REPUBLIC OF SOUTH AFRICA

HIGH COURT OF SOUTH AFRICA, GAUTENG LOCAL DIVISION

CASE NO: 2009/8872

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED

23/7/2015
DATE SIGNATURE

In the matter between:

CORPORATE FINANCE SOLUTIONS (PTY) LTD Plaintiff

And

HOPE RESTORATION MINISTRIES Defendant

J U D G M E N T

MASHILE J:

[1] The Plaintiff instituted this action against the Defendant as a cessionary to a master rental agreement (hereinafter "the MRA") concluded between SGR

Finance (hereinafter "SGR") and the Defendant. The parties signed the MRA on 26 and 8 May 2008 respectively. Subsequently, SGR further entered into a cession agreement with the Plaintiff in terms of which it agreed to cede the MRA to the latter. However, it was not until on or about 23 May 2008 that the actual cession happened. The cession of the MRA from SGR to the Plaintiff is governed by a written main cession agreement concluded between SGR and the Plaintiff on or about 5 September 2005.

[2] In the months that ensued, the Defendant allegedly failed to pay the monthly rentals as per the terms of the MRA. Consequent thereupon, the Plaintiff chose to cancel the MRA and claimed relief as envisaged in Clause 17.2 of the MRA. On 27 February 2009, the Plaintiff issued summons and served it on the Defendant on 15 April 2009. In the initial papers, the Plaintiff alleged having acquired its *locus standi* in this matter from the main cession agreement of 5 September 2005 by which SGR ceded the MRA to it.

[3] The Plaintiff's claim was based on the payment of the debt arising from the MRA between SGR and the Defendant. The whole outstanding amount under the MRA arose on 9 October 2008 based on the alleged breach and was to prescribe on 8 October 2011 being 3 years after it became due owing and payable. The Defendant opposed the action. Still basing its right to claim the debt on the main cession agreement of 5 September 2005, the Plaintiff served a Declaration on the Defendant on 20 August 2009. In this declaration, however, the Plaintiff claimed that the cession of the MRA occurred on 4 December 2007 between it and SGR.

[4] On 9 September 2009, the Defendant served its Plea and on 05 July 2012 served an Amended Plea in which it raised a defence of misrepresentation in respect of the MRA, denied that it breached the MRA and further raised issues pertaining to penalty provisions. On 4 July 2012, the Plaintiff delivered a notice of its intention to amend to which the Defendant objected. The Plaintiff proceeded to apply to court for leave to amend. This court, per Van Oosten J, heard the Application on 5 March 2013 and granted the Plaintiff leave to amend its declaration the following day.

[5] The court summarised the cause of action as the Plaintiff suing the Defendant as a cessionary of SGR based on a number of lease agreements. The Plaintiff was relying upon a main cession agreement. The court noted that the difference in the proposed amendment was that the Plaintiff was no longer relying on the main cession agreement. The Plaintiff was instead seeking to rely on a cession agreement that was partially in writing and partially oral concluded on 23 May 2008. The Defendant objected to the proposed amendment on the ground that the Plaintiff was raising a new cause of action.

[6] Rejecting the Defendant's argument, the court held that the amendment as proposed by the Plaintiff concerned *locus standi* and not the cause of action as asserted. Accordingly, it granted leave to amend. With reference to the prescription issue that the Defendant also advanced, the court concluded that such should be raised by special plea in the action once the amendment has been effected. The Defendant heeded the court's advice and that is how this court became seized of the present special plea.

[7] Following the granting of the leave to amend, the Plaintiff served its Amended Declaration on 2 April 2013 upon the Defendant. In the Amended Declaration, the Plaintiff now premises its right to claim on a partly written partly oral cession dated 23 May 2008 in which SGR ceded the rights to the MRA to the Plaintiff and not the main cession agreement dated 5 September 2005 or the actual date of cession of the right, 4 December 2007.

[8] On 15 May 2013 the Defendant served its Special Plea of Prescription to the amended declaration as delivered on 2 April 2013. In the special plea, the Defendant contends that the Plaintiff's cause of action arose with the conclusion of the cession now alleged in the amended plea being partially written and partially oral cession of 23 May 2008, in which it claims payment of money (being the debt, which has a three year prescription period) based on a breach on 9 October 2008 of the MRA of 26 October 2008, and that the Plaintiffs claim has accordingly prescribed.

[9] The Defendant captures the essence of its special plea as follows:

> "The crux of the argument by the Defendant for the prescription of the claim of the Plaintiff, being a claim for payment of money ("the debt") in terms of a rental agreement and based on a right of cession held by the Plaintiff, is that such debt cannot be considered in isolation to the right to claim such debt which is based on the cession, in that such right and debt both have to be present in the process whereby a creditor, in this case the Plaintiff, claims payment from a debtor, in this case the Defendant. Such process in which both the current right and debt were present for the first time was the Amended Declaration filed on 2 April 2012, being after the debt had prescribed, and therefore no cause of action of the Plaintiff remains due to the claim having prescribed. {Even the Notice of Intention to Amend as filed on 4 July 2012 was filed almost a year after the debt had prescribed.}"

[10] The Plaintiff raised a preliminary issue pertaining to the manner in which the Defendant advanced its argument on Section 15(1) and (2) of the Prescription Act. The Plaintiff asserted that the Defendant's argument as presented in court and in its heads of argument was not foreshadowed in its special plea. For this reason, the Plaintiff contends that had the Defendant pleaded its special plea in the manner it did in court and in its heads of argument, it would have replicated. It was deprived of that opportunity and accordingly the Defendant should be restricted within the Precinct of the special plea.

[11] In short, the Plaintiff alleges that it has been ambuscaded. It is common cause that the Defendant has indicated earlier that it would be raising prescription without alluding to the sections of the Prescription Act it would be invoking. However, the Plaintiff would have had indication that the form of prescription on which the Plaintiff would rely could only be Section 15(1) and (2). Thus,I am prepared to lean in favour of the Defendant that the prescription that it is currently raising was presaged earlier albeit without specificity.

[12] That clears the pathway for this court to turn to the main issue that is detaining this court. While the parties are agreed that simultaneously with having the necessary *locus standi*, the Plaintiff would also have been required to have had a completed cause of action at the time of issue of summons, they are at variance on when this happened. The Defendant maintains that this occurred on 6 March 2013 when the Plaintiff's claim against it had already prescribed while the Plaintiff fervently contended that the right to sue accrued to it when the actual cession took place being the date when it effected the payment to SGR, 30 May 2008. The question

must therefore be decided first as it will bedispositive of the question of prescription and necessarily of the whole matter.

[13] Section 15(1) provides:

> "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."

Section 15(2) stipulates:

> "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 his 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."

[14] The main agreement of cession between SGR and the Plaintiff governs the actual cession of SGR's right to sue to the Plaintiff. This cession happened on 30 May 2008 consequently at the time when the Plaintiff served the summons on the Defendant on 15 April 2009 it had already stepped into the shoes of SGR. The leave to amend granted by this court on 6 March 2013 did not change the cause of action but, as Counsel for the Plaintiff correctly stated, merely put forward the circumstances under which its *locus standi* could be presumed. The critical date is thus not 6 March 2013 but rather 30 May 2008 on which the Plaintiff was a cessionary and entitled to sue in case the Defendant defaulted.

[15] Section 15(2) of the Prescription Act does not find application under these circumstances because the Plaintiff is still prosecuting its claim under this process as contemplated in the subsection. The service of summons upon the Defendant on 15 April 2009 by the Plaintiff did, in terms of Section 15(1), interrupt the running

of prescription. The Defendant's argument that the date of 6 March 2013 being the date on which this court granted leave to amend to the Plaintiff should be regarded as the date on which the Plaintiff's cause of action and *locus standi* coincided for the first time must be rejected. It cannot be the determinant date because it is common cause that the Plaintiff had already acquired his right to sue years earlier.

[16] It should follow that all the cases to which the Defendant referred this court are unquestionably distinguishable. The distinctions between the facts in those cases and the instant case are glaring. It is common cause that the court in **Silhouette InvestmentsLtd v Virgin Hotels Group Ltd** 2009 (4) SA 617 (SCA) dealt with the substitution of one plaintiff for another. The Plaintiff in this matter has always been the plaintiff. There is no question of a new plaintiff being substituted in this case.

[17] The merits in **Tecmed(Pty) Ltd and Others v Nissho Iwai Corporation and Another** 2011 (1) SA 35 (SCA)specifically concerned a different description of the claimant. The court in that matter concluded that the substitution of the cessionary as the plaintiff must be regarded as the institution of new proceedings. Needless to state that in *casu*, the Plaintiff's description has been the same and consistent. In the same breath, **Solenta(Pty) Ltd v Aviation @ Work (Pty) Ltd** 2014 (2) SA 106 (SCA)dealt with an amendment to the description of the claimant. The court concluded that the description of the claimant made it clear that the appellant was not the creditor that claimed the payment of the debt in terms of the combined summons. The court stated further that this was despite the reference to the appellant's name as the lessor in the annexed contract.

[18] In the last two cases, **Firstrand Bank Ltd v Nedbank (Swaziland) Ltd** 2004 (6) SA 317 (SCA) and **Miller v H L Shippel& Co (Pty) Ltd** 1969 (3) SA 447 (T), the court concerned itself with merits that involved the introduction of a new cause of action. The cause of action has since the inception of this matter and throughout the running hereof been premised on the MRA. Thus, the distinctions are apparent and need no further elaboration. In the circumstances, The Defendant has, on a balance of probabilities, failed to discharge the onus of proof of the allegations set out in its special plea.

[19] In the result, the special plea cannot succeed and I make the following order:

1. The special plea is dismissed with costs;
2. The hearing of the trial is postponed *sine dies*.

B. A. MASHILE
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Counsel for the Plaintiff: Adv J. du Randt
Instructed by: Jay Mothobi Incorporated

Counsel for the Defendant: Adv V. Meijers
Instructed by: PhungulaInc Attorneys

Argument took place on 27 May 2015
Judgment delivered on: 23 July 2015