

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

Case No: A 599/01

In the matter between:

ANGLO DUTCH MEATS (EXPORTS) LIMITED

Appellant

and

BLAAUWBERG MEAT WHOLESALERS CC

Respondent

JUDGMENT: 27 JUNE 2002

VAN ZYL J:

INTRODUCTION

[1] On 12 April 1996 Anglo Dutch Meats (UK) Limited (“ADM (UK)”), as plaintiff, issued summons against the respondent (hereinafter referred to as the defendant) for payment of the sum of \$226 720,00 (later amended to \$112 230,00 and still later to \$109,287). This was the balance of the purchase price owing to it on two consignments of frozen, boneless beef flanks, with an average visual lean content of 70%. The beef had been shipped to the defendant on 8 May 1995 pursuant to orders placed through the agent of ADM (UK), namely August Export Limited, on 23 March and 13 April 1995 respectively. The defendant had paid ADM (UK) the amount of \$114 490.00, but had failed to make any further payments.

[2] In its plea the defendant denied having contracted with ADM (UK). It averred that it had, on or about 10 March and 11 April 1995, negotiated agreements with JNC Traders CC, trading as Megatron Meat Trading and acting on behalf of an undisclosed principal, for the purchase of

the beef in question. The defendant averred that the shipment of beef had arrived in Cape Town on 20 June 1995 and admitted that it had paid ADM (UK), after establishing its identity as the previously undisclosed principal, the amount of \$114 400.00 in respect thereof. The said payment was made, however, before it had inspected the beef and discovering that its visual lean content was 60% and not 70% as agreed. The defendant relied on this, and a number of further alleged breaches of contract, when it subsequently filed a claim in reconvention.

[3] Shortly before the trial was to commence in November 1998, ADM (UK), still as plaintiff, gave notice of its intention to amend its pleadings by describing itself as Anglo Dutch Meats (Exports) (“ADM (Exports)”). The application was supported by an affidavit deposed to by one Paul Gilham, the Export Manager of ADM (Exports). He pointed out that ADM (Exports) was, at all relevant times, a wholly owned subsidiary of ADM (UK), the holding company. Both these companies were duly registered in accordance with English law and had their registered office and principal place of business at the same address in Eastbourne, East Sussex. According to Gilham, ADM (UK) purchased, cut, processed and packed meat in preparation for sale. ADM (Exports), in turn, purchased the packed product from ADM (UK) and was the sole distributor and exporter to South Africa of such product. South African clients, again, purchased the product from ADM (Exports), and not directly from ADM (UK).

[4] According to Gilham confusion sometimes arose because of the occurrence of the words “Anglo Dutch Meats” (ADM) in the name of both corporate entities. This happened in the present case, where the plaintiff was wrongly described as ADM (UK) instead of ADM (Exports), despite Gilham’s specific instructions to Mr Garth Hardie of attorneys Coulters, Van Gend and Kotze, to institute proceedings on behalf of ADM (Exports). These instructions appear from a fax from Gilham to Hardie dated 22 December 1995. When subsequent attempts to settle the matter failed, Gilham sent a similar fax, dated 4 April 1996, to Mr Jan van Gend, who had taken over the relevant file on the retirement of Hardie. In both these transmissions the plaintiff was described as “adm (exports)” and the letterhead indicated that the fax transmission emanated from Anglo Dutch Meats (Exports) Ltd.

[5] In a supporting affidavit Van Gend confirmed that the plaintiff, on whose behalf he had been instructed to issue summons against the defendant, was at all material times intended to be ADM (Exports). This was in fact also the defendant’s understanding, as appears from a number of documents recording the sale and delivery of, and payment for, the meat in question. Thus, for example, in response to an invoice from the plaintiff dated 5 May 1995 and indicating ADM (Exports) as the seller, the defendant made full payment of the amount on the invoice by means of a bill of exchange dated 26 May 1995 and addressed to ADM (Exports) as payee. Despite the fact that the parties were *ad idem* as to the identity of the plaintiff, Van Gend explained, he

erroneously, and in good faith, proceeded to describe the plaintiff as ADM (UK), instead of ADM (Exports), in the summons and in subsequent pleadings. He averred, however, that, although initiated by him, this mistake was common to both parties. The defendant would not, therefore, be prejudiced by the proposed amendment. It was, indeed, in the interests of justice and fairness, that it be granted.

[6] The defendant opposed the amendment on the ground that it would not simply be correcting an erroneous description or a misnomer, but would have the effect of substituting “a separate legal persona” for the plaintiff. Any claim that ADM (Exports) might have against the defendant would already have prescribed. The defendant would hence be prejudiced should the amendment be granted in that it would, *inter alia*, be deprived of a special plea of prescription. I have some difficulty in understanding this, since the defendant could at no stage have raised prescription against ADM (UK). The amendment was in fact to its benefit in that, if it should be held to have introduced a new plaintiff, it would have the effect of furnishing the defendant with a special plea of prescription against ADM (Exports). This is a far cry from being prejudiced by the loss of a previously available defence. This aspect will be dealt with again later on in this judgment (par 17 below).

[7] The matter came before Cleaver J for consideration of only the application for amendment. After dealing at some length with the submissions of counsel and after careful perusal of the relevant documentation, he accepted that the plaintiff had been wrongly described in the summons and subsequent pleadings as a result of a genuine mistake on the part of Van Gend. The parties had, in their correspondence and elsewhere, clearly regarded ADM (Exports) as the seller of the meat and hence as the true plaintiff in the action. An amendment to reflect this misnomer would not have the effect of introducing a new plaintiff and would not cause the defendant any prejudice. The learned judge found support for this finding in *Mutsi v Santam Versekeringsmaatskappy en 'n Ander* 1963 (3) SA 11 (W), *Dawson and Fraser (Pty) Ltd v Havenga Construction (Pty) Ltd* 1993 (3) SA 397 (B) and *Devonia Shipping Ltd v MV Luis (Yeoman Shipping Co Ltd Intervening)* 1994 (2) SA 363 (C). In addition he was satisfied that justice and fairness favoured the plaintiff. In the event the application for amendment of the pleadings was granted on 10 December 1998 and ADM (Exports) became the plaintiff (the appellant in the present proceedings, to whom I shall continue to refer as the plaintiff).

[8] An application for leave to appeal was dismissed by Cleaver J, as was a subsequent petition to the Chief Justice. The amendment substituting ADM (Exports) as plaintiff was accordingly effected. The defendant thereupon filed a special plea on the basis that the claim of ADM (Exports) against the defendant had prescribed by the time the aforesaid amendment was granted.

[9] The matter subsequently came before Hodes AJ on a number of defined issues, including whether or not the plaintiff's claim had prescribed and whether or not the defendant had suffered damages as claimed in reconvention. On the prescription issue the learned judge held that Cleaver J had been clearly wrong in finding that the original description of the plaintiff was merely a misnomer. The amendment of this description in fact amounted to the introduction of a new plaintiff. In this regard he relied strongly on *Associated Paint & Chemical Industries (Pty)*

LTD t/a Albestra Paint and Lacquers v Smit 2000 (2) SA 789 (SCA), a judgment reported after Cleaver J had delivered his judgment. Inasmuch as section 15(1) of the *Prescription Act* 68 of 1969 requires the creditor to claim payment of the debt, Hodes AJ distinguished the cases relied on by Cleaver J and held that the original plaintiff, ADM (UK), had never been the defendant's creditor. The running of prescription was accordingly not interrupted by service of ADM (UK)'s summons on the defendant. In the event the special plea was upheld. The claim in reconvencion, however, was dismissed for reasons not presently relevant.

[10] The present appeal is directed only against the decision by Hodes AJ to uphold the defendant's special plea of prescription. There is no cross-appeal in regard to the dismissal of the claim in reconvencion.

THE ISSUES

[11] The most immediate issue is whether or not Hodes AJ was at large to differ from Cleaver J's finding that the effect of the amendment was merely to correct a misnomer and not to introduce a new plaintiff. He was not considering an appeal against the granting of the amendment, leave to appeal having been refused by both Cleaver J and the Supreme Court of Appeal (par 8 above). If that means that he was bound by Cleaver J's finding on the issue of a misnomer, the question must inevitably arise whether a special plea of prescription could have been entertained at all.

[12] If Hodes AJ were indeed free to reject Cleaver J's aforesaid finding, his reasons for doing so would have to be considered. This would require consideration of, firstly, whether or not the amendment simply corrected a misnomer or introduced a new plaintiff and, secondly, whether or not it had retrospective operation. Of particular importance in this regard would be the effect of section 15(1) of the *Prescription Act* 68 of 1969. This section played a significant role in the decision of Hodes AJ, but was not dealt with by Cleaver J in his judgment, ostensibly because Cleaver J was considering an application for amendment, whereas Hodes AJ was dealing with a special plea of prescription.

Was the Finding by Cleaver J Binding on Hodes AJ?

[13] It is well established in our law that “[a] purely interlocutory order, that is, one not having the effect of a final decree, may at any time before final judgment in the suit be varied or set aside by the judge who made it or by any other judge sitting in the same court and exercising the

same jurisdiction”. So reads the head note to the case of *Bell v Bell* 1908 TS 887, in which Innes CJ held (at 891) that an interlocutory order has final effect under the following circumstances:

When an order incidentally given during the progress of the litigation has a direct effect upon the final issue, when its execution causes prejudice which cannot be repaired at a later stage, when it disposes of a definite portion of that suit, then in essence it is final, though in form it may be interlocutory.

This test was confirmed by the same judge (then judge of appeal) in *Steytler N O v Fitzgerald* 1911 AD 295 at 313.

[14] In *Mears v Nederlandsch Zuid Afrikaansche Hypotheek Bank Ltd* 1908 TS 1147, Bristowe J referred to the *Bell* judgment (par 13 above) in formulating the test as follows (at 1151):

Taking this as the test, then, in order to be appealable an interlocutory decision must be one which is irreparable, not in the sense that the effect which it produces cannot be repaired having regard to the resources at the command of the person against whom it is made, but in the sense that (if it remains unreserved) it irreparably anticipates or precludes some of the relief which would or might have been granted at the hearing.

Curlewis JA cited this *dictum* with unqualified approval in *Globe and Phoenix Gold Mining Co Ltd v Rhodesian Corporation Ltd* 1932 AD 146 at 162-163. See also *Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd* 1948 (1) SA 839 (A) at 870.

[15] In *Duncan N O v Minister of Law and Order* 1985 (4) SA 1 (T), Van Dijkhorst J stated (at 2E-F) that, as a general rule, a final judgment, which correctly expresses the decision of the court, cannot be altered by such court. On the other hand, he observed (at 3A), “a simple

interlocutory order [which does not have the effect of a final order] ... is open to reconsideration, variation or rescission on good cause shown". In this regard the learned judge relied strongly on the judgment of Schreiner JA in the *Pretoria Garrison Institutes* case (par 14 above).

[16] A particularly instructive discussion of the distinction between interlocutory orders that have "a final and definitive effect on the main action" and those that do not may be found in the judgment of Corbett JA in *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 549G-551A. See too *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) at 521H-534B (on the meaning of an appealable "judgment or order") and *Standard General Insurance Co Ltd v Eli Lilly (SA) (Pty) Ltd* 1996 (1) SA 382 (W) at 387E-F. For present purposes it is not necessary to elaborate on this theme.

[17] An order granting an amendment of a pleading would, under normal circumstances, be interlocutory unless it can be shown that it is final in nature in that it wholly or partially disposes of an issue in the main action. In the present matter the amendment granted by Cleaver J did not have the effect of disposing of any issue in the main action. It likewise did not cause the defendant irreparable prejudice by depriving him of a special plea of prescription, or by anticipating or precluding any relief envisaged in the particulars of claim. On the contrary, as mentioned before (par 6 above), if in fact the amendment introduced a new legal *persona*, as alleged by the defendant, it furnished him with such plea for the first time.

[18] It must, of course, be remembered that Hodes AJ was not considering an appeal against the decision of Cleaver J, but was dealing with a special plea of prescription raised for the first time after Cleaver J had granted the amendment. As such, I believe, he was at large to consider afresh the effect of the amendment for purposes of assessing whether or not it had merely corrected a misnomer or had indeed introduced a new plaintiff. In accordance with the authorities cited above, he would in fact have been empowered to vary or set aside the amendment (par 13 above). Assuming, however, that he was bound by the amendment inasmuch as the application for leave to appeal against the order granting it had been refused by both Cleaver J and the Chief Justice, he could not, in my view, be bound by the *ratio* underlying the granting thereof. The refusal of leave to appeal was, simply stated, a confirmation of the validity of the amendment, not necessarily of the reasoning behind it. In his judgment dismissing the application for leave to appeal Cleaver J held that the order granting the amendment was not susceptible to appeal. In any event there was nothing stopping the defendant from raising a plea

of prescription and leading evidence in the trial to bolster it.

[19] At the stage Cleaver J considered the application for amendment, prescription had not yet been pleaded and was at most a potential defence that could be raised at some future time. The facts and circumstances relevant to a plea of prescription could differ substantially from those before the court at the time of considering only the amendment. And even if they should remain the same, the trial court could, conceivably, approach their meaning, ambit and interpretation from a totally different perspective. That is why a court may be reluctant to consider such a potential defence before it has been pleaded. The defendant is certainly not precluded from raising it after the amendment has been granted and can hence not submit that he has been prejudiced. See *Wavecrest Sea Enterprises (Pty) Ltd v Elliot* 1995 (4) SA 596 (SEC) at 598I-J and *Stroud v Steel Engineering Co Ltd and Another* 1996 (4) SA 1139 (W) at 1141B-D and 1142C-F. In the latter citation, I would respectfully submit, Flemming DJP approached the issue in an eminently practical way:

There remains the contention that because the claim is prescribed, it should not be allowed. I accept that the Court normally would not permit an allegation which has no possibility of advancing the situation of a litigant and can at best serve as a basis for the need to hear evidence which leads nowhere. Accordingly it would make no sense to permit a claim which is known to have prescribed. But if the supervening of prescription is not common cause, the application for amendment is normally not the proper place to attempt to have that issue decided. Technically speaking, in fact, prescription is not an issue until it has been pleaded. I say 'normally' because there may be special cases, for example where only legal interpretation makes the difference to facts which are common cause. However, except in such special situations, once prescription is not common cause, the plaintiff should not be deprived of his chance to put his claim before the Court because of apparent probabilities at the time when the amendment is considered. Considerations of effectiveness and fairness confirm that propriety. The present defendant ought to raise its proposed defence (prescription) in the same way that it would raise any other defence which becomes appropriate after an amendment is granted.

This *dictum* was referred to with approval by Foxcroft J in *Grindrod (Pty) Ltd v Seaman* 1998 (2) SA 347 (C) at 351B-E.

[20] In view of the aforesaid considerations I am of the view that Hodes AJ was not bound by Cleaver J's finding that the effect of the amendment was to correct a misnomer and not to introduce a new plaintiff. I now turn to this issue.

Did the Amendment Correct a Misnomer or Introduce a New Plaintiff?

[21] The difficulty in this regard is that it is common cause that ADM (UK), the original plaintiff, and ADM (Exports), the substituted plaintiff, are separate corporate entities, each with

its own legal personality. On the face of it, therefore, a new plaintiff has indeed been introduced by the amendment. On the other hand, however, it seems to be clear that both parties identified the plaintiff, ADM (Exports), as the seller of the meat, as appears from the relevant invoice and payment thereof (par 5 above). It was purely as a result of a *bona fide* mistake by Van Gend that the seller was not identified as the plaintiff in the summons and subsequent pleadings.

[22] We hence have before us two sides of the same coin. The one side prompted Cleaver J to regard the original description of the plaintiff, namely ADM (UK), as a misnomer for the intended and bilaterally accepted seller-plaintiff, namely ADM (Exports). The other side led Hodes AJ to hold that the amendment of this description, by substituting ADM (Exports) for ADM (UK), had the effect of introducing a new plaintiff. The difference in legal effect of these two approaches is of a radical nature. If indeed the amendment of the plaintiff's name were merely a misnomer, service of the summons would ordinarily have the effect of interrupting the running of prescription. If, however, it should be regarded as the introduction of a new plaintiff, with separate legal personality, the opposite may be true.

[23] The difference between a misnomer and a change of defendant or plaintiff has exercised judicial minds for many years. In the early case of *L & G Cantamessa v Reef Plumbers; L & G Cantamessa (Pty) Ltd v Reef Plumbers* 1935 TPD 56 summons was issued against the defendant as a partnership. At the conclusion of the evidence, however, the magistrate granted an amendment in terms of which the defendant was cited as a company. His reason for doing so was that, in his view, the original description of the defendant as a partnership was a mere misnomer that he could correct in terms of section 105 (3) of the *Magistrate's Court Act* 32 of 1917. On review Tindall J held that the magistrate had erred in making this finding, and stated (at 60): This is not a case of a mere misnomer. The effect of the amendment was to introduce a new defendant into the case. The original defendant, L. & G. Cantamessa was either a partnership or two individuals. It would seem that it was intended to cite L. & G. Cantamessa as a partnership because the summons was served only on one of the partners under Order VI. In any event, whether the summons was against a partnership or against two individuals, it is clear that the limited company is an entirely different *persona* in law and that it was not merely a matter of a misnomer. A different *persona* was introduced into the proceedings, and in my opinion that was not permissible under sec. 105 ... The plaintiffs cannot escape from the fact that, in law, the company is a separate *persona* and that the *persona* was not sued in the original summons.

In the event the review was allowed with costs and the judgment against L & G Cantamessa (Pty) Ltd was set aside.

[24] The roles of the *personae dramatis* were reversed in *Park Finance Corporation (Pty) Ltd*

v Van Niekerk 1956 (1) SA 669 (T). In that case the defendant had contracted with a partnership, which subsequently became incorporated and sued the defendant as a company. When the defendant pleaded that he was not liable to the plaintiff as a company, the plaintiff sought an amendment to the effect that the partnership had ceded its rights against the defendant to the plaintiff prior to the institution of the action. The defendant opposed the amendment on the grounds that he would be prejudiced in that the claim contained in the amendment had prescribed. Ramsbottom J considered the facts and the argument placed before him and held (at 674A-E):

The summons and the declaration alleged a right arising from a contract between the plaintiff and the defendant, and the action was to enforce that right. In fact there was no such contract and the alleged right was non-existent; the action was brought to enforce a right which in fact did not exist. The amendment is to enforce a right which arose out of a different contract between the defendant and a different party, and that is quite a different right; the fact that the right sued for in the summons does not exist does not make the right referred to in the amendment the same right as that claimed in the summons ... In my opinion the right which the plaintiff now wishes to enforce is a right arising out of a contract between different parties and is a different right from that which the action was brought to enforce, and therefore the service of the summons did not interrupt the prescription of the different right which the plaintiff now wishes to enforce.

A similar approach was adopted in *Thompson & Stapelberg (Pty) Ltd v President Staal Korporasie (Edms) Bpk* 1963 (3) SA 293 (O). The decision on the facts was criticised, however, by Trollip JA in *Neon and Cold Cathode Illuminations (Pty) Ltd v Ephron* 1978 (1) SA 463 (A) at 474D-475B. See also *Standard General Insurance Co Ltd v Eli Lilly (SA) (Pty) Ltd (FBC Holdings (Pty) Ltd, Third Party)* 1996 (1) SA 382 (W) at 385F-G and *Grindrod (Pty) Ltd v Seaman* 1998 (2) SA 347 (C) at 354D-F.

[25] The first case relied on by Cleaver J in his aforesaid judgment (par 7 above) was *Mutsi v*

Santam Versekeringsmaatskappy Bpk en 'n Ander 1963 (3) SA 11 (O). This was an application by the plaintiff (applicant) in a damages claim to amend the description of the defendant (first respondent) in the summons and declaration. The two respondents, Santam Versekeringsmaatskappy and Suid-Afrikaanse Nasionale Trust en Assuransie Maatskappy Beperk, were both insurance companies doing business at the same address under the same abbreviated name, Santam. The applicant, who was involved in a collision with a vehicle insured with the first respondent, instructed his attorney to claim damages for injuries suffered by him in the collision. His attorney thereupon, erroneously and in good faith, issued summons against the second respondent. The summons was served, however, on the first respondent, which was fully aware of the fact that the applicant's claim had been instituted against it in its capacity as insurer of the said vehicle. When the mistake was discovered, the applicant applied for an amendment of his summons and declaration in order to substitute the name of the first respondent for that of the second respondent. The application was opposed.

[26] In his judgment (at 14C-G) Hofmeyr J accepted that an ordinary reasonable person would be confused by the identical abbreviation used for both respondents and held on a balance of probabilities that the applicant's attorney had intended in good faith to issue summons against the first respondent. The learned judge held further that this was a case involving the incorrect description of the correct defendant, rather than the substitution of one defendant by another. In this regard he stated (at 18H-19A):

In die omstandighede deur my as bewese aanvaar, moet die huidige geval ook myns insiens as 'n geval van 'n foutiewe beskrywing van die juiste verweerder en nie as 'n geval van die vervanging van een verweerder deur 'n ander, beskou word nie. Die feit dat die naam wat die aplikant gebruik het om die eerste respondent te beskryf, ook die naam van die tweede

respondent was, is 'n faktor wat myns insiens in die omstandighede van hierdie saak van geen belang was nie. Niemand was in werklikheid daardeur benadeel of mislei nie. Dit was nie alleen nooit bedoel om die tweede respondent te dagvaar nie, maar die dagvaarding is ook in werklikheid nooit op die verkeerde party (naamlik die tweede respondent) bestel nie. Die eerste respondent het verder nie alleen geweet dat die dagvaarding wel vir hom bedoel was nie, maar ook dat dit nie vir die tweede respondent bedoel was nie.

In response to an argument on behalf of the first respondent that the amendment should not be granted because the claim against the first respondent had already prescribed, Hofmeyr J held (at 19D-E) that the service of the summons on the first respondent had in fact interrupted prescription. The first respondent would hence not be prejudiced by the granting of the amendment.

[27] The facts in the second case relied on by Cleaver J (par 7 above), namely *Dawson and Fraser (Pty) Ltd v Havenga Construction (Pty) Ltd* 1993 (3) SA 397 (B), were remarkably similar to those in the *Mutsi* case (par 25-26 above). The defendant (applicant) was erroneously cited in the summons as "Dawson and Fraser (Pty) Ltd" instead of "Dawson and Fraser (Bophuthatswana) (Pty) Ltd". Default judgment was subsequently granted against the former. In an application for rescission of such judgment Hendler J considered the facts contained in the papers and held (at 401A), on a balance of probabilities, that the plaintiff (respondent) had intended to cite the latter, but had in error omitted the bracketed "Bophuthatswana". The court had the power, the learned judge held (at 402H), to correct the citation without substituting the defendant. This would accord with the relief granted in the *Mutsi* case. The application for rescission was hence dismissed and the relevant amendment granted.

[28] The third matter relied on by Cleaver J (par 7 above) was *Devonia Shipping Ltd v MV Luis (Yeoman Shipping Co Ltd Intervening)* 1994 (2) SA 363 (C). The initial application, brought by Devonia Shipping Ltd as applicant, was directed at placing the respondent ship *Luis* under arrest in respect of the applicant's claim for security arising from certain arbitration proceedings. After its arrest, the ship's owner applied for leave to intervene as respondent, seeking that the *Luis* be released forthwith on the ground that the applicant was not a registered company in the United Kingdom. It would appear that its name was in fact "Devonia Shipping Agency Ltd", trading as "Devonia Shipping Ltd". The applicant thereupon sought an amendment to its notice of motion to reflect the name of the applicant as "Devonia Shipping Agency Ltd". Rose Innes J considered this application for amendment in the following terms (at 369E-370B):

The general rule is that an amendment of a notice of motion, as in the case of a summons or pleading in an action, will always be allowed unless the application to amend is *mala fide* or unless the amendment would cause an injustice or prejudice to the other side which cannot be compensated by an order for costs or, in other words, unless the parties cannot be put back for the purposes of justice in the same position as they were when the notice of motion which it is sought to amend was filed ... A material amendment such as the alteration or correction of the name of the applicant, or the substitution of a new applicant, should in my view usually be granted subject to the considerations of prejudice to the respondent ... The risk of prejudice will usually be less in the case where the correct applicant has been incorrectly named and the amendment is sought to correct the misnomer than in the case where it is sought to substitute a different applicant. The criterion in both cases, however, is prejudice which cannot be remedied by an order as to costs and there is no difference in principle between the two cases ... The correction of a misdescription of an applicant differs also from the cases where the Courts have regarded a summons or notice of motion as *ab initio* invalid because the plaintiff or applicant was a non-existent person ... The kind of irremediable prejudice which may cause a court to refuse an amendment may occur, for example, where the amendment would deprive the other party of a defence which it would otherwise have set up ...or where the substitution of the plaintiff or applicant would release parties from liability for costs.

The learned judge referred with approval to the *Mutsi* case (par 25-26 above) and granted the amendment on the basis "that the applicant has been misnamed in the notice of motion due to

error". In this regard he was satisfied that there was no indication that the amendment would cause the respondents any prejudice or injustice.

[29] The issue of a misnomer, as opposed to a substitution or change of parties, has been dealt with in a number of further matters. Reference may be made in this regard to *Greef v Janet en 'n Ander* 1986 (1) SA 647 (T) at 654A-E, where Stegmann J distinguished the *Mutsi* case on the basis that, in the case before him, there had been a deliberate attempt to substitute one *persona* for another as defendant. See also *O'Sullivan v Heads Model Agency CC* 1995 (4) SA 253 (W), in which the defendant had been cited as "Heads Model Agency" instead of "Heads Model Agency CC". A third party notice was, however, served on the correct defendant, which duly responded to it. This prompted Flemming DJP to say the following (at 254H-J):

The third party notice served as an invitation to the party. Who accepted the invitation and who turned up at the party? It is none other than 'Heads Model Agency CC'. That is the legal person who understood the third party claim to be intended for him. That is the person who pleaded. That person said that it is not the firm but a close corporation. When a party realises that a pleading is addressed to him and responds accordingly, the situation seems to come within the scope of *Mutsi v Santam Versekeringsmaatskappy Bpk en 'n Ander* 1963 (3) SA 11 (O). Whether or not it is a situation of a 'mere misnomer', the amendment then does not seek to change parties but to describe with accuracy the party which was successfully ... brought before Court.

[30] In *Friends of the Sick Association v Commercial Properties (Pty) Ltd and Another* 1996 (4) SA 154 (D) the plaintiff was cited as a voluntary association in an action claiming, as against the first defendant, transfer of a certain property. The voluntary association had in fact ceased to exist in 1948, when it became an association not for gain, incorporated as a company limited by guarantee in terms of section 21 of the *Companies Act* 46 of 1926. When the point was taken that

the correct plaintiff was not before the court, the plaintiff applied for the necessary amendment.

With reference to the decision in the *Cantamessa* case (par 23 above), Miles-Duner AJ held (at 157E-F):

I similarly take the view that this is not a case of a mere misnomer and that the effect of granting the amendment would be to introduce a new *persona* in law as the plaintiff. This, in itself, upon the authorities to which I have referred, is not a bar to the granting of the amendment sought by the plaintiff - subject to considerations of prejudice to the first defendant. The difficulty, however, is that the substitution sought relates to the plaintiff, and the *persona* described in the summons does not exist and did not exist at the date of the issue of the summons.

The learned judge held further, with reference to *Van Heerden v Du Plessis* 1969 (3) SA 298 (O) at 304A-C, that the summons was a nullity in that the plaintiff was non-existent. In the event both the application for amendment and the main action were dismissed with costs.

[31] In *Embling and Another v Two Oceans Aquarium CC* 2000 (3) SA 691 (C) at 699C-H Van Heerden J expressed her disagreement with this finding and suggested that, on the facts, the amendment was directed simply at "a rectification of a misdescription of the plaintiff". See also *Rossner v Lydia Swanepoel Trust* 1998 (2) SA 123 (W) at 127J-128A and *Luxavia (Pty) Ltd v Gray Security Services (Pty) Ltd* 2001 (4) SA 211 (W) at 219H-I. I respectfully associate myself with this criticism which, I believe, is fully justified. The reason for the amendment was to bring the pleadings in line with the fact that the voluntary association in question had, as far back as 1948, converted to a section 21 company and was clearly the correct plaintiff. The effect of the amendment would then simply be to correct the wrong description of the plaintiff and not to introduce a new plaintiff in the place of a non-existent one.

[32] In cases where the description of the plaintiff or defendant is inaccurate or incomplete, a court will not be averse to granting an amendment to correct it, subject to the usual provisos relating to prejudice of the opposing party. Thus in *Rosner v Lydia Swanepoel Trust* 1998 (2) SA 123 (W) the plaintiff was cited in the summons in the name of a trust instead of in the name of the trustees in their official capacities. A magistrate granted an application to amend the summons to reflect the trustees, in their official capacities, as plaintiffs. On appeal Goldstein J held (at 128E-G) that the amendment had changed "nothing of substance". All it did was "to give linguistic effect to the legal rule that a trust lacks legal personality". The plaintiff had not changed; only its description had. In this regard the learned judge found support in the *Devonia Shipping* case (par 28 above), holding (at 127H) that the approach of Rose Innes J appeared to be "eminently practical and sensible, eschewing technicality and correcting procedural mistakes as cheaply as possible".

[33] In a Full Bench appeal of the Witwatersrand Local Division, *Du Toit v Highway Carriers and Another* 1999 (4) SA 564 (W), Marais J inclined the same way. This was a case in which the defendant was cited as a firm instead of as a company. Inasmuch as the summons had been served on the correct defendant, which had pleaded thereto, denying that it was a firm, there was no doubt that it was indeed the intended defendant. In upholding an appeal against the court *a quo*'s refusal to grant an amendment rectifying the description of the defendant in the summons, the learned judge held (at 568D) that the amendment was merely seeking to correct a misnomer and not to substitute a new party. With reference to the similar decisions in *S A Dental Surgical Manufacturing Co v Express Messenger Service* 1935 CPD 336 and in the *O'Sullivan* case (par

29 above), the learned judge suggested (at 569J-570E) that the following approach in cases of this nature would be appropriate:

The point that a 'wrong' defendant has been cited not infrequently rears its head when the defendant pleads, often after prescription has run. It is often the case that the intention of the plaintiff is to cite the entity conducting a specific business at a specific address and the defendant served with the summons is in no doubt that it is indeed the intended defendant. In such a case courts should lean towards allowing amendments which would correct inadvertent incorrect descriptions and should not be astute to refuse such amendments involving the description of the defendant on pure semantic and legalistic grounds which ignore the realities of the situation as perceived by the parties themselves. By so refusing an amendment at the instance of the defendant the courts lend themselves to an exercise in formalism, the object of which is to enable a defendant to escape a summons which it knows is directed to it, and often to wholly defeat a claim which has by then prescribed. Courts should not formalistically ignore the fact, if such it be, that the party now sought to be accurately described was the party whom the plaintiff intended to sue, even though the plaintiff had only a vague or fuzzy idea of the correct description of the defendant, *and* the defendant itself knew very well that the summons was directed to it when it was served. The approach of Gardener J in the *S A Dental* case and that of Flemming DJP in *O'Sullivan's* case seem to me to be in accordance with both justice and common sense. The law (and its practical application) should be the embodiment of common sense, as Denning MR once remarked. The more flexible approach of Gardener J and Flemming DJP better serves the ends of justice than the formalistic approach so favoured by defendants, who see in it a loophole enabling them to avoid adjudication upon the merits of a claim against them.

[34] I am in respectful agreement with this approach and associate myself wholeheartedly with it. Not only is it eminently logical and fully commensurate with practical common sense, but it also achieves what should be regarded as the main function of the judiciary, namely to do justice between the parties. Justice in this sense necessarily encompasses fairness or equity and reasonableness. It also underscores the need for good faith to subsist between the parties at all times. At the same time it satisfies the expectations of the community as to what law and justice is all about. As such it complies in all respects with public policy considerations. It must be realised, however, that such considerations may be applicable only in so far as the facts and

circumstances of the particular case allow them to be applied. Statutory limitations, such as those imposed by the rules relating to the prescription of claims, although they may ostensibly have a harsh and unfair result, are also required, and indeed essential, for putting an end to what might otherwise become a tyranny of interminable litigation. It is, indeed, policy considerations that underlie limitations of this nature and assist in creating legal order and certainty. Inasmuch as the community requires such order and certainty when the facts and circumstances justify it, it cannot be said to be in conflict with considerations of justice, fairness, reasonableness or good faith.

[35] This brings me to the judgment upon which Hodes AJ (par 9 above) placed strong reliance, namely that of the Supreme Court of Appeal in *Associated Paint & Chemical Industries (Pty) Ltd t/a Albestra Paint and Lacquers v Smit* 2000 (2) 789 (SCA). The plaintiff (appellant) in that case issued summons against the defendant (respondent) claiming payment for goods sold and delivered. In the summons the plaintiff was described as "Associated Paints & Chemical Industries (Wynberg)(Pty) Ltd t/a Albestra Paints" but in the declaration its description was "Associated Paint & Chemical Industries (Pty) Ltd t/a Albestra Paints". It was common cause that these descriptions related to different companies. The plaintiff's claim was duly served on the defendant. In its plea, strangely enough, the defendant admitted that the company described in the declaration was the plaintiff and that he owed it a certain sum of money. He requested, however, that judgment be stayed pending the adjudication of his conditional counterclaim for damages against the plaintiff. When the plaintiff later sought to amend the summons and subsequent pleadings to reflect its correct description, the defendant opposed the amendment on

the ground that, if it were granted, he would be deprived of his defence that the debt had prescribed. The court *a quo* refused the application for amendment.

[36] On appeal F H Grosskopf JA considered the effect of the amendment and stated briefly as follows (in par 11 at 793I-794A):

Counsel for the plaintiff submitted that the amendment sought was really only to correct a misdescription of the plaintiff but in my judgment this is not the case of a mere misnomer. The effect of the amendment would be to introduce a new plaintiff. (*L & G Cantamessa v Reef Plumbers; L & G Cantamessa (Pty) Ltd v Reef Plumbers* 1935 TPD 56 at 60.) On this ground alone the present matter can be distinguished from the case of *Mutsi v Santam Versekeringsmaatskappy Bpk en 'n Ander* 1963 (3) SA 11 (O) on which counsel for the plaintiff relied. (Compare *Greef v Janet en 'n Ander* 1986 (1) SA 647 (T) at 654A-F.) Prescription in any event anticipated the amendment, as will be explained later.

In this regard the learned judge stated (in par 13 at 794C-D) that a plaintiff is generally not precluded by prescription from amending his claim, provided the debt remains the same or substantially the same, and provided that prescription of the debt originally claimed has been "duly interrupted". In support of this statement the learned judge referred (in par 13 at 794D-F) to a *dictum* of Eksteen JA in *Sentrachem Ltd v Prinsloo* 1997 (2) SA 1 (A) at 15J-16D:

Die eintlike toets is om te bepaal of die eiser nog steeds dieselfde, of wesenlik dieselfde skuld probeer afdwing. Die skuld of vorderingsreg moet minstens uit die oorspronklike dagvaarding kenbaar wees, sodat 'n daaropvolgende wysiging eintlik sou neerkom op die opklaring van 'n gebrekkige of onvolkome pleitstuk waarin die vorderingsreg, waarop daar deurgaans gesteun is, uiteengesit word ... So 'n wysiging sal uiteraard nie 'n ander vorderingsreg naas die oorspronklike kan inbring nie, of [om] 'n vorderingsreg wat in die oorspronklike dagvaarding prematuur of voorbarig was, te red nie, of om 'n nuwe party tot die geding te voeg nie.

[37] Having referred to the *Park Finance* case (par 24 above) and to *Neon and Cold Cathode Illuminations (Pty) Ltd v Ephron* 1978 (1) SA 463 (A), F H Grosskopf JA turned to the facts of

the case before him and stated (in par 16 at 795F-H):

In our case the only real difference between the debt originally claimed and the debt claimed in the proposed amendment is the identity of the creditor who seeks to enforce payment of the debt. Even if I assume that the debt which the proposed new plaintiff now seeks to claim by means of the amendment is substantially the same debt which the plaintiff sought to enforce in the original summons (a questionable assertion), the problem still remains whether prescription in respect of the original debt had been duly interrupted. In this connection the plaintiff is faced with the difficulty whether the summons was issued by the 'creditor'.

In this regard the learned judge distinguished the requirements of section 6(1)(b) of the previous *Prescription Act* 18 of 1943 (the "1943 Act") and those of section 15(1) of the current *Prescription Act* 68 of 1969 (the "1969 Act"). The former provided that "extinctive prescription" would be interrupted by "service on the debtor of any process **whereby action is instituted**", whereas the latter provided that the running of prescription would be interrupted by "the service on the debtor of any process **whereby the creditor claims payment of the debt**" (my emphasis). This prompted the learned judge to conclude (in par 18 at 796B-D):

In the present case a summons was served on the defendant whereby the plaintiff claimed payment of the debt. It subsequently transpired that the plaintiff was not the defendant's creditor. In an affidavit in support of the plaintiff's application for the amendment his Germiston attorney conceded that the wrong company had been cited as the plaintiff in the summons and that the defendant at no time concluded any contract or had any dealings with the plaintiff. It is common cause therefore that a debtor-creditor relationship between the defendant and the plaintiff never existed. Consequently the summons did not constitute a process whereby *the creditor* claimed payment of the debt. The running of prescription in respect of the debt was accordingly not interrupted by service of the summons on the defendant. (*Standard General Insurance Co Ltd v Eli Lilly (SA) (Pty) Ltd (FBC Holdings (Pty) Ltd, Third Party)* 1996 (1) SA 382 (W) at 385A-H and 387H; and see *Grindrod (Pty) Ltd v Seaman* 1998 (2) SA 347 (C) at 353A-354F.)

[38] It would appear (par 36 above) that F H Grosskopf J relied on the *Cantamessa* case (par 23 above) for his finding that the effect of the amendment in the case before him was not to correct a misnomer, but to introduce a new plaintiff. "On this ground alone" he then proceeded to

distinguish the *Mutsi* case (par 25-26 above). It is most unfortunate that the learned judge was, apparently, not referred to the decisions in the *Dawson*, *Devonia*, *O'Sullivan* or *Du Toit* cases (par 27-29 and 33 above). I am of the respectful view that, if he had had occasion to consider the judgments in these cases, he might well have come to a different conclusion on the facts. I say this with particular reference to the fact that both parties at all relevant times appear to have regarded the "proposed new plaintiff" as the correct plaintiff. In terms of the said decisions this might indeed have been a case of an erroneous description of the correct plaintiff, rather than a substitution of the correct plaintiff for the wrong one. This underscores once again the well-established principle that each case must be considered on its own merits and with reference to its own peculiar facts and circumstances.

[39] If it should be held that a plaintiff has been wrongly described and that such description may be rectified, it follows that the wrong description of the creditor, for purposes of section 15(1) of the 1969 Act, may likewise be rectified. The difference in wording between section 15(1) of the 1969 Act and section 6(1)(b) of the 1943 Act (par 37 above) cannot, in my view, justify any limitation in this regard. To non-suit a creditor as plaintiff because his description is not exactly correct would result in a degree of formalism and inflexibility reminiscent of the *ius strictum* of ancient Roman law. This would certainly not accord with practical common sense or with the community's perception of justice and its concomitant values (par 34 above). In view of his finding that the amendment in the case before him had introduced a new plaintiff, it was not necessary for F H Grosskopf JA to consider what the position would have been if he had held that it had merely rectified an incorrect description of the plaintiff.

[40] The *Associated Paint* case (par 35-39 above) has not been the last word on the present issue. In *Embling and Another v Two Oceans Aquarium CC* 2000 (3) SA 691 (C), the first applicant, who had sustained injuries in a fall on the premises of the Two Oceans Aquarium in Cape Town, claimed damages against it on the grounds of alleged negligence. In the summons it was cited as "Two Oceans Aquarium CC". The summons was served on a responsible employee at the aquarium and the "Two Oceans Aquarium Trust" gave notice of its intention to defend. In a special plea subsequently filed, it denied having traded as a close corporation and pleaded that any claim against it as a trust had prescribed. In an opposed application to amend the summons and particulars of claim, Van Heerden J held (at 696B-E) that the wrong citation was attributable to a *bona fide* error on the part of the applicant's attorney. After dealing with the relevant facts and applicable law, the learned judge concluded (at 698C-D) that, provided the defendant

described in the amended summons was "clearly *recognisable* from the original summons", the amendment constituted "no more than the 'clarification of a defective pleading' and not the introduction of a *new* legal entity as the defendant". See also the recent case of *Luxavia (Pty) Ltd v Gray Security Services (Pty) Ltd* 2001 (4) SA 211 (W).

[41] I return now to the facts of the case before us. Despite the defendant's plea (par 2 above) that it had paid ADM (UK), it is clear from the relevant invoice and proof of payment that it had in fact paid ADM (Exports), thereby acknowledging that it was the seller of the meat products and hence the defendant's creditor. It was ADM (Exports) that subsequently gave instructions, in two separate faxes, to its South African attorneys to institute action against the defendant. This was in accordance with its expressed intention and it had the justifiable expectation that its attorneys would carry out its instructions properly. That Mr van Gend could have been confused in carrying out the instruction is understandable in that, as pointed out by Mr Gilham (par 3-4 above), ADM (Exports) was a subsidiary of ADM (UK) and both companies had the same registered address. Both were Anglo Dutch Meats companies, distinguished only by the bracketed "(UK)" and "(Exports)" respectively. Van Gend clearly acted in all good faith in issuing summons in the name of the wrong company. I have no hesitation in finding, on a balance of probabilities, that ADM (Exports) was, at all relevant times, the seller of the meat in question and hence the defendant's creditor in respect of the debt arising from the delivery thereof to the defendant. As a result of Van Gend's *bona fide* error, however, it was not cited as the plaintiff in the ensuing summons and subsequent pleadings.

[42] The question is now whether or not the order granting leave to amend the name of the plaintiff from ADM (UK) to ADM (Exports) constituted a rectification of an incorrect citation or a substitution of one legal person for another. In this regard I have carefully considered the differing approaches of Cleaver J and Hodes AJ, with particular reference to their discussion and assessment of the relevant authorities.

[43] Cleaver J (par 7 above) was strongly influenced by the judgments in the *Mutsi, Dawson* and *Devonia* cases (par 25-28 above). He was of the view that the facts in the *Devonia* case were "not greatly dissimilar from the facts in this case" and found strong support in the judgment of Rose Innes J for his finding that ADM (UK) was a misnomer for ADM (Exports).

[44] Hodes AJ, on the other hand, distinguished *Mutsi* and *Dawson* as cases dealing with the amendment of a defendant's name, whereas prescription of a creditor's claim did not arise in the *Devonia* case. He found support for his contrary view in the *Park Finance, Thompson & Stapelberg* and *Standard General Insurance* cases (par 24 above), but relied especially on the *Associated Paint* case (par 35-37 above) for his finding that ADM (UK) was not a misnomer for ADM (Exports). Inasmuch as no debtor-creditor relationship between the defendant and ADM (UK) had ever come into existence, service of the summons in the name of ADM (UK) did not, in his view, constitute a process whereby the creditor, ADM (Exports), claimed payment of the debt. Accordingly service of the summons did not, he concluded, interrupt the running of prescription in respect of the debt. This approach, with respect, does not take cognisance of the fact that the rectification of a misnomer in respect of a plaintiff is not, and cannot be, restricted

by the wording of section 15(1) of the 1969 Act. This was an aspect not considered in the *Associated Paint* case (par 39 above).

[45] After consideration of the various arguments and authorities in support of the opposing approaches to the current issue, I respectfully incline to the view that Cleaver J was indeed correct in finding that the citation of ADM (UK) as plaintiff in the summons and subsequent pleadings was no more than a misnomer for ADM (Exports). This was the legal *persona* identified and accepted by both parties as the seller of the meat products and hence as the true creditor and plaintiff. The correction of its description does not mean that it was being substituted as plaintiff or creditor by a different entity or *persona*. In principle it is irrelevant whether it was wrongly described as an existing entity or as a non-existent one. In either case the question is simply whether the summons served on the defendant was a “process whereby the creditor claims payment of the debt” (par 37 above).

[46] I am in respectful disagreement with Hodes AJ as to the points of distinction raised by him between the present case and those relied on by Cleaver J. It is, in my view, irrelevant whether the misnomer relates to a plaintiff or to a defendant. The applicable principles remain the same. It is likewise irrelevant whether prescription is an issue raised by the defendant. It is merely a factor to be taken into account in deciding whether or not an amendment will cause the opposing party prejudice or injustice.

[47] Accepting the incorrect citation as a misnomer accords, in my respectful view, with the need to take cognisance of the substance rather than the form of the process (*Neon and Cold Cathode Illuminations (Pty) Ltd v Ephron* 1978 (1) SA 463 (A) 471B). It also accords with considerations of justice, fairness and reasonableness, while giving due regard to the requirement of good faith between contracting parties and to the policy considerations underlying the justice system (par 34 above). Peace-loving and justice-seeking members of the community do not take kindly to what they perceive as “technical” defences that allow debtors to escape liability and accountability.

Was the Amendment Retrospective?

[48] This issue arose during the course of argument on appeal, when the court raised the question whether or not the amendment granted by Cleaver J had retrospective operation. If the amendment simply corrected a misnomer, it would clearly have retrospective effect and would perforce date back to the day the summons was issued. If, however, it had the effect of introducing a new plaintiff other considerations would arise.

[49] Mr Whitehead for the appellant and Mr Berthold for the respondent furnished

supplementary submissions on this issue. The court expresses its gratitude for the additional effort required for the research and presentation of such submissions. It would appear that they are *ad idem* that, if the amendment had the effect of rectifying a misnomer in the citation of the plaintiff, it would have retrospective effect (*nunc pro tunc*) and date back to the date of issue of summons. In that event prescription could not be raised as a defence. If, however, it had the effect of introducing a new plaintiff, it might operate retrospectively as a matter of procedural law, but not necessarily as a matter of substantive law. See *Levi Strauss & Co v Coconut Trouser Manufacturers (Pty) Ltd* 2001 (3) SA 1258 (SCA) at 1291C-H. Reference may also be made to *Dinath v Breedts* 1966 (3) SA 712 (T) at 717A-D; *Miller v H L Shippel & Co (Pty) Ltd* 1969 (3) SA 447 (T) at 453F-G and 454B; *Cordier v Cordier* 1984 (4) SA 524 (C) at 532G-I; *Mias de Klerk Boerdery (Edms) Bpk v Cole* 1986 (2) SA 284 (N) at 288C-G; *Barrie Marais & Seuns and Another v Eli Lilly (SA) (Pty) Ltd and Others: In Re Barrie Marais & Seuns and Another v Eli Lilly (SA) (Pty) Ltd and Another* 1995 (1) SA 469 (W) at 472A-473B; *Wavecrest Sea Enterprises (Pty) Ltd v Elliot* 1995 (4) SA 596 (SEC) at 598D-H; *Stroud v Steel Engineering Co Ltd and Another* 1996 (4) SA 1139 (W) at 1141E-1142C; *Brandon v Minister of Law and Order and Another* 1997 (3) SA 68 (C) at 75D-F. For present purposes it is not necessary to deal with these authorities.

[50] In view of my finding that the effect of Cleaver J's amendment was to rectify a misnomer and not to introduce a new plaintiff, it is clear that the amendment operates retrospectively and that a possible defence of prescription does not arise.

CONCLUSION

[51] It follows from the aforesaid considerations that the appeal must succeed and that the order of Hodes AJ, upholding the special plea of prescription, falls to be set aside.

[52] In the event I would make the following order:

1. The appeal is upheld with costs.
2. The order of the court *a quo* upholding the special plea of prescription is set aside and replaced by the following:

"The special plea of prescription is dismissed with costs."

Judge of the High Court of South Africa

I agree.

W J LOUW

Judge of the High Court of South Africa

I agree.

S J NGWENYA

Judge of the High Court of South Africa