THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable
Case No: **175/2016**

In the matter between:

DEEZ REALTORS CC t/a FIRZT REALTY COMPANY	**FIRST APPELLANT**
DENESE ZASLANSKY	**SECOND APPELLANT**
SOLOMON ZASLANSKY	**THIRD APPELLANT**
and	
SOUTH AFRICAN SECURITISATION PROGRAM (PTY) LIMITED	**FIRST RESPONDENT**
UTAX RENTALS (PTY) LIMITED	**SECOND RESPONDENT**
SUNLYN INVESTMENTS (PTY) LIMITED	**THIRD RESPONDENT**
SASFIN BANK LIMITED	**FOURTH RESPONDENT**

Neutral Citation:	*Deez Realtors v SA Securitisation Program* (175/2016) [2016] ZASCA 194 (2 December 2016).
Coram:	Bosielo, Petse JJA and Fourie, Makgoka and Nicholls AJJA
Heard:	18 November 2016
Delivered:	2 December 2016

Summary: Practice: civil procedure: prescription: extinctive prescription: interruption of: service of summons on debtor by creditor claiming payment of a debt arising from contract: contract affording creditor two alternative remedies in the event of breach:

creditor suing for accelerated payment of remaining instalments: amendment of particulars of claim to substitute damages claim for accelerated payments: meaning to be assigned to word ‘debt’: amendment not affecting essential character of the debt: debt remaining the same in substance: section 10(1) and 15(1) of the Prescription Act 68 of 1969: word ‘debt’ of wider import than ‘cause of action’.

ORDER

On appeal from: Gauteng Local Division of the High Court, Johannesburg (Windell J sitting as court of first instance):
The appeal is dismissed with costs.

JUDGMENT

Petse JA (Bosielo JA and Fourie, Makgoka and Nicholls AJJA concurring):

[1] On 2 September 2010 the respondents, South African Securitisation Program (Pty) Ltd, as first plaintiff, Utax Rentals (Pty) Ltd, as second plaintiff, Sunlyn Investments (Pty) Ltd, as third plaintiff, and Sasfin Bank Limited, as fourth plaintiff (the plaintiffs), instituted an action in the Gauteng Local Division of the High Court, Johannesburg. The present appellants, Deez Realtors CC, Denese Zaslansky and Solomon Zaslansky were the first, second and third defendants respectively (the defendants). In what follows I shall, for convenience, refer to the appellants as the defendants and the respondents as the plaintiffs. The summons was served on the defendants on 7 and 8 September 2010.

[2] The plaintiffs’ action comprised two claims, styled Claim A and Claim B in terms of which the plaintiffs claimed the sum of R586 239.34 and R582 088.93 respectively. The plaintiffs also claimed, in each instance, payment of interest at the rate of 15% per annum and costs of suit. These amounts were alleged to be due and payable to the plaintiffs, in respect of certain printing equipment, pursuant to clause 14.1 of two written lease agreements, concluded between the second plaintiff and

the first defendant on 14 December 2009. The first, third and fourth plaintiffs are cessionaries of the second plaintiff's right, title and interest accruing under the two lease agreements, in terms of two agreements of cession concluded between the parties during July 2005 and March 2006. The plaintiffs averred in their particulars of claim that the first defendant had breached the agreements in material respects. The second and third defendants had bound themselves as sureties and co-principal debtors for all amounts that were or might be due and payable under the agreements.

[3] Common in relation to both claims was the allegation in the plaintiffs' particulars of claim that the first defendant had defaulted in the punctual payment of moneys as they fell due in terms of the agreements. And in consequence, the first plaintiff was entitled to claim immediate payment of all the amounts which would have been payable in terms of the agreements until the expiry of the rental period regardless of whether or not such amounts were then due for payment.

[4] In their plea the defendants, inter alia, alleged that the plaintiffs had, on 16 July 2010, elected to terminate the agreements and communicated their election to the first defendant. This allegation prompted the plaintiffs to amend their particulars of claim. The plaintiffs' amended particulars of claim consequently alleged that on 16 July 2010 and as a result of the first defendant's breach of the agreements each of the plaintiffs elected to cancel the agreements and communicated such election to the first defendant. The plaintiffs further alleged that pursuant to their cancellation of the agreements they were entitled to payment of all arrear amounts outstanding as at the date of cancellation together with the aggregate amounts of rentals which would, but for the cancellation, have been payable to the plaintiffs for the unexpired period of the agreements. The amount representing the value of the goods on cancellation was, in respect of each claim, to be deductible from the aggregate amount of rentals claimed.

[5] The amendment of the plaintiffs' particulars of claim in turn elicited, from the defendants, a notice of intention to amend their plea in terms of rule 28(1) of the Uniform Rules of Court. In that notice, the defendants sought to introduce a special plea of prescription, alleging that the plaintiffs' claims were prescribed in that by the

time the plaintiffs' amendment was effected on 23 June 2014, a period of more than three years had, since 16 July 2010, elapsed. The plaintiffs objected to the defendants' proposed amendment, inter alia, on the grounds that, if allowed, it would render the defendants' plea excipiable.

[6] Following the plaintiffs' objection, the defendants lodged an application for leave to amend in terms of Uniform rule 28(4). In their affidavit in support of their application, the defendants averred that the plaintiffs' amendment as effected on 23 June 2014 relied on their right to cancel the agreement which they had exercised on 16 July 2010. And as the election to cancel 'creat[ed] a debt of a different nature to the debt arising from the election to accelerate payments' the summons issued on 2 September 2010 and served on 8 September 2010 did not interrupt the running of prescription of the debt flowing from the cancellation of the agreement. The plaintiffs opposed the application for leave to amend. They, in essence, contended that their right to sue the defendants both prior to and post the amendment of their particulars of claim derived from clause 14.1 of the two rental agreements in issue. And that such right arose from the breach of the agreements. Consequently, the debt claimed in the pre and post amendment of the particulars of claim was in reality the same or substantially the same debt.

[7] In due course the application for leave to amend came before Windell J in the court a quo. After her analysis of the case law, the learned judge stated the following:

'[26] A right to claim performance under a contract ordinarily becomes due according to its terms or, if nothing is said, within a reasonable time, which, in appropriate circumstances can be immediately. When the contract fixes the time for performance *mora* is said to arise from the contract itself (*mora ex re*). The rental agreements *in casu* contained a *lex commissoria* entitling the creditor to cancel the contract if [the first defendant] fails to perform by the time fixed for performance.'

[8] She then continued:

'[28] Extinctive prescription commences to run as soon as the debt is due. In terms of clause 14 the debt "became due" when [the first defendant] defaulted in the payment of the monthly installments. Prescription started to run from the date of [the first

defendant's] breach. At the time of the breach the plaintiff had all the necessary facts to institute action for specific performance or alternatively cancelation.'

[9] Ultimately, she concluded:

'[35] The allegations and relief need not be identical for the purpose of the interruption of prescription. I am satisfied that the plaintiffs' amended claim is not a different debt from the one initially pleaded. The issuing of the summons therefore interrupted prescription. The proposed special plea is accordingly excipiable and bad in law.'

[10] Consequently, the court a quo dismissed the application with costs. The appeal now before us is with its leave.

[11] Counsel were agreed that in order to determine whether the debt sought to be recovered by the plaintiffs prior to and post the amendment is substantially the same, it is necessary to compare the allegations and relief claimed in both instances.[1] A comparison of the particulars of claim before and after the amendment reveals that the plaintiffs sued on two lease agreements. In both instances the plaintiffs relied on clause 14.1 – which is in identical terms in both agreements – and which affords the plaintiffs two inconsistent remedies. The one remedy is to cancel the contract. Upon cancellation, the creditor would be entitled to sue for: (a) the amounts in arrears as at the date of cancellation; (b) liquidated damages representing the aggregate of all rentals which would, but for the cancellation, have been payable for the remaining period of the agreement; and (c) the market value of the goods, as determined in accordance with one or the other of the ways provided for in the agreements, would be deductible from the quantum of the liquidated damages.

[12] Alternatively, in the event that the creditor elects to keep the contract in force the following remedies would then accrue. The creditor would be entitled to sue for: (a) arrear rentals as at the date of election; (b) accelerated payment representing all of the rentals which would have become due and payable under the contract for the remaining unexpired period of the contract; and (c) repossession of the goods pending full settlement of the amounts claimed.

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[1] *Wavecrest Sea Enterprises (Pty) Ltd v Elliot* 1995 (4) SA 596 (SE) at 600H-J, cited with approval by this court in *CGU Insurance Ltd v Rumdel Construction (Pty) Ltd* 2004 (2) SA 622 (SCA) para 7.

[13] As already mentioned, clause 14.1 of the agreements accorded the plaintiffs a right to cancel the agreements, if the first defendant, as lessee, failed to comply with any of its obligations under the agreements. This occurred when the defendants failed to pay certain instalments as they fell due and payable. In that event, the plaintiffs would have a right, without prejudice to any other rights which they might have in law, to cancel the agreements without prior notice. In addition, the plaintiff's would have a right to: (a) take possession of the goods; (b) demand payment of arrear rentals due on the date of cancellation; and (c) claim liquidated damages. The liquidated damages would be the aggregate of all rentals which would, but for cancellation, have been payable for the unexpired period of the contract less the market value of the goods as at the date of their return to the possession of the plaintiffs.

[14] The alternative remedy, upon breach by the first defendant, was to sue for the immediate payment of the aggregate amount of all rentals which would otherwise have become due and payable in terms of the agreements for the unexpired period of the agreements, and all arrear rentals in terms of the agreements. In addition, the plaintiffs would be entitled to be placed in possession of the goods until full payment of the amounts due under the agreements.

[15] As already indicated, on 16 July 2010 the first plaintiff addressed a letter to the first defendant advising that the first defendant was in arrears with its instalments and calling upon it to pay the total amount then in arrears and also the amount representing the aggregate value of the rentals which would have been payable had the agreements continued until the expiry of the rental period. The first plaintiff also intimated in that letter that should the first defendant fail to pay the amounts claimed within seven days of the date of demand, the first plaintiff would issue summons without further notice.

[16] As previously mentioned, the plaintiffs instituted an action against the defendants on 2 September 2010. In this action the plaintiffs claimed payment of all the amounts which would have been payable in terms of the agreements until the expiry of the initial period. The defendants pleaded to this claim and averred that the

plaintiffs, having elected to cancel the agreements, were precluded from claiming accelerated payments, but were obliged to sue for liquidated damages.

[17] The point taken by the defendants in their plea that the plaintiffs could not sue for accelerated payments prompted the plaintiffs to amend their particulars of claim. In the latest amendment of their particulars of claim, the plaintiffs, relying on the self-same breach by the defendants, claimed liquidated damages representing the aggregate of all rentals which would have been payable in terms of the agreements but for the early termination of the agreements.

[18] As already indicated, the defendants sought to amend their plea by introducing a special plea of prescription to the plaintiffs' amended particulars of claim. In the court a quo, the plaintiffs successfully opposed the proposed amendment. The defendants' case was, and still is, essentially that the debt in the plaintiffs' amended claim is an entirely different debt from the one that was claimed in the previous claim. And that the right which the plaintiffs sought to enforce in their original claim derived from their election to sue for accelerated payments, thus, in effect, enforcing the agreements. But in the amended claim, the right sought to be enforced flowed from the cancellation of the agreements. As the original claim (namely, for accelerated payment of rentals) did not serve to interrupt the running of prescription of the right derived from the cancellation of the agreements, it followed that the debt claimed in the amended claim, it being a different debt, has become prescribed.

[19] Counsel for the defendants emphasised, as did counsel in *CGU Insurance v Rumdel (Pty) Ltd*,[2] that if the plaintiffs had pursued their claim in its unamended form it would have eventually failed at the trial. In that event, a defence of *res judicata* would not be available to the defendants if the plaintiffs were to institute a fresh action based on the cancellation of the agreements. It was argued that these factors underscore the material distinction between what counsel contended were two different debts.

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[2] *Ibid* at para 4.

[20] As I see it, this appeal raises the fundamental question whether the debt in the amended claim is the same or substantially the same debt as originally claimed by the plaintiffs. If it is, the appeal must fail.[3] But if it is not, then the appeal must succeed.

[21] If the service of the plaintiffs' summons on 8 September 2010 did not interrupt the running of prescription of the plaintiffs' claim now advanced in the amended particulars of claim, then the plaintiffs' claim had long become prescribed by the date on which the amendment was effected. It is to that question that I now turn.

[22] The parties were agreed that the Prescription Act 68 of 1969 (the Act) applies to a debt of the kind in issue in this appeal. Section 10(1) of the Act provides that a debt shall, subject to Chapters 3 and 4, be extinguished after a lapse of the period which in terms of the relevant law applies in respect of the prescription of such debt. Section 12(1) of the Act, which is the relevant law referred to in s 10(1), in turn, provides, subject to subsections (2), (3) and (4) which are not material for the present purposes, that prescription shall commence to run as soon as the debt is due. Section 15(1) which provides for judicial interruption of prescription reads:

'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.'

[23] I propose dealing briefly with the general principles relating to applications for amendments of pleadings. First, it must be emphasized that the primary object of allowing an amendment is 'to obtain a proper ventilation of the dispute between the parties, to determine the real issues between them, so that justice may be done'. (See, for example, D E van Loggerenberg *Erasmus Superior Court Practice* 2016 5I2 at D1-332; *Blaauwberg Meat Wholesalers CC v Anglo Dutch Meats (Exports) Ltd* 2004 (3) SA 160 (SCA) para 12; *Cross V Ferreira* 1950 (3) SA 443 (C) at 447A-H.)

[24] As to the general approach to be adopted, the Constitutional Court made plain in *Affordable Medicines Trust & others v Minister of Health & others* 2006 (3) SA 247 (CC) that (para 9):

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[3] See for example, *Mazibuko v Singer* 1979 (3) SA 258 (W) at 265D-266C; *Sentrachem Ltd v Prinsloo* 1997 (2) SA 1 (A) at 15A-16D; *Associated Paint & Chemical Industries (Pty) Ltd t/a Albestra Paint and Lacquers v Smit* 2000 (2) SA 789 (SCA) paras 13-15.

'The practical rule that emerges . . . is that amendments will always be allowed unless the amendment is *mala fide* . . . or unless the amendment will cause an injustice to the other side which cannot be cured by an appropriate order for costs, or "unless the parties cannot be put back for the purposes of justice in the same position as they were when the pleading which it is sought to amend was filed". . . . The question in each case, therefore, is, what do the interests of justice demand?'

[25] But, where an amendment would render a pleading excipiable it will, save in exceptional circumstances, not be allowed. This is so because generally speaking the issue that the amendment seeks to introduce must be a triable issue.[4] By a triable issue is meant an issue that is viable or relevant for adjudication at the trial and which, as a matter of probability, will be proved by the evidence foreshadowed in the notice of intention to amend.[5]

[26] In *The Standard Bank of South Africa Ltd v Miracle Mile Investments 67 (Pty) Ltd & another* [2016] ZASCA 91; [2016] 3 All SA 487 (SCA) this court said (para 26):

'The election and communication thereof in the form of the requisite notices are essential pre-conditions to create a cause of action in the first place. . . . Prescription would therefore commence to run only from the date of a notice claiming the outstanding balance . . .'

[27] In this case, the requisite notice cancelling the agreements and demanding: (a) payment of the amount in arrears as at the date of cancellation; (b) payment of the liquidated damages; and (c) return of the goods, was given on 16 July 2010. As already mentioned, the first plaintiff instituted an action against the defendants on 2 September 2010 and by 8 September 2010 summons had been served on the defendants. Consequently, it must be accepted that when the plaintiffs instituted action against the defendants, the process commencing action interrupted the running of prescription when it was served on the defendants by 8 September 2010 at the latest.

[28] I have, to the extent necessary for the present purposes, already set out the similarities between the plaintiffs' claim as pursued in the plaintiffs' summons both

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[4] *Gross v Ferreira, ibid* at 450A-F. See also *Caxton Ltd v Reeva Forman (Pty) Ltd & another* 1990 (3) SA 547 (A) at 565H-J.
[5] *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd & 'n ander* 2002 (2) SA 447 (SCA) para 34.

prior to and post the amendment. It is now apposite to make reference to the differences resulting in two different debts as perceived by the defendants. The defendants rely on four bases for their contention. First, that prescription did not commence to run until the decision to cancel was taken and communicated to the first appellant. It bears mentioning that the election to cancel was exercised and communicated to the defendants on 16 July 2010. Second, the original claim was for payment of accelerated rentals under the agreement whereas the claim pursued post the amendment was for liquidated damages. And the quantum of the damages is different to the quantum of the amount of accelerated rentals. Third, the *facta probanda* necessary to sustain the two claims differ. Fourth, cancellation brought the agreements to an end, whereas the claim for accelerated rentals did not, but on the contrary sought to enforce the agreements.

[29] Counsel for the defendants referred us to a number of cases in support of the proposition that in this case we were dealing with two substantially different debts. That being so, proceeded the argument, the proposed amendment sought to be introduced by the defendants should have been allowed by the court a quo. I do not find it necessary to analyse and discuss each of those cases. The defendants strongly relied on *National Sorghum Breweries Ltd (t/a Vivo African Breweries) v International Liquor Distributors (Pty) Ltd* 2001 (2) SA 232 (SCA) – a case concerned with a defence of *res judicata* – and contended that 'a claim for liquidated damages remains a claim for damages' and that it does not avail the plaintiffs that the liquidated damages arose from a contract. And, that such liquidated damages were quantified in accordance with the formula stipulated in the agreements was of no consequence.

[30] The facts in *National Sorghum Breweries* were briefly as follows. In the first summons the plaintiff relied on a contract that had been breached and sought cancellation of the contract and repayment of the purchase price. In the second summons, whilst the plaintiff relied on the conclusion of the contract, its breach and cancellation thereof, it claimed damages alleged to have been suffered as a consequence of the breach. The court of first instance dismissed the defence of *res judicata* on the ground that the two claims were different despite the presence of common elements in the allegations made. The appeal against that finding was

dismissed by this court. In my view that case is distinguishable on the facts and cannot assist the defendants. Indeed, it aptly demonstrates the dangers of arguing by analogy.

[31] The defendants also heavily relied on a passage in *Imprefed (Pty) Ltd v National Transport Commission* 1990 (3) SA 324 (T) in which the following is stated (at 329I-330A):

'It is true that the amount claimed is the same as the amount previously claimed (after an increase) as contractual remuneration. The fact remains that contractual remuneration and damages are not the same thing.'

Whilst accepting that this statement might well be obiter, the defendants were nevertheless emboldened by its apparent approval by this court in *CGU Insurance*. However, this court in *CGU Insurance* found *Imprefed (Pty) Ltd* to have been distinguishable on the facts from the facts of that case. It also noted that the nature of the other debt in *Imprefed (Pty) Ltd* was different. Similarly, for the present purposes, it offers no support to the defendants that is tenable on the facts of this case.

[32] The defendants made much of the fact that enforcement of agreements gives rise to consequences different to those that would flow from cancellation of agreements. For this reason it was argued that the two inconsistent remedies provided for in clause 14.1 give rise to two different debts. It is of course true that different consequences flow from either enforcing or cancelling a contract. But the defendants' contentions on this score are only correct as far as they go. Beyond that, they falter. In the context of clause 14.1, whichever way the election is exercised, it gives rise to a single debt. This must therefore necessarily mean that the debt owed by the debtor does not change its essential character. In reality, what the plaintiffs did in this case was to invoke a wrong remedy in their particulars of claim – one which was not available to them having previously elected to cancel the agreements – to sue for the debt then due by the defendants. The defendants' plea alerted them to this mistake. What they then sought to achieve with their amendment was to allege, in the words of Jones AJA in *CGU Insurance*, the correct 'material facts that begot the debt' owed to them in the first place. That self-same debt flowed from the

breach of the two agreements. (Compare *HMBMP Properties (Pty) Ltd v King* 1981 (1) SA 906 (N) at 910A-911D.) Indeed, the terms of clause 14.1 themselves contemplate a single debt arising in the event of breach.

[33] To my mind, the contentions advanced by the defendants are unsustainable. They manifest a misconception of the concept of a 'debt' within the meaning of s 10(1) of the Prescription Act. This court has repeatedly emphasized that the word 'debt' bears a 'wide and general meaning' and that it 'does not have the technical meaning given to the phrase "cause of action" when used in the context of pleadings.'[6] In *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 825F-G, Trollip JA was at pains to explain the distinction between a 'debt' on the one hand and 'cause of action' on the other in these terms:

'"Cause of action" is ordinarily used to describe the factual basis, the set of material facts, that begets the plaintiff's legal right of action and, complimentarily, the defendant's "debt", the word used in the Prescription Act.'[7]

[34] This meaning of 'debt' was, most recently, elaborated upon by the Constitutional Court in *Makate v Vodacom Ltd* [2016] ZACC 13; 2016 (4) SA 121 (CC) which, with reference to the New Shorter Oxford English Dictionary, 3 ed (1993) vol 1 at 604, said (para 85):

'1. Something owed or due: something (as money, goods or service) which one person is under an obligation to pay or render to another. 2. A liability or obligation to pay or render something; the condition of being so obligated.'

[35] In my view, the effect of the amendment of the plaintiffs' particulars of claim was merely to cure a defective cause of action (namely, mistakenly claiming accelerated rentals when they had already cancelled the contracts) by introducing the correct cause of action for liquidated damages pursuant to the election that they had exercised. The nature of the debt claimed remained the same. In substance, the remedies provided for in clause 14.1 both sought to place the plaintiffs in the position in which they would have been, had the breach not intervened. Hence they gave rise

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[6] *CGU Insurance* para 6; *Drennan Maud & Partners v Pennington Town Board* 1998 (3) SA 200 (SCA) at 212G-I.
[7] See also *FirstRand Ltd v Nedbank (Swaziland) Ltd* 2004 (6) SA 317 (SCA) para 4.

to a single debt. As emphasised by this court in *CGU Insurance*, 'the debt is not the set of material facts' required to sustain the cause of action but rather 'that which is begotten by the set of material facts.'

[36] In these circumstances, it follows that the appeal must fail for substantially the same reasons that the court a quo gave. In the result the following order is made:
The appeal is dismissed with costs.

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X M PETSE
JUDGE OF APPEAL

APPEARANCES:

For the Appellants:	S C Vivian Instructed by: T G Fine Attorneys, Johannesburg c/o Lovius Block, Bloemfontein
For the Respondents:	A G Sawma SC Instructed by: Wright Rose-Innes Inc, Johannesburg c/o Phatshoane Henney, Bloemfontein