THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 237/2016

In the matter between:

SENTRACHEM LIMITED **APPELLANT**

and

A L TERREBLANCHE **RESPONDENT**

Neutral Citation: *Sentrachem v Terreblanche* (237/2016) [2017] ZASCA 16 (22 March 2017)

Coram: Leach, Majiedt, Mathopo and Mocumie JJA and Schippers AJA

Heard: 2 March 2017

Delivered: 22 March 2017

Summary: Prescription – pension funds – erroneous double payment – substitution of a party after *litis contestatio* as a result of a cession of the debt does not give rise to a valid plea of prescription – cessionary attains all the rights of cedent – has full locus standi – impoverishment proved on the facts.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Engelbrecht AJ sitting as court of first instance):

1 The appeal is upheld with costs.

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

'(a) The defendant's special plea of prescription is dismissed with costs.

(b) The defendant is ordered to pay the plaintiff the sum of R453 972.31.

(c) The defendant is ordered to pay the plaintiff interest on the sum of R453 972.31 at the rate of 15.5 per cent per annum calculated from 11 July 2011 to date of payment in full.

(d) The defendant must pay the costs of the action including all reserved costs.'

JUDGMENT

Majiedt JA (Leach, Mathopo and Mocumie JJA and Schippers AJA concurring)

[1] The main issue in this appeal is whether the substitution of a party after *litis contestatio* as a result of the cession of a debt gives rise to a valid plea of prescription. In addition, the alleged impoverishment of the cessionary in a claim based on the *condictio indebiti* has also been placed in issue. The Gauteng Division of the High Court, Pretoria (Engelbrecht AJ sitting as court of first instance), upheld a special plea of prescription in respect of an undue enrichment claim brought by the appellant, Sentrachem Limited (Sentrachem), against the respondent, Mr A L Terreblanche. That decision was dispositive of the case and consequently the other issues (locus standi and impoverishment) were not decided. This appeal is with the leave of the court a quo.

[2] The facts are largely common cause or not seriously disputed and are briefly as follows. Mr Terreblanche was a member of the Sentrachem Group Pension Fund (the pension fund). During 2010 the pension fund received approval of a surplus apportionment scheme in terms of the Pension Funds Act 24 of 1956. In the course of implementing the scheme, the pension fund made a payment of the sum of R94 614.99 to Mr Terreblanche on 6 October 2010. On behalf of Mr Terreblanche the correctness of the computation of this amount was challenged, although the parties were *ad idem* that an amount was due to him. As I will demonstrate below, the issue regarding computation of the first amount does not affect the resolution of the main issues outlined above.

[3] On the same day (6 October 2010), the pension fund made a second payment to Mr Terreblanche in the sum of R453 872.31. It is this payment which is in issue in this appeal. The pension fund's case was that this payment was made in error to Mr Terreblanche in the bona fide and reasonable, but mistaken belief that the amount was due to him as his share of the surplus apportionment scheme. Its claim is based on the *condictio indebiti.* The pension fund issued summons in the amount of R453 872.31, the amount with which Mr Terreblanche allegedly had been enriched. The summons was served on Mr Terreblanche on 22 August 2011.

[4] On 13 December 2011 the Registrar of Pension Funds approved the voluntary dissolution of the pension fund and the liquidator, Mr Jeremy Peter Andrew, was substituted as plaintiff in terms of Uniform rule 15(2) on 27 February 2012. Thereafter, on 27 September 2013, Mr Andrew entered into a cession and assignment agreement with Sentrachem, in which the claim against Mr Terreblanche was ceded to Sentrachem. Pursuant to the cession, Sentrachem was substituted in place of Mr Andrew as plaintiff in terms of a court order dated 22 November 2013. Mr Terreblanche did not object to the first substitution, nor to the substitution of Sentrachem as plaintiff, which occurred on 3 December 2013. Mr Terreblanche also did not amend his plea as a result of both the substitutions of the plaintiff mentioned above. The second substitution thus occurred on a date after the end of the prescription period.

[5] In an amended plea, delivered on 31 March 2015, Mr Terreblanche raised a special plea of prescription. The plea states that the defendant received R453 972.31 on 6 October 2010; that prescription began to run from 7 October 2010; and that the plaintiff's claim has prescribed, because more than three years have passed since the debt became due as contemplated in terms of s 11(d) of the Prescription Act 68 of 1969. The crux of the submissions was that the substitution of Sentrachem as plaintiff amounted to the institution of new proceedings that had to be completed within the statutory period of three years. This contention found favour with the court a quo and it upheld the special plea of prescription. In doing so, the court a quo relied on *Standard General Insurance Co Ltd v Eli Lilly (SA) (Pty) Ltd (FBC Holding (Pty) Ltd as Third Party).*[1]

[6] The dates relevant to the issue of prescription are the following:

(a) On 27 October 2010, Mr Andrew, tasked with the investigations into double payments, discovered the erroneous payment made to Mr Terreblanche.

(b) On 22 November 2013, Kollapen J granted leave for Sentrachem to be substituted as plaintiff in place of Mr Andrew, pursuant to the cession agreement. This application was not opposed.

(c) The formal substitution occurred on 3 December 2013.

It bears mention that the cession agreement provided that the cession would only become effective upon the date of substitution of Sentrachem as the plaintiff. It was contended on behalf of Mr Terreblanche that both the dates in (b) and(c) above fall outside the prescription period, which ended on 26 October 2013 (an earlier assertion on behalf of Mr Terreblanche that prescription started running on the date of the payment, ie 6 October 2010, appears to have been abandoned in this court, correctly so - the period of prescription plainly commenced running on 27 October 2010, when the mistake was discovered).

[7] In essence therefore, what falls to be determined is the effect of the substitution of Sentrachem as plaintiff and whether the substitution introduced a new creditor which sought to enforce the claim in its own name after the three year period laid down in s 11(d) of the Act, had lapsed ie after the claim had prescribed. A

[1] *Standard General Insurance Co Ltd v Eli Lilly (SA) (Pty) Ltd (FBC Holdings (Pty) Ltd, Third Party)* 1996 (1) SA 382 (W).

further, related enquiry is the effect, if any, of the cession having occurred after *litis contestatio*.

[8] As stated, in terms of s 11(d) of the Act a debt of the present type prescribes after three years from the time the debt is due (s 12(1)). Section 15 is the key provision in the present enquiry. In relevant part it reads as follows:

'**Judicial interruption of prescription**

(1) 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.

(2) Unless the debtor acknowledges liability, the interruption of prescription in terms of subsection (1) shall lapse, and the running of prescription shall not be deemed to have been interrupted, if the creditor does not successfully prosecute this claim under the process in question to final judgment or if he does so prosecute his claim but abandons the judgment or the judgment is set aside.

(3) If the running of the prescription is interrupted as contemplated in subsection (1) and the debtor acknowledges liability, and the creditor does not prosecute his claim to final judgment, prescription shall commence to run afresh from the day on which the debtor acknowledges liability or, if at the time when the debtor acknowledges liability or at any time thereafter the parties postpone the due date of the debt, from the day upon which the debt again becomes due.

(4) If the running of prescription is interrupted as contemplated in subsection (1) and the creditor successfully prosecutes his claim under the process in question to final judgment and the interruption does not lapse in terms of subsection (2), prescription shall commence to run afresh on the day on which the judgment of the court becomes executable.

(5) …

(6) For the purposes of this section, "process" includes a petition, a notice of motion, a rule *nisi*, a pleading in reconvention, a third party notice referred to in any rule of court, and any document whereby legal proceedings are commenced.'

[9] It was contended on behalf of Mr Terreblanche that the original creditor (the pension fund) had not successfully prosecuted its claim under the summons to final judgment as contemplated in s 15(4) above. The new creditor (Sentrachem), so it was contended, had stepped into the pension fund's shoes and the prosecution of the claim by Sentrachem only commenced after the period of prescription had ended. These submissions were countered on behalf of Sentrachem with *Van*

Rensburg v Condoprops 42 (Pty) Ltd[2] and *Fisher v Natal Rubber Compounders (Pty) Ltd.*[3]

[10] In *Van Rensburg* a similar defence was raised as one of two main defences to a claim for estate agent's commission. The defendant raised a special plea that the plaintiff's claim was based on a cession of the original plaintiff's claim concluded after *litis contestatio* and more than three years prior to the notice to amend and substitute, and that the claim had accordingly prescribed. Unlike the present instance, however, the court had not been approached to sanction the substitution – the original plaintiff had merely given notice in terms of Uniform rule 28 of her intention to amend the claim in a manner which effected the substitution. The defendant failed to object to the substitution, as is the case here.

[11] In dismissing the special plea of prescription, Leach J took the view that the defendant's argument failed to draw a distinction between a cause of action, on the one hand, and a 'debt' as envisaged by the Act, on the other (in this regard the learned Judge relied on two decisions of this court).[4] The learned Judge stated:

'The Prescription Act prescribes periods of prescription in respect of "debts", not periods of prescription relating to causes of action. Thus, even accepting that the substitution of a plaintiff amounts to the introduction of a new cause of action, the debt remains the same, viz the amount the defendant became obliged to pay as commission due to Nissen having performed her mandate. That was the debt Nissen sought to enforce by way of the summons in the present proceedings. That summons interrupted the running of prescription in respect of such debt. When *litis contestatio* was reached, the rights of the defendant and Nissen in regard to such debt were frozen, and the subsequent cession of Nissen's right, title and interest in the debt did not divest her of her right to prosecute that claim until such time as Van Rensburg was substituted as plaintiff. At all times, between the cession in 2004 and the substitution in May 2007, Nissen was entitled to proceed to prosecute her claim against the defendant. When substitution took place Van Rensburg's rights under the cession were perfected and he stepped into Nissen's shoes in that regard. In these circumstances there can be no question of the debt owed by the defendant having prescribed.'[5]

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[2] *Van Rensburg v Condoprops 42 (Pty) Ltd* 2009 (6) SA 539 (E).
[3] *Fisher v Natal Rubber Compounders (Pty) Ltd* [2016] ZASCA 33; 2016 (5) SA 477 (SCA).
[4] *Standard Bank of South Africa Ltd v Oneanate Investments (Pty) Ltd (in Liquidation)* 1998 (1) SA 811 (SCA) at 826J – 827A; *CGU Insurance Ltd v Rumdel Construction (Pty) Ltd* 2004 (2) SA 622 (SCA) para 6.
[5] Paragraph 12.

Later on, Leach J held:

'. . . In any event, if prescription was a valid defence to a substitution . . . it should have been raised in opposition to the substitution.'[6]

Van Rensburg was referred to with approval in *Fisher.*

[12] In *Fisher* this court was concerned with the cession to another company, NRC, of the creditor's claim for goods sold and delivered. Pursuant to the cession, the creditor amended its summons by substituting NRC as plaintiff. The defendant, in raising a special plea of prescription, advanced a similar argument as Mr Terreblanche did in the present instance, namely that the substitution of NRC as the plaintiff amounted to the institution of fresh proceedings. The original creditor had failed to prosecute its claim to final judgment and the interruption of prescription through the service of summons had fallen away in terms of s 15(2) and (6) of the Act. Since, at the time of substitution, more than three years had elapsed since the claim had arisen, the claim had become prescribed.

[13] In giving short shrift to these contentions, this court, in *Fisher,* held that:

'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.'[7]

The court continued as follows:

'It seems to me clear that the process under which the debt was being pursued remained the same throughout. To suggest that the summons operated to interrupt the running of prescription when it was initially served but ceased to fulfil that function when there was a notice of amendment or substitution is clearly not consistent with the Act. Any judgment that is granted in favour of NRC in this case will be granted in terms of the original summons and particulars of claim, not in terms of the application for substitution. In the result the original process that interrupted prescription will be prosecuted successfully. That is what is required by s 15(2) of the Act. There is no doubt that it is only the identity of the party (NRC) now

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[6] Paragraph 13.

[7] Paragraph 15. See also: *Waikiwi Shipping Co Ltd v Thomas Barlow and Sons (Natal) Ltd & another* 1978 (1) SA 671 (A) at 678E-G.

pursuing the debt that changes. The debt remains the same and unaffected by prescription.'[8]

[14] This case is on all fours with *Fisher* and *Van Rensburg.* The effect of the substitution of Sentrachem as plaintiff did not result in new proceedings having been instituted. The debt (an erroneous double payment) has remained unaltered throughout – only the identity of the party which pursued the debt has changed: first from the pension fund to Mr Andrew and then to Sentrachem. And Mr Terreblanche's failure to object to the substitution amounts to a consent to such substitution. The special plea of prescription is therefore without merit and ought to have been dismissed.

[15] *Standard General Insurance Co Ltd v Eli Lilly (SA) (Pty) Ltd* is distinguishable on the facts. In that case the creditor of the debt, Stangen, did not originally claim payment of the debt – the original summons was issued by two other entities. An amendment to the particulars of claim substituted Stangen as plaintiff in the place of the other two entities, on the basis that they had ceded their claim to Stangen. But, importantly, it was common cause that the notice of the application for amendment to substitute Stangen as plaintiff had been given more than three years after the debt became due. It is in this context and against this backdrop that Streicher J held that:

'By ceding the debt [the two entities] transferred all their rights in respect of their claims against the defendant to Stangen. As from the time that the debt was ceded they were no longer creditors of the defendant. Stangen became the creditor and only Stangen could sue upon the debt.'[9]

Later the learned Judge held as follows:

'As I have already indicated prescription can only be interrupted by process whereby the creditor claims payment of the debt. Before the amendment the creditor of the debt had not claimed payment of the debt and by the time that the amendment was applied for the debt had already become prescribed.'[10]

The reliance on this decision by the court a quo was therefore misplaced.

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[8] Paragraph 17.
[9] At 385F-G.
[10] At 387H-I.

[16] As stated, the court a quo did not deem it necessary to consider the issue of locus standi, given its conclusion with regard to the special plea of prescription. The challenge to Sentrachem's legal standing to sue is closely related to the contention that Sentrachem had not been impoverished. I will therefore discuss these two aspects together. It is well settled that once an order for thesubstitution of Mr Andrew by Sentrachem as plaintiff had been made, Sentrachem as cessionary became vested with locus standi to pursue the claim in its own name.[11] And, as stated, Mr Terreblanche's lack of objection to the substitution amounted to a consent to Sentrachem substituting Mr Andrew as plaintiff. It was contended that Sentrachem itself had not been impoverished – only the pension fund had suffered impoverishment. This contention is untenable. The claim was based on the *condictio indebiti*. It was alleged that Mr Terreblanche had been paid (for the second time) in the bona fide, reasonable but mistaken belief that the payment was due. It can hardly be disputed that the pension fund had experienced a diminution in the value of its assets as soon as the erroneous payment had been made. Mr Andrew stepped into the the shoes of the pension fund, which had been impoverished. Mr Andrew, in turn, ceded the claim to Sentrachem. It is trite that upon a valid cession, the underlying obligation and the personal right flowing from it remain unchanged. The transfer of the personal right occurs with all the sureties, real securities, advantages and disadvantages attached to it.[12] The personal right to claim was therefore properly ceded to Sentrachem – it simply stepped into the impoverished cedent's shoes. What finally puts paid to this contention is the relevant provision in the cession agreement itself. The cessionary had agreed to bear the expenses incurred in prosecuting the claim and the damages sustained as a result of the irrecoverability of the claim. Clause 3.4 of the cession reads as follows:

'The cedent does not warrant the validity of the claim and is not to be liable to the cessionary for any fees, costs or charges that may be incurred in prosecuting the claim, or for any damages that may be sustained by the cessionary if the claim proves irrecoverable for any reason whatsoever.'

There is therefore no merit in the argument advanced regarding impoverishment.

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[11] *Fisher* fn 3 para 12; *Brummer v Gorfil Brothers Investments (Pty) Ltd en andere* 1999 (3) SA 389 (SCA) at 410F; *Van Rensburg* fn 2 para 12.

[12] S Scott, *The law of cession* 2 ed (1991) at 128.

[17] 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 cession. After substitution the cedent is entitled, and is in fact in law obliged, to continue the suit in its own name.[13]

[18] The appeal must therefore succeed and costs should follow the outcome.
In the premises I issue the following order:
1 The appeal is upheld with costs.
2 The order of the court a quo is set aside and substituted with the following:
'(a) The defendant's special plea of prescription is dismissed with costs.
(b) The defendant is ordered to pay the plaintiff the sum of R453 972.31.
(c) The defendant is ordered to pay the plaintiff interest on the sum of R453 972.31 at the rate of 15.5 per cent per annum calculated from 11 July 2011 to date of payment in full.
(d) The defendant must pay the costs of the action including all reserved costs.'

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S A Majiedt
Judge of Appeal

[13]Ibid 133-4; *Brummer* fn 11 at 410F; *Fisher* fn 3 para 11.

APPEARANCES

For the Appellant:	D P de Villiers (with him L Grobler)
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