



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable
Case No: 754/2012

In the matter between:

SOLENTA AVIATION (PTY) LTD

Appellant

and

AVIATION @ WORK (PTY) LIMITED

Respondent

Neutral citation: *Solenta v Aviation @ Work* (754/2012) [2013] ZASCA 103
(12 September 2013)

Coram: Mthiyane AP, Ponnann, Tshiqi and Willis JJA and Meyer AJA

Heard: 23 August 2013

Delivered: 12 September 2013

Summary: Prescription – Extinctive prescription – s 15(1) of the Prescription Act 68 of 1969 – whether the running of prescription is interrupted by service on debtor of combined summons whereby action is instituted by a plaintiff company which is not the creditor but subsequently substituted with the true one by means of an amendment after the prescriptive period.

ORDER

On appeal from: the North Gauteng High Court, Pretoria (JW Louw J sitting as court of first instance):

The appeal is dismissed with costs, including the costs of two counsel.

JUDGMENT

Meyer AJA (Mthiyane AP, Ponnann, Tshiqi, Willis JJA concurring):

[1] This is an appeal against a judgment of Louw J, sitting in the North Gauteng High Court, in which he upheld a special plea of prescription raised by the respondent, Aviation @ Work (Pty) Ltd, against a claim for payment of damages brought against it by the appellant, Solenta Aviation (Pty) Ltd.

[2] On 13 March 2007, a combined summons was issued in the name of Solenta Aviation Workshops (Pty) Ltd (Solenta Aviation Workshops) against the respondent. A plea with a claim in reconvention was in due course delivered by the respondent, followed by the delivery of a replication and a plea to the claim in reconvention in the name of Solenta Aviation Workshops.

[3] It was common cause on the pleadings that on or about 22 March 2006 and at Wonderboom, Pretoria, Solenta Aviation Workshops, as lessor, and the respondent, as lessee, concluded a written agreement - referred to as the 'Aircraft Dry Lease Agreement' – in terms whereof Solenta Aviation Workshops leased a certain Cessna aircraft to the respondent ('the contract'). A copy of the contract upon which reliance was placed was annexed to the particulars of claim, and admitted. Solenta Aviation

Workshops in convention and the respondent in reconvention claimed damages against each other resulting from the other party's alleged breach of the contract.

[4] The description of the lessor in terms of the contract is 'Solenta Aviation (Pty) Ltd' and not Solenta Aviation Workshops as described in the combined summons and in the particulars of claim. On 18 August 2009, a notice of intention to amend was delivered in which notice was given that the description of the plaintiff was to be amended to 'Solenta Aviation (Pty) Ltd' by the deletion of the word 'Workshops' where it appears in the summons and in paragraph 1 of the particulars of claim. The respondent objected to the proposed amendment on the grounds that it would amount to a substitution of one plaintiff for another and that any claim that Solenta Aviation (Pty) Ltd might have had against the respondent had prescribed. An application for leave to amend the citation of the plaintiff was then brought.

[5] In granting the amendment on 31 March 2010, Potterill J held that the description of the plaintiff amounted to a misnomer rather than a substitution of the correct plaintiff for the wrong one. She held that the true identity of the plaintiff was recognisable from the particulars of claim and the annexed contract and that service of the summons on the respondent had interrupted the running of prescription in terms of s 15(1) of the Prescription Act.¹

[6] The amendment was effected on 7 April 2010. The respondent thereupon amended its plea by raising a special plea of prescription to the appellant's claim. The appellant delivered a replication in answer to the respondent's special defence. It is common cause on these further pleadings that Solenta Aviation Workshops and the appellant were both registered companies and therefore separate legal entities. It is also common cause that the contract was concluded between the appellant and the respondent; that no contractual relationship existed between Solenta Aviation Workshops and the respondent at the time of instituting the action; and, that Solenta Aviation Workshops was not a creditor of the appellant.

¹ Prescription Act 68 of 1969.

[7] It is alleged in the special plea that service on the respondent of the summons whereby Solenta Aviation Workshops claimed payment of damages arising from the respondent's alleged breach of the contract - which breach is alleged in the particulars of claim to have taken place on or about 13 May 2006 - did not interrupt the running of prescription in terms of s 15(1) of the Prescription Act and that a period of more than three years had lapsed since the alleged breach and the delivery of the notice of intention to amend the citation of the plaintiff or of the actual substitution of the appellant for Solenta Aviation Workshops.

[8] The appellant responded in its replication to the special plea that, although incorrectly described in the summons and particulars of claim, it was the company that instituted the action against the respondent on 13 March 2007 and that that process conveyed to the reader the intention of the appellant, as creditor, to claim payment from its debtor, the respondent. The defence of *res iudicata* in the form of what has become known as issue estoppel is also raised. It is alleged that, in dismissing the respondent's objection to the proposed amendment, '... the court determined the identical issue between the identical parties now raised in the special plea ...' and that the respondent '... is accordingly, and in addition, issue estopped on the issue raised in the special plea.'

[9] The trial on two separated issues proceeded before Louw J. He was only concerned with the issues of *res iudicata* and prescription while the remaining issues stood over for later determination. No evidence was led and the parties confined themselves to the documents that formed part of the record. In upholding the special plea of prescription, the court a quo followed the decision of this court in *Blaauwberg Meat Wholesalers CC v Anglo Dutch Meats (Exports) Ltd*² and held that the summons that was served in this instance, objectively considered, failed to communicate to the defendant (respondent) the intention of the plaintiff (appellant) to claim payment of the debt. It held that the summons did not meet the objects of s 15(1) of the Prescription Act and it did not interrupt prescription. In dismissing the plea of *res iudicata*, the court a quo held that the application for amendment was interlocutory and the finding of

²*Blaauwberg Meat Wholesalers CC v Anglo Dutch Meats (Exports) Ltd* 2004 (3) SA 160 (SCA).

Potterill J was not one that finally disposed of an issue in the action between the parties.³ In the result, the appellant's claim was dismissed with costs, including the costs of two counsel. The appellant appeals to this court with the leave of the court a quo. This appeal concerns the same issues of prescription and *res iudicata*.

[10] In terms of s 12(1) of the Prescription Act, prescription begins to run when the debt becomes due. It is common cause between the parties that the debt which forms the subject of the appellant's claim became due on 13 May 2006. Sections 10(1) and 11(d) provide for a period of prescription of three years in the present case. The notice of the application to amend the citation of the plaintiff was given on 18 August 2009, which was after the prescriptive period. Section 15(1) provides as follows:

'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.' (Underlining added.)

[11] The question to be decided is therefore whether the combined summons served on the respondent by which action was instituted in the name of Solenta Aviation Workshops was a claim by the creditor of the debt, which it is now common cause is the appellant, in compliance with the provisions of s 15(1).

[12] The general rule or test applicable in the determination of whether there is compliance with s 15(1) was re-affirmed by this court in *Blaauwberg* thus:⁴

'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. Compare *Standard Bank of SA Ltd v Oneanate Investments (Pty) Ltd* 1995 (4) SA 510 (C) at 553E-G.⁵

³ The court a quo followed the decision of the Full Court of the Western Cape High Court in *Anglo Dutch Meats (Exports) Limited v Blaauwberg Meat Wholesalers CC* 2002 CLR 292 (C) paras 17-19.

⁴ Fn 2 supra para 13.

⁵ In *Associated Paint & Chemical Industries (Pty) Ltd t/a Albestra Paint and Lacquers v Smit* 2000 (2) SA 789 (SCA) para 18 this court applied the objective test and concluded that the claim made in the

[13] In *Standard Bank of SA Ltd v Oneanate Investments (Pty) Ltd*, the case referred to in the above quotation, Selikowitz J stated the test as follows:

'The test as to whether any given process interrupts prescription in respect of a particular debt must be an objective one. The process in question must be objectively considered. Knowledge which one or both of the parties may have *dehors* the process cannot affect its interpretation or its interruptive effect. More particularly, the fact that the plaintiff may subjectively intend to claim a particular debt, and that defendant may, by virtue of extrinsic knowledge, appreciate that plaintiff has wrongly identified the debt in his summons, cannot convert the summons into one which interrupts prescription in respect of any debt other than the one identified in the process. It is the process which interrupts prescription, not the plaintiff's subjective intention to sue.'

[14] Counsel for the appellant placed great reliance upon the description of the lessor as 'Solenta Aviation (Pty) Ltd' and that of the lessee as 'Aviation @ Work (Pty) Ltd' in the contract that is annexed to the combined summons that was served upon the respondent as well as on the reference to '*domicilium citandi et executandi*' in the description of each party on the face of the combined summons and in paragraphs 1 and 2 of the particulars of claim. The details of the creditor given in the summons and in paragraph 1 of the particulars of claim were that:

'[t]he plaintiff is Solenta Aviation Workshops (Pty) Ltd, a company, duly incorporated in accordance with the laws of the Republic of South Africa with *domicilium citandi et executandi* of (sic) Block 5 Stratford Office Park, Corner Cedar Avenue and Valley Road, Broadacres, Johannesburg.'

The appellant was sought to be introduced to the proceedings by the deletion of the word 'Workshops'. For the rest the citation remained unchanged. It is common cause that both corporate entities had the same registered address, which was the one given in the combined summons and in the particulars of claim. The appellant's counsel submitted that the description of the lessor in the contract and the reference to a '*domicilium citandi et executandi*' communicated to the respondent the correct identity of the creditor, viz the appellant.

[15] To look only at the contents of the contract and to conclude that the respondent must have appreciated, or even did appreciate, who the true creditor was, which is

summons was, on a plain reading, not that of the true creditor.

essentially what the argument on behalf of the appellant amounts to, can in my view not be conclusive of the enquiry as to whether payment of the debt was claimed by the creditor. The parties to an action are cited in the combined summons and particulars of claim and the cause of action is set out in the particulars of claim. It is true that the debt which the appellant seeks to claim is the same debt that Solenta Aviation Workshops sought to enforce in the combined summons that was served upon the respondent. This does not mean that the combined summons was issued by 'the creditor' in compliance with s 15(1).⁶ The description of the plaintiff as Solenta Aviation Workshops and of the defendant as Aviation @ Work (Pty) Ltd on the face of the combined summons and in the particulars of claim and the further averments about the written agreement that was concluded between those two entities make it plain that the appellant was not the creditor that claimed payment of the debt in terms of the combined summons notwithstanding the reference to the appellant's name as the lessor in the annexed contract. The citation of the *domicilium* does not assist the appellant.

[16] The admissions by the respondent of the citations of the parties and of the contract and its terms also do not avail the appellant. They did not bring about an automatic substitution of one plaintiff for another.⁷ The appellant's counsel in my view correctly conceded that the admissions could also not be regarded as an unconditional acknowledgement of liability in terms of s 14(1) of the Prescription Act. The admissions in any event admit the parties to the contract to have been the respondent and Solenta Workshops and not the respondent and the appellant. They also do not assist the appellant.

[17] To sum up: in applying the objective test the claim made in the combined summons was, on a plain reading, not that of the true creditor, which is the appellant, and service of that process on the respondent did not interrupt the running of prescription. The appellant's counsel conceded that, if this be the finding, it will not be necessary to consider the defence of issue estoppel.

⁶Fn 5 para 16.

⁷Fn 5 para 6.

[18] The appellant's counsel resisted the request on behalf of the respondent that a costs order in favour of the respondent include the costs of two counsel. I consider the employment of two counsel on behalf of the respondent to have been prudent and not extravagant.

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

The appeal is dismissed with costs, including the costs of two counsel.

P A Meyer
Acting Judge of Appeal

APPEARANCES:

For Appellant:

D J Vetten

Instructed by:

Darryl Furman & Associates
Pretoria

Matsepes Incorporated
Bloemfontein

For Respondent:

M C Erasmus SC and
N C Hartman

Instructed by:

Mathys Krog Attorneys
Pretoria

Hugo & Bruwer Attorneys
Bloemfontein