defendant the sum of R719 876,76 plus VAT in excess of the amount to which the Defendant was entitled, having regard to the work and material actually done and supplied by it to the Plaintiff.

6.3 Subsequent to the above and during or about June 2003, the Defendant repaid to the Plaintiff the sum of R327 737,36, however failed, refused and/or neglected to pay to the Plaintiff the balance of R392 160,00 plus VAT, totalling the sum of R447 062,40.'

[7] The defendant objected to the proposed amendment on the following grounds:

'1. The amendment is sought late without any explanation.

2. The amendment will prejudice the Defendant as:

2.1 the Plaintiff has already led the evidence of three witnesses who were cross-examined in a limited fashion based on the pleadings as they stand;

2.2 evidence and witnesses necessary to deal with the proposed amendment are no longer available to the defendant;

2.3 the evidence of the Plaintiff's witnesses contradicts the amendment sought in that the Plaintiff's witnesses admit that services were rendered and materials were supplied in or about January and February 2003. The Plaintiff's amendment asserts that no services were rendered and no materials were supplied in or about January and February 2003.

3. The Plaintiff seeks to introduce in the alternative a claim based on a contractual debt which is a different debt to the debt claimed in its particulars of claim and which different debt has prescribed.

4. Paragraphs 6.2.2 and 6.2.3 of the proposed amendment do not comply with Rule 18(6) of the Uniform Rules of Court.

5. The proposed pleading is vague and embarrassing in that it does not state when, where and by whom the agreement was reached as pleaded in the proposed paragraph 6.2.2 or when, where and by whom the instruction was given and accepted as pleaded in the proposed paragraph 6.2.3.

6. The embarrassment is compounded in the light of the evidence already led.'

[8] Willis J disposed of the matter by considering whether, by the proposed amendment, the plaintiff sought to introduce a different debt from the one originally claimed. He held that the proposed amendment introduces an obligation which arises separately from the claim originally pleaded. That obligation, he said, is an agreement allegedly entered into during January/February 2003, it being common cause that the relevant period for prescription has lapsed. Willis J upheld the defendant's objection and refused the application to amend the particulars of claim with costs, but subsequently granted leave to appeal to this court.

[9] In supporting the judgment of the court a quo counsel for the defendant submitted that the plaintiff's claim, as originally formulated, is a classic *condictio* founded on the absence of a contractual obligation (*condictio indebiti*). The proposed amendment, counsel argued, seeks, however, to introduce a claim based on a contractual obligation to repay the excess amount under certain circumstances: that is, it is aimed at enforcing a right based on an agreement, a proposition which is irreconcilable with the original claim. The rights and obligations which the plaintiff seeks to enforce in the original claim based on the *condictio indebiti* and the rights and obligations sought to be enforced in the alternative claim (as per the proposed amendment) are not the same. The proposed alternative claim, counsel contented, is not a 'fleshing out' of the main claim but a different claim seeking to enforce a different debt, which has

become prescribed.

[10] Section 10(1) of the Prescription Act 68 of 1969 provides that 'a debt shall be extinguished by prescription after the lapse of the period which in terms of the relevant law applies in respect of the prescription of such debt', in this case after the lapse of three years from the date upon which the debt became due (11(d)). In terms of s 15(1) the running of prescription 'shall . . . be interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt'. So, once again the meaning of the word 'debt' in the Prescription Act comes under the spotlight.

[11] In *Drennan Maud and Partners v Pennington Town Board*,[1] Harms JA, having referred to the decisions of this court in *Sentrachem Ltd v Prinsloo*[2] and *Standard Bank of South Africa Ltd v Oneanate Investments (Pty) Ltd (in liquidation)*,[3] reminded that the word 'debt' does not refer to the 'cause of action', but more generally to the 'claim'. And in *Evins v Shield Insurance Co Ltd*[4] Trollip JA, in a minority judgment, said that 'cause of action' is ordinarily used 'to describe the factual basis, the set of material facts, that begets the plaintiff's right of action and, complementarily, the defendant's "debt", the word used in the Prescription Act.'[5] (See also the majority judgment of Corbett JA at 838D-H, and *CGU Insurance Ltd v Rumdel Construction (Pty) Ltd*.[6]) It should, therefore, by now be fairly clear that when the Prescription Act speaks of a 'debt' it refers more generally to a 'claim' and not the 'cause of action'.

[12] In this matter the defendant objects to the proposed amendment on the basis that the claim or debt sought to be introduced by the plaintiff has become prescribed. Counsel for the plaintiff contended, in this court, that what the plaintiff seeks to recover is money admittedly paid by it to the defendant for work and materials that has not as yet been done or supplied at the time of the payment. Thus, the debt sought to be recovered, whether by way of the particulars of claim as originally framed or in accordance

1 1998 (3) SA 200 (SCA) at 212F-G.
2 1997 (2) SA 1 (A) at 15B-16D.
3 1998 (1) SA 811 (SAC) at 825B-827F.
4 1980 (2) SA 814 (A).
5 At 825F-G.
6 2004 (2) SA 622 (SCA) para 6.

with the alternatives as set out in the proposed amendment, is the same.

[13] An amendment is no doubt permissible, provided that the debt which is claimed by way of the amendment is the same or substantially the same debt as originally claimed.[7] In order to decide the defendant's objection based on prescription in this matter, that is, whether the 'debt' claimed in the proposed amendment has become prescribed, it is necessary to identify the 'debt' or, as Harms JA put it in *Drennan*,[8] one must ascertain 'what the "claim" was in the broad sense of the meaning of that word'. As has been mentioned above, it is common cause between the parties that when the excess amount was paid to defendant, there was no *causa* for the payment – no work had as yet been done and no materials supplied. It is that excess amount (the 'debt') as embraced in the original cause of action, which plaintiff seeks to recover. It is true that the proposed amendment sets out a cause of action which is different from that contained in the particulars of claim. The proposed amendment seeks to introduce, as alternative causes of action, contractual obligations arising from agreements between the parties in terms of which the defendant tacitly agreed to repay the excess amount to plaintiff. The question, however, is whether the proposed amendment introduces a new 'claim' or 'debt'.

[14] In *Evins v Shield Insurance*[9] Corbett JA said the following:

'Where the plaintiff seeks by way of amendment to augment his claim for damages, he will be precluded from doing so by prescription if the new claim is based upon a new cause of action and the relevant prescriptive period has run, but not if it was part and parcel of the original cause of action and merely represents a fresh quantification of the original claim or the addition of a further item of damages.'[10]

Dealing with the difference between the concepts 'cause of action' (skuldoorsaak) and 'right of action' (vorderingsreg) in the same case, Trollip JA said:

'. . . I am not sure that it necessarily follows that, because one factual basis differs from another in some respect or respects, separate or different rights of action arise; on the contrary, both cases may nevertheless beget only one

7 *CGU Insurance*, above footnote 6 para 5; *Associated Paint v Chemical Industries (Pty) Ltd t/a Albestra Paint and Lacquers v Smith* 2000 (2) SA 789 (SCA) at 794C-G and *Sentrachem Ltd v Prinsloo*, above footnote 2 at 15H-16D.
8 Above footnote 1 at 212I-G.
9 Above footnote 4.
10 At 836D-E.

right of action or debt, eg one for the plaintiff's entire patrimonial loss. The cases of *Green v Coetzer* 1958 (2) SA 697 (W) and *Schnellen v Rondalia Assurance Corporation of SA Ltd* 1969 (1) (SA) 517 (W) . . . are apposite illustrations of that.'[11]

These two statements (by Corbett and Trollip JJA) were held to be consonant with each other (*Sentrachem Ltd v Prinsloo*[12]). According to Corbett JA, if an amendment introduces a new 'claim' or 'debt' which is based on a new cause of action, such amendment would be susceptible to a special plea of prescription if the prescriptive period has run. Put differently, if the new cause of action, ie the material facts which must be proved for a plaintiff to succeed, sought to be introduced by the amendment, gives rise to a different 'right of action' or 'debt' to the one originally claimed, that plaintiff will be precluded from effecting the amendment if the relevant prescriptive period has run. But, as I understand the extract from the judgment of Trollip JA, it does not follow that a new cause of action sought to be introduced by an amendment will necessarily give rise to a new 'claim' or 'debt'.

[15] In *CGU Insurance*[13] the plaintiff issued summons against the defendant for payment of two amounts for loss alleged to have been caused by storm damage on two separate occasions. The amounts were alleged to have been due and payable in terms of a single contract of insurance identified in and annexed to the particulars of claim. Approximately five months later the plaintiff sought to amend its particulars of claim, by alleging that a different contract to the one annexed to the particulars of claim was the basis of liability for one of the two storm damage occurrences. The defendant objected to the amendment on the basis that it sought to introduce a new contract which had not been alleged before and thus introduced 'a new cause of action or right of action' based upon the newly alleged contract. This new 'cause of action or right of action' arose more than three years before the amendment was sought and therefore introduced a prescribed claim.

[16] Jones AJA, in considering the objection raised, said it was necessary, when deciding whether a summons interrupts prescription, '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'.[14] In rejecting counsel's argument in support of the objection he said:

'I accept that the amendment introduces a new insurance contract as the basis for a claim for the loss which occurred in March 1996. But an objective comparison between the original particulars of claim and the

11 At 825H.
12 Above footnote 2 at p 15D-H.
13 Above footnote 6.
14 Ibid, para 7.

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 particularised 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.'[15]

[17] Counsel for the defendant 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*.[16] 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* '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:

'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.'[17]

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]

[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,

15 Above para 8.
16 1978 (1) SA 463 (A).
17 At 473G-H.
18 Ibid

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 (see para 15 above).[19] 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,[20] 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.

[20] The defendant raised further objections to the proposed amendment. The first is that the amendment was sought late without any explanation. In the affidavit in support of the proposed amendment it is stated that the plaintiff realised that it was necessary to amend its particulars of claim as proposed only during the course of the evidence of one of its witnesses. That witness, Mr Bart Pieterse, testified on 22 May 2007. The notice of amendment was handed to defendant's legal representatives on the morning of 24 May 2007. I agree with the contention on behalf of the plaintiff that there was no real delay between its realisation of the necessity to amend and the attempt to amend on 24 May 2007, to which objection was raised. In my view, the submission that the explanation should have related to plaintiff's failure to amend after the close of pleadings has no merit.

[21] The second objection is that the amendment will prejudice the defendant in that (a) the cross-examination of the three witnesses whose evidence has already been led was in a limited fashion based

19 See also *Sentrachem L td v Prinsloo* above footnote 2 at p 15J-16D.

20 The proposed amendment also seeks to amend prayer 1 by inserting the words 'plus VAT totalling R447 062.40' after 'R392 160.00'.

on the pleadings as they stand; (b) evidence and witnesses necessary to deal with the proposed amendment are no longer available to defendant, and (c) the evidence of the plaintiff's witnesses contradicts the amendment sought. As to (a) I can think of no reason why the witnesses who have already testified cannot be recalled for further cross-examination, if necessary. The defendant's contention that the 'contamination of witnesses discussing their evidence' after cross-examination 'cannot be gauged or undone' and that their recalling cannot undo the prejudice, can hardly be a basis for refusing the amendment, in my view. The possibility of witnesses discussing their evidence even before they testify is ever present. As to (b), the defendant avers that the best evidence available to it is that of Mr Jaco Schnettler, who is no longer within the country. The defendant offers no detail in respect of the nature of the evidence which Mr Schnettler would have given if he were present, nor does it give details as to why Mr Schnettler cannot travel to South Africa to attend court. The averment accordingly requires no further attention. The defendant also contends that certain internal memoranda of the plaintiff relating to the agreements (as alleged in paragraphs 6.2.2 and 6.2.3 of the proposed amendment) have not been discovered. I can again find no reason why, if such documents exist, the defendant cannot invoke the provisions of Rule 35(3) to obtain discovery of them. As to (c), it suffices to say that the plaintiff's case has not been closed. Further witnesses may still be called. I am also not convinced that the evidence of the plaintiff's witnesses led thus far contradicts the amendment sought.

[22] The third objection raised is that the proposed amendment does not comply with the provisions of Rule 18(6)[21] of the Rules of Court in that it does not state in paragraph 6.2.2 when, where and by whom the agreement was concluded, nor does it state in paragraph 6.2.3 when, where and by whom the instruction was given and accepted on behalf of the plaintiff and the defendant respectively. There is no substance in this objection. Paragraph 6.2.2 of the amendment states that the parties were represented by their duly authorised representatives, who orally agreed at the plaintiff's premises during or about January/February 2003. These allegations must also be read into paragraph 6.2.3. It is for the defendant, if it so wishes, to request further particularity for purposes of the trial.

[23] The fourth objection is that the proposed amendment is vague and embarrassing in that it does not state when, where and by whom the agreement was reached as pleaded in the proposed paragraph 6.2.2 or when, where and by whom the instruction was given and accepted as pleaded in the proposed paragraph 6.2.3. I have already dealt with these issues in the preceding paragraph (para 22). The objection has no substance. It was further submitted on behalf of the defendant that the plaintiff's failure to comply with Rule 18(6) compounds the embarrassment which the defendant would suffer in pleading

21 The subrule reads: 'Any party who in his pleading relies upon a contract shall state whether the contract is written or oral and when, where and by whom it was concluded, and if the contract is written a true copy thereof or of the part relied on in the pleading shall be annexed to the pleading.'

thereto in the light of the evidence already led in relation to the happenings in early 2003. I have already dealt with these issues and they require no further consideration.

[24] In the result the following order is made:

1 The appeal is allowed with costs.

2 The order of the court a quo is set aside and replaced with the following:

'(a) The plaintiff is granted leave to amend its particulars of claim in accordance with its notice of amendment dated 5 June 2007.

(b) The defendant is ordered to pay the costs of the application for leave to amend, including the costs of the appearances on 17 July 2007.'

MPATI P

Appearances:

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