REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

GJ APPEAL CASE NO.: A2024/016195
GJ CASE NO.: 11188/15

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED: YES
13 DEC 2024 _____
DATE SIGNATURE

In the matter between:

MOODLIYAR & BEDHESI ATTORNEYS Appellant

and

Y[…] M[…] First Respondent

B[…] A[…] M[…] Second Respondent

This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and released to SAFLII. The date and time for hand-down is deemed to be 13 December 2024.

Summary: The combined summons in the matter had been issued on behalf of the respondents in their personal capacities and effected within the prescriptive period.

Prescription - Extinctive prescription - Interruption of – Section 15(1) of the Prescription Act 68 of 1969- special plea of prescription.

Citation of defendants in their personal capacities and subsequently in their representative capacities on behalf of a minor child in terms of Uniform Rule 28- misnomer and substitutions.

Held-accordingly, in dismissing the appeal, the subsequent amendment pursuant to Rule 28 of the Uniform Rules, which was thereafter granted sanctioning the citation of the respondents in their representative capacities amounted to the introduction of new parties to the proceedings and that in consequence section 15(1) of the Prescription Act did not have the effect of interrupting the running of prescription against them in their representative capacities.

JUDGMENT

MUDAU J: (DIPPENAAR J AND FARBER AJ CONCURRING)

Introduction

[1] On 7 June 2018, Cele AJ granted an amendment to the particulars of claim in an action pending between the appellant (as plaintiff) and the first and second respondents (as the first and second defendants respectively), in terms whereof the appellant was permitted to cite the first and second respondents in the action in not only their personal capacities but also in their representative capacities.

[2] The issue which arises in this appeal concerns the question whether the sanctioned amendment had the consequence of introducing additional parties (namely the first and second respondents in their representative capacities) to the action or whether it merely corrected a misdescription or misnomer in their then existing citation. The answer to these questions will determine whether M Olivier AJ (the trial court) was correct in subsequently upholding the special plea of prescription, which the first and second respondents in their representative

capacities subsequently raised in relation to the claim which had been proffered against them with the leave of the Supreme Court of Appeal. This determination forms the subject matter of this appeal.

The facts

[3] On 14 October 2006, the first and second respondents signed a special power of attorney in favour of the appellant, a firm of attorneys. It was cast in the following terms:-

> ***"SPECIAL POWER OF ATTORNEY***
> *We, the undersigned,*
> ***B[…] A[…] (AKA A[…]) M[…]***
> *(ID NO: 6[…])*
> *AND*
> ***Y[…] […]***
> *(ID NO: 6[…])*
> *acting personally herein,*
> ***AND ON BEHALF OF OUR MINOR DAUGHTER***
> ***A[…] M[…]***
> *(ID NO: 0[…]),*
> *all of No 1[…] G[…] Street, S[…], Johannesburg*
> *do hereby appoint:*
> ***MAGASVARAN SOOBRAMONEY MOODLIYAR***
> *(ID NO: 5[…])*
> *of* ***MOODLIYAR & BEDHESI ATTORNEYS*** *situated at 57 Oxford Road, Saxonwold, Johannesburg, with power of substitution, to be our lawful attorneys and/or agents with full power and authority for us and in our names and on behalf of our above named daughter, and for our account and benefit:*
> *To institute and prosecute to finality, all necessary legal actions against the Minister of Health or any other person who is legally liable to compensate us, for damages sustained by us as a result of the negligent acts, of persons employed and/or acting within the course and scope of their duties with the said Minister of Health or such other persons, in relation to the birth of our*

abovenamed daughter on the 16th July 2002 at the Coronation Hospital, Johannesburg;

On our behalf and in our names, to sign all documents, make all necessary affidavits, statements and other averments, engage professional legal representatives including counsel, engage medical and other experts and generally do all things necessary to prosecute our said actions to finality.

We further agree to pay all fees and/or legal costs to be charged by our attorney in the performance of this mandate, which fees and/or legal costs on the attorney and own client scale at the agreed rate of R900-00 (nine hundred rand) per hour or such pro rata amounts in respect of parts of an hour.

We further agree to pay all fees of counsel and witnesses; to make all and any payments whatsoever which may be necessary and desirable for the proper conduct of the case; to proceed to the final end and determination thereof; and generally for effecting the purpose aforesaid, to do or cause to be done, whatsoever shall be requisite, as fully and effectually, to all intents and purposes, as we might or could do if personally present and acting therein, hereby ratifying, allowing and confirming, and promising and agreeing to ratify, allow and confirm all and whatsoever my said attorney and agent shall lawfully do or cause to be done by virtue of these presents."

[4] Pursuant thereto, the appellant commenced rendering the services contemplated thereunder, which services related to the recovery of damages by the first and second respondents, in both their personal and representative capacities, from the Member of the Executive Committee for Health and Social Development in Gauteng("the MEC"), arising from injuries sustained by their minor daughter during her birth at a state hospital.

[5] The power of attorney referred to in paragraph [2] was superseded by one executed by the first and second respondents on 15 January 2009. It was in terms identical to that embodied in the earlier document, save that the hourly rate was increased from R900-00 to R1 200-00, which latter amount was to increase *"at a rate of 15% (fifteen percent) per annum from date of signature hereof."*

[6] The work continued and during the course of August 2011 the appellant caused Summons to be issued against the MEC for the recovery of damages arising from the injuries sustained by the minor child.

[7] On 21 May 2012 the appellant's mandate was terminated and the respondents appointed Ivan Maitin Attorneys to act on their behalf in the then pending litigation. This was embodied in a document headed "Termination of Mandate" signed by the respondents, which document reads as follows:-

"***TERMINATION OF MANDATE***

I/we, the undersigned

M[…], Y[…]

(ID NO: 6[…]2)

AND

M[…], B[…] A[…]

(ID NO: 6[…])

Acting in my/our personal and representative capacity as mother/father and legal guardian of ***A[…] M[…]****, do hereby withdraw and/or revoke the mandate I/we have given to the firm of attorneys:*

MOODLIYAR AND BEDHESI ATTORNEYS
57 OXFORD ROAD
SAXONWOLD
JOHANNESBURG
TEL: (011) 486 2911
FAX: (011) 486 3911
REF: BEDHESI/M654

and/or any other Agent or Attorney with immediate effect, in relation to the prosecution of my/our medical negligence claim arising from the birth of our aforementioned minor child on or about the 16th of July 2002.

I/we hereby authorize, empower and/or instruct:

IVAN MAITIN ATTORNEYS
179 BEYERS NAUDE DRIVE
1ST FLOOR, SILHOUETTE HOUSE

NORTHCLIFF
JOHANNESBURG

To take over the prosecution of such claim, and proceed with it to finality."

[8] On 15 October 2013, the appellant's attorney and client bill of costs in respect of the services which it had rendered was taxed in the sum of R381 831-75. Some days later the appellant made demand on Ivan Maitin Attorneys for payment of the amount in question. This demand was not acceded to, seemingly because the appellant had agreed to render the services in question on contingency. The appellant disputed that to be the case.

[9] Ivan Maitin Attorneys continued prosecuting the matter on behalf of the respondents. The MEC accepted liability and following thereon a substantial amount was paid to a Trust which had been established to administer the funds which were paid by the MEC in consequence of the damages which the minor child had sustained.

[10] Payment of costs was also made to Ivan Maitin Attorneys. These costs included those which has been raised by the appellant during the course of its engagement by the respondents. Ivan Maitin Attorneys retained that portion of the recovered costs and has seemingly not accounted to the appellant in respect thereof.

[11] Following thereon, and in and during March 2015, the appellant instituted an action against the respondents, jointly and severally, the one paying the other to be absolved, for payment of the sum of R381 831-75, together with interest thereon. Costs were also sought.

[12] The respondents (being the first and second defendants in that action were cited in the Combined Summons thus:-

"***Y[…] M[…]*** *(the "First Defendant") an adult male dispatch manager residing at 1[...] G[...] Street, T[...], Johannesburg*

AND

B[…] A[…] M[…] *(the "Second Defendant") an adult female administrative assistant residing at 1[...] G[...] Street, T[...], Johannesburg -*"

[13] The first and second respondents were described in paragraphs 2 and 3 of the particulars of claim annexed to the Combined Summons thus:-

"*2. The first defendant is* ***Y[…] M[…]*** *an adult male dispatch manager residing at 1[...] G[...] Street, T[...], Johannesburg.*

3. The second defendant is ***B[…] A[…] M[…]*** *an adult female administrative assistant residing at 1[...] G[...] Street, T[...], Johannesburg.*"

[14] This must be read with paragraph 5 thereof which was cast in the following terms:-

"*5. On or about 14th October 2006 and at Johannesburg the first and second defendant instructed the plaintiff to act on their behalf. The defendants duly executed Special Powers of Attorney. A copy of the Powers of attorney are annexed hereto marked "A" and "B" respectively*."

[15] On 25 August 2017, the appellant sought to amend their Particulars of Claims in the action in a number of respects. One of the foreshadowed amendments related to the insertion therein of an additional paragraph, which paragraph reads as follows:-

"*4. The defendants are cited herein in their personal and representative capacities as guardian of the minor child, A[…] M[…] ("the minor child")*".

[16] The respondents objected to the proposed amendments. They in relation to the amendment referred to in paragraph [15] asserted the following in paragraphs 6 to 10 of their notice of objection:-

"***FIRST OBJECTION***

6. In paragraph 2 of the Plaintiff's notice, the Plaintiff proposes to insert a new paragraph 4 wherein the Defendants would, for the first time, be cited in the present action under the above case number ("the present action") in their representative capacities as guardians of the minor child, A[…] M[…] ("the minor child") in addition to their personal capacities, in which capacity they had been cited since the inception of the present action.

7. At paragraph 7 of the Plaintiff's notice, the Plaintiff also seeks to include liability on the Defendants personally, alternatively personally and in their representative capacities.

8. It is trite law that a minor may be sued either in the minor's own name or by the guardian, or in the name of the guardian representing the minor, in which case the fact or representative capacity must be alleged.

9. Prior to the Plaintiff's notice, the minor child was not sued in her own name, assisted by the Defendants, nor were the Defendants sued as representatives of the minor child.

10. The effect of allowing the amendment would also be that a claim is instituted against the party against whom summons was not served in terms of the Rules of Court thereby creating a nullity, alternatively an irregular step."

[17] The Respondents went on to record the following in paragraphs 11 to 16 of their notice of objection:-

"SECOND OBJECTION

11. Since the institution of the present action and in the Plaintiff's Particulars of Claim, the Plaintiff alleged the conclusion of and annexed thereto, two special powers of attorney concluded between the Plaintiff's Magasvaran Soobramoney Moodliyar and the Defendants.

12. However, the special power of attorney

12.1 were in fact concluded between the Plainliff's Magasvaran Soobramoney Moodliyar and the Defendants:

12.1.1 acting in their personal capacity; and

12.1.2 also acting therein on behalf of the minor child.

12.2 provided for the institution and prosecution to finality, of all necessary legal actions against the Minister of Health or any other person who was legally liable to compensate the Defendants for damages sustained by them and for the minor child in respect of which full power and authority were given by the Defendants in their names and on behalf of the minor child.

13. The Plaintiff's mandate is alleged to have been terminated during May 2012.

14. On the Plaintiff's further proposed amendments (against which objection is also lodged as set out later herein) the entitlement to fees and

disbursements on behalf of the Defendants would be payable on demand. The Plaintiff then alleges that on 21 October 2013, it addressed a written demand to the Defendants.

15. Therefore, even on the Plaintiff's own version, and at best for the Plaintiff, its cause of action against the minor child, or the Defendants in their representative capacity of the minor child, arose by no later the 21 October 2013.

16. Accordingly, the Plaintiff's claim against the minor child would have prescribed at midnight on 20 October 2016 in terms of Section 11(d) of the Prescription Act 68 of 1969 ("the Prescription Act")."

[18] Despite these objections, Cele AJ allowed the amendment on 7 June 2018 with the result that the respondents where expressly cited in the Particulars of Claim in both their personal and representative capacities as the guardians of their minor child.

[19] This attracted what is described in the respondents' amended plea as a "SECOND SPECIAL PLEA." It reads as follows:-

"In the event of any mandate found to have existed between the Plaintiff and the Defendants in their personal capacities, and even on the Plaintiff's version:

I. The Plaintiff's cause of action is based on legal services rendered to the Defendants commencing from the period 14 October 2006 to 21 May 2012.

II. The Plaintiff's mandate was terminated on 18 May 2012 in terms of annexure "C" to the particulars of claim, at which date, at best for the Plaintiff, prescription commenced running in terms of Section 12(1) of the Prescription Act.

III. The process whereby the joinder of Defendants in their representive capacities of their minor daughter, A[…] M[…] ('the new Defendant") was sought and which process was prosecuted to finality culminating in the service of the Plaintiff's amended pages of its Particulars of Claim on 19 June 2018, viz the Plaintiff's notice of intention to amend (dated 21 August 2017), was served on the attorneys of the Defendants (then still only cited in their

personal capacities) on 25 August 2017, being more than 3 years after the commencement of prescription.

IV. Accordingly, the period of prescription was completed by 18 May 2015 in terms of Section 11(d) of the Prescription Act vis-à-vis the new Defendant.

V. In the premises the Plaintiff's claim against the new Defendant has prescribed in terms of Section 11(d) of the Prescription Act."

[20] The second special plea was upheld by the trial court. This appeal is against that order and the judgement which underpins it.

The approach of the trial court

[21] The court *a quo* found that prescription in relation to the appellant's claim for payment of the fees and disbursements said to be due to it prescribed on 18 May 2015, being a period of 3 years after its mandate had been terminated. The combined summons in the matter had been issued on behalf of the respondents in their personal capacities. Service of it was effected during March 2015 and thus within the prescriptive period. It went on to hold that the amendment which was thereafter granted by Cele AJ on the 7 June 2018 sanctioning the citation of the respondents in their representative capacities amounted to the introduction of new parties to the proceedings and that in consequence section 15(1) of the Prescription Act 68 of 1969 (the Prescription Act) was not of application in interrupting the running of prescription against them in these capacities.

[22] The court *a quo* in this regard rejected the appellant's contention that the amendment simply cured what amounted to a misdescription of the respondents and that in consequence section 15(1) interrupted the running of prescription.

[23] It will thus readily be appreciated that the dispute between the parties is narrow in ambit and solely concerns the question whether the amendment had the consequence of introducing additional parties to the action or to whether it simply amounted to the correction of the citation of the respondents who had from the very outset been parties to the litigation in both their personal and representative capacities. This will turn on the question whether individuals in their personal

capacities are considered as different persons when they act in representative capacities.

The legal position in relation to the application of section 15(1) of the Prescription Act

[24] There are significant cases which illustrate the application of section 15(1). I will deal with some of them.

[25] In *Sentrachem Ltd v Prinsloo* 1997 (2) SA 1 (AD) [1]Prinsloo, a farmer, sued Sentrachem Ltd (Sentrachem) for damages arising from the destruction of his crop. He contended that those damages were occasioned by his use of a product which had been marketed and recommended to him by Sentrachem for the control of a certain pest which unfortunately had the side-effects of destroying the biological control of another pest. It became apparent that the particulars of claim filed by Prinsloo were less than satisfactory. As a result Prinsloo in relation to one of the claims amended his particulars of claim. Sentrachem contended that the effect of the amendment was to introduce a new claim which had prescribed. It consequently introduced a defence of prescription in relation to that claim. In response Prinsloo contended that the claim in question constituted nothing more than a refinement of the existing claim and that the earlier service of summons had pursuant to section 15(1) of the Prescription Act interrupted the running of prescription. The trial court dismissed the plea.

[26] This dismissal was unanimously upheld by the Appelate Division (per Eksteen JA with whom EM Grosskopf, Nienaber, Olivier and Zulman JJA concurred). The test to be applied in relation to the question in issue was formulated by Eksteen JA at 15J-16D thus.[2]

> *"The real test was whether the same claim had been preferred in the earlier process, that is whether the debt as set out in the amended summons was recognisable from the original summons, so that any subsequent amendment amounted to no more than a clarification of a defective pleading in which the*

[1] 1997 (2) SA 1 (AD)

[2] Eksteen JA formulated the test through the medium of the Afrikaans language. We are grateful to counsel on behalf of the respondent who translated it into English. The translation is reproduced in this judgment.

right of action relied on throughout was set out. Such an amendment shall naturally not be able to bring in another right of claim in addition to the original right of claim, or save a right of claim which was premature in the original summons, or to join a new party to the lis."

[27] The case of *Blaauwberg Meat Wholesalers CC v Anglo Dutch Meats (Exports) Ltd* [3]affords another example of the application of section 15(1). A company named Anglo-Dutch Meats (UK)Ltd ("UK") instituted action for the recovery of the purchase price of beef flanks which it had allegedly supplied to the appellant. It subsequently became apparent that the meat in question had been supplied by Anglo-Dutch Meats (Exports) Ltd ("Exports"), a wholly owned subsidiary of UK. Some three years after the institution of proceedings the particulars of claim in the matter were amended to substitute "Exports" for "UK" as the plaintiff in the action. The court granting the amendment found that the plaintiff had been wrongly cited in the action. The trial court found that the amendment had been wrongly granted as the summons did not constitute a process whereby the creditor had claimed payment of the debt and, accordingly, the service of summons had not interrupted prescription. The trial court in this regard found that the original citation (being that of "UK") did not amount to a misnomer or an incorrect description. The plea of prescription which the defendant in the action had raised was consequently upheld. The decision of the trial court went on appeal to the Full Bench which set aside the decision of the trial court. It held that the citation of "UK" as the plaintiff in the action had been no more than a misnomer for "Exports".

[28] The Supreme Court of Appeal (per Heher JA with whom Harms, Farlam and Brand JJA and Mlambo AJA concurred) reversed the finding of the Full Bench and reinstated that of the trial court. Heher JA reasoned as follows (footnotes omitted):-

"[12] The approach adopted by the Court a quo reveals confusion. There seems to have been no consideration of whether a difference in approach is called for between applications for the amendment of pleadings and the determination of whether there is compliance with a statutory provision such as s 15(1). The cases referred to in paragraph [8], which related to the first

[3] 2004 (3) 160 (SCA).

problem, were willy-nilly applied to the second. It is clear that there are fundamental differences between the two situations. Amendments are regulated by a wide and generous discretion which leans towards the proper ventilation of disputes and are granted according to a body of rules developed in that context. Whether there has been compliance with a statutory injunction depends upon the application of principles wholly unrelated to the rules just mentioned and without the exercise of a discretion, principles which were expressed by Van Winsen AJA in the well-known passage from Maharaj and Others v Rampersad 1964 (4) SA 638 (A) at 646C-E as follows:

'The enquiry, I suggest, is not so much whether there has been "exact" or "substantial" compliance with this injunction but rather whether there has been compliance therewith. This enquiry postulates an application of the injunction to the facts and a resultant comparison between what the position is, and what according to the requirement of the injunction it ought to be. It is quite conceivable that a court might hold that, even though the position as it is is not identical with that which it ought to be, the injunction has nevertheless been complied with. In deciding whether there has been compliance with the injunction the object sought to be achieved by the injunction and the question of whether the object has been achieved are of importance. Cf J.E.M. Motors Ltd v Boutle and Another 1961 (2) SA 310, at pp. 327-8.'

[13] For obvious practical reasons the legislature ordained certainty about when and how the running of prescription is interrupted. That certainty is of importance to both debtors and creditors. It chose an objective outward manifestation of the creditor's intentions as the criterion, viz the service on the debtor of process in which the creditor claims payment of the debt. That is not a standard which allows for reservations of mind or reliance on intentions which are not reasonably ascertainable from the process itself. Nor does it, as a general rule, let in, in a supplementation of an alleged compliance with s 15(1), the subjective knowledge of either party not derived from the process, such as, for example, the content of a letter of demand received by the debtor shortly before service of the process. Cf Standard Bank of SA Ltd v Oneanate Investments (Pty) Ltd 1995 (4) SA 510 (C) at 553E-G. The question whether this general rule allows for an exception where both parties

have been ad idem at all times as to the true identity of the plaintiff, does not arise on the facts of this case.

[14] Applying these considerations to the facts of the case, the question which requires answering is 'Was a summons served on the defendant before prescription in which the creditor who asked for judgment, viz Exports, claimed payment?' That there was no exact compliance is beyond dispute because the original plaintiff was not the creditor and did not seek judgment. Of course the identity of a creditor does not depend only on its name. Place of residence or business, registered office, occupation or nature of business, details of some or all of which one would expect to find in a process, may also serve to establish identity or clarify an ambiguous or incorrectly-stated name. (There may be other indicators, such as a previous name of a company, company registration details or an identity number, which are sometimes encountered.) In the present instance, however, the only possibly pertinent details in the summons are that UK was 'a company with limited liability registered in accordance with the laws of England with registered office at Arkwright Road, Highfield Industrial Estate, Eastbourne, East Sussex, United Kingdom'. When Exports was later introduced into the summons exactly the same description was applied to it. Of itself that is insufficient to assist Exports. The fact remains that the summons served on the appellant failed entirely to communicate to it the intention of Exports to claim payment. The summons did not, therefore, achieve the objects of s 15(1) and was not effective to interrupt prescription.

[15] From what I have said it will be apparent that the importance attached to a misnomer or misdescription by all three of the Courts which previously considered this matter, while appropriate in the context of an amendment, was misplaced in relation to the interruption of prescription.

[16] There is no unfairness in this conclusion, as the Court a quo seemed to think. Prescription penalizes negligence and inactivity. Judged according to the legislative intention the respondent remained absent and inert for more than three years. Both shortcomings are ascribable to the failure to take reasonable precautions from the time of preparing the summons to the belated awakening. The power of correction always lay with the respondent.

[17] There are, no doubt, a great variety of factual possibilities which may arise in the context of deciding whether s 15(1) has been complied with. It is, however, unnecessary to go beyond the facts of this appeal in order to decide its fate.

[18] It is, nevertheless, desirable, because of the approach adopted by the Court a quo, to allude to certain other considerations. The first is that, in the context of s 15(1), though not necessarily in relation to the amendment of pleadings, the existence of another entity which bears the same name as that wrongly attributed to a creditor in a process is irrelevant. That is not the creditor's concern or responsibility. Second, an incorrectly named debtor falls to be treated somewhat differently for the purposes of s 15(1). That that should be so is not surprising: the precise citation of the debtor is not, like the creditor's own name, a matter always within the knowledge of or available to the creditor. While the entitlement of the debtor to know it is the object of the process is clear, in its case the criterion fixed in s 15(1) is not the citation in the process but that there should be service on the true debtor (not necessarily the named defendant) of process in which the creditor claims payment of the debt. The section does not say '. . . claims payment of the debt from the debtor'. Presumably this is so because the true debtor will invariably recognize its own connection with a claim if details of the creditor and its claim are furnished to it, notwithstanding any error in its own citation. Proof of service on a person other than the one named in the process may thus be sufficient to interrupt prescription if it should afterwards appear that that person was the true debtor. This may explain the decision in Embling supra where the defendant was cited in the summons as the Aquarium Trust CC whereas the true debtors were the trustees of the Aquarium Trust. Service was effected at the place of business of the Trust and came to the knowledge of the trustees. In the light of what I have said such service was relevant to proof that s 15(1) had been satisfied and was found to be so by Van Heerden J (at 700D, 701D)."

[29] A similar problem arose in the matter of *Solenta Aviation (Pty) Ltd v Aviation @ Work (Pty) Ltd*[4] *(754/2012) [2013]* ZASCA 103 (12 September 2013. Solenta Aviation Workshops (Pty) Ltd issued a combined summons against the respondent. Its cause of action was based on an agreement of lease which was annexed to the particulars of claim. The lease reflected the name of the lessor as Solenta Aviation (Pty) Ltd and not Solenta Aviation Workshops (Pty) Ltd. An application was subsequently made after prescription had run to amend the name of the plaintiff in the action by the deletion of the word "Workshops" from it. Despite the recognition that the two entities where distinct and separate entities, the amendment was granted because, so it was reasoned, the description of the plaintiff amounted to a misnomer rather than the substitution of one plaintiff for another. The respondent then raised a special plea of prescription to the claim of the now named plaintiff Solenta Aviation (Pty) Ltd. The trial court (per Louw J) upheld the special plea on the basis that objectively considered the summons which had been served did not communicate to the now substituted defendant the intention of the appellant to claim payment of the debt and that in the circumstances the objects of section 15(1) had not been satisfied and that consequently prescription had not been interrupted.

[30] Meyer AJA (as he then was) after referring to *Blaauwberg and the case of Standard Bank of SA Ltd Oneanate Investments (Pty) Ltd*[5]wrote the following in paragraphs [14] to [17] (footnotes omitted):-

> *"[14] Counsel for the appellant placed great reliance upon the description of the lessor as 'Solenta Aviation (Pty) Ltd' and that of the lessee as 'Aviation @ Work (Pty) Ltd' in the contract that is annexed to the combined summons that was served upon the respondent as well as on the reference to 'domicilium citandi et executandi' in the description of each party on the face of the combined summons and in paragraphs 1 and 2 of the particulars of claim. The details of the creditor given in the summons and in paragraph 1 of the particulars of claim were that:*
>
> *'[t]he plaintiff is Solenta Aviation Workshops (Pty) Ltd, a company, duly incorporated in accordance with the laws of the Republic of South Africa with*

[4] *(754/2012) [2013]* ZASCA 103 (12 September 2013).
[5] 1995 (4) SA 510 (C) at 553 E-G

domicilium citandi et executandi of (sic) Block 5 Stratford Office Park, Corner Cedar Avenue and Valley Road, Broadacres, Johannesburg.'

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

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

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

of the Prescription Act. The admissions in any event admit the parties to the contract to have been the respondent and Solenta Workshops and not the respondent and the appellant. They also do not assist the appellant.

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

[31] It is thus clear that for the purposes of prescription and the determination whether it has run, our courts will not permit a new plaintiff to be substituted for the existing plaintiff so as to bring section 15 (1) into operation. This is because the existing plaintiff is not the defendant's true creditor. In that instance there will not have been service on the defendant of process in which the creditor claims payment of the debt. In short, the initiating summons issued at the instance of the existing plaintiff will not serve the purpose of communicating the intention of the new plaintiff to claim payment. In short, section 15 (1) will not have been complied with.

[32] It is equally clear that in a situation where process has been served on a person other than the plaintiff's true debtor, our courts will not permit the substitution of the true debtor for that person. This is because the summons did not communicate to the proposed substituted debtor the intention of the plaintiff to claim the debt from it, with the consequence that section 15(1) has not been complied with.

[33] In the situation now under consideration care must be taken to distinguish between the substitution of parties (whether plaintiffs or defendants) in circumstances where an amendment is sought as opposed to situations where considerations of prescription arise.

[34] As to the former, Marais AJ said the following in paragraph [37] of his judgment in *Essence Lading CC v Infiniti Insurance Ltd and Another*[6]:-

> *"[37] It is, therefore, evident that during the first half of the 20th century a practice was in existence in our courts whereby a party in legal proceedings could be substituted by a new party, provided that the process by which the substitution was effected did not result in incurable injustice. In some cases, the amendment went hand in hand with an application for the joinder of the new party and in others, where the court was satisfied that the new party had effectively been served (for example by service on a co-partner), by way of an amendment without a formal joinder. The most important consideration remained prejudice and, in this regard, the main consideration was whether the party who is to be introduced to the action was given proper notice of the proceedings against him. This practice continued thereafter."*

[35] The learned acting Judge in relation to the latter expressed himself as follows in paragraph [67] (footnotes omitted): -

> *"[67] In relation to the interruption of prescription the Supreme Court of Appeal held in Blaauwberg Meat Wholesalers held that it was apparent that the importance attached to a misnomer or misdescription by all three of the Courts which previously considered this matter was misplaced in relation to the interruption of prescription. The question is not whether there was a misnomer or a substitution, but whether the correct creditor claimed payment. In Solenta Aviation (Pty) Ltd v Aviation @ Work (Pty) Ltd the Supreme Court of Appeal decided the issue of interruption of prescription (in a setting where previously the reasoning would be beset with niceties regarding the distinction between misnomers and substitutions) without a single reference to this distinction. The only reference to a misnomer was that the High Court in an interlocutory application granted an amendment on the basis that the mistake was a mere misnomer. On the facts of that case, applying the test for a misnomer, the mistake was indeed a misnomer (this is this court's conclusion, not that of the Supreme Court of Appeal), but that did not preclude the court*

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[6] [2023] 3 All SA 410 (GJ); 2024 (2) SA 407 (GJ) (9 June 2023)

from finding that the mistake resulted in the correct creditor having failed to commence legal proceedings for purposes of section 15(1) of the Prescription Act, and that the correction of that misnomer by way of the amendment, did not cure the failure."

[36] The observations of Marais AJ are entirely in keeping with what Heher JA had to say in paragraph [12] of *Blaauwberg.*

[37] It will moreover be readily appreciated that in the ultimate analysis the test for determining whether the issue of process will have the effect of interrupting prescription is factual in nature. The enquiry is an objective one and knowledge which the parties may have outside the process itself is irrelevant to the enquiry. So too, is the subjective intention of the party initiating the process, even in circumstances where the wrongly described defendant has knowledge of that subjective intention.

Additional considerations of Law

[38] The appellant was mandated to institute proceedings for the recovery of damages arising from the negligent treatment of the respondents' daughter at birth. Notionally, damages in that type of situation may well have been sustained by the respondents, both in their personal and representative capacities respectively.[7] The child requires assistances of his or her guardian and he or she may sue or be sued either in the name of the guardian or in his or her own name assisted by the guardian.[8] The guardian in the former instance acts in a representative capacity, which capacity must be made perfectly clear.[9]

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[7] Parents are responsible for the maintenance of their children. An injury sustained by a child will give rise to the parents incurring heightened expenses, which they will be able to recoup from the wrongdoer. The child will have a claim in his or her own right.
[8] *Curator ad litem of Letterstedt v Executors of Letterstedt* 1874 Buch 42 and *Nicholl NO v SAR and H* 1917 WLD 95; Van *der Walt v Hudson and Moore* (1886) *4 SC 327; Jackson v Humphrey* (1887) 4 CLJ 234 (E), *Le Roux v Le Roux Joel* (1897) 4 OR74 and *Willmer v Nance* (1904) 21 SC 423.
[9] See *January v Kilpatrick* (1881) 2 EDC 18.

[39] It is trite that "*Individuals in their personal capacities are treated as different persons from when they act in representative capacities*."[10]

Application of the facts to the Law

[40] It is clear that the respondents were cited in the combined summons in their personal capacities. This description was maintained in the particulars of claim annexed thereto. Given the fact that an individual who is sued in his or her personal capacity is a different person when sued in a representative capacity it cannot said that the citation of the respondents in the combined summons, as read with the particulars of claim, constituted a misnomer or mistake.

[41] On the face of it, is clear that the appellant wished to sue the respondents in their personal capacities. This was a remedy available to them in terms of the mandates which they executed. The fact that the appellant omitted to cite them in their representative capacities as well does not strengthen the appellant's contention that their original citation was based on a misnomer or otherwise mistaken.

[42] The respondents in their personal capacities were liable for payment of the costs in those capacities, albeit that such liability may have been coextensive with that of the minor child. The situation is akin to that which arises when the creditor sues one of several joint debtors. The process initiating that action will clearly not have the effect of interrupting prescription in relation to the debtors who were not so sued. It would, I suggest, be fallacious to contend otherwise.

[43] As the cases show matters of the appellant's subjective intention and the respondents' understanding thereof do not enter the equation. It is in this regard inescapable that the initiating process did not convey that the appellants were being sued in their representative capacities. Section 15(1) is clearly not of application on the facts of the case.

[44] In my view the court *a quo's* approach was clearly correct.

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[10] *Road Accident Fund v Advocate ELE Myhill NO. [505/2012]* [2013] ZASCA 73.

The result

[45] In the result the appeal falls to be dismissed with costs. The result is unfortunate. Ivan Maitin Attorneys recovered the fees raised by the appellant and its disbursements, at least in part. These monies ought to have been paid over to the appellant for the services which it had rendered in what turned out to be a successful case. One can but only hope that the required payment is made to the appellant.

The following orders will thus issue: -

1. The appeal is dismissed.
2. The costs of the appeal are to be paid by the appellant.

T P MUDAU
JUDGE OF THE HIGH COURT
JOHANNESBURG

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Date of hearing: 27 November 2024

Date of Judgment : 13 December 2024