



you are here: [home](#) > [news](#) > [dispute resolution ENSight](#)

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South African Supreme Court of Appeal sends prescription defence packing

by Armando Aguiar and Naledi Mdyesha

Once legal proceedings relating to a debt have started, does the subsequent substitution of one of the parties affect the prescription period for the debt? This was the crux of the recent Supreme Court of Appeal (“SCA”) case of *Sentrachem Limited v Terreblanche*.

A substitution occurs when a party to legal proceedings is replaced by another party, with no effect on the cause of action.

In this case, Sentrachem Group Pension Fund (the “Fund”) paid an amount, in error, to a Mr Terreblanche in October 2010. The Fund demanded repayment, which Mr Terreblanche refused. In response, the Fund caused summons for the recovery of the erroneous payment to be served on Mr Terreblanche in August 2011. However, a few months later, in December 2011, the Fund’s voluntary dissolution was approved by the Registrar and a liquidator was appointed to deal with the dissolution. The liquidator was substituted as the plaintiff (in place of the Fund) in February 2012. In November 2013, the liquidator ceded the claim against Mr Terreblanche to Sentrachem, which was substituted as the plaintiff in December 2013.

Mr Terreblanche did not object to this substitution (nor to that of the liquidator previously), but he raised a special plea that Sentrachem’s claim had prescribed, as the substitution in December 2013 had occurred more than three years after the debt became due in October 2010. Mr Terreblanche alleged that the substitution of Sentrachem was tantamount to the institution of new proceedings and, as the new proceedings were instituted more than three years after the debt fell due, the debt had prescribed.

In terms of the South African Prescription Act, 1969 (the “Act”), a debt of the present type prescribes three years from the date that the debt falls due, unless prescription is interrupted. Prescription is interrupted when a debtor is served legal process claiming payment of the debt. If the creditor fails to prosecute the legal process to final judgment, then prescription is no longer interrupted and runs from the date the debt fell due. For example, if a creditor withdraws summons and the date of withdrawal is more than three years after the date the debt fell due, the debt will prescribe as soon as the summons is withdrawn.

The matter was first heard in the High Court, which held that the debt had indeed prescribed. Sentrachem then appealed to the SCA. According to the SCA, the nub of the issue was: (i) what was the effect of the substitution and (ii) did it introduce a new creditor who sought to enforce a claim in its own right after the three-year prescription period provided for in the Act had passed (ie, had the claim prescribed)?

The SCA drew a distinction between a cause of action, on the one hand, and a debt, on the other, relying on the findings in the case of *Van Rensburg v Condoprops*. In the *Van Rensburg* case, the court found that the Act prescribes periods of prescription in respect of debts but not in respect of causes of action and that, even if one accepted that the substitution of a plaintiff amounts to the introduction of a new cause of action, the debt remains the same. This being so, prescription in respect of the debt in the *Sentrachem* case was interrupted in August 2011 when the Fund caused the summons to be served on Mr Terreblanche. In effect, the rights and obligations of the original parties (the Fund and Mr Terreblanche) were frozen at the time the legal proceedings commenced.

In relation to whether the cessions had any effect, the SCA referred to the case of *Fischer v Natal Rubber Compounders*. In the *Fischer* case, a defence similar to that of Mr Terreblanche was raised, and the court found that, upon substitution, the cessionary (in the *Sentrachem* case, first the liquidator and later Sentrachem) acquired all the rights and obligations vested in the cedent at the time of the substitution. In the *Sentrachem* case, as the rights and obligations of the original parties (the Fund and Mr Terreblanche) were frozen at the time the legal proceedings commenced, when the debt was ceded to the liquidator by the Fund, and then later by the liquidator to Sentrachem, each cessionary received a claim in respect of which the running of prescription had been interrupted by the service of summons.

The SCA disagreed with the High Court’s finding and dismissed Mr Terreblanche’s special plea of prescription. The SCA found that the claim of prescription had no merit as the substitution did not result in new proceedings being instituted. The court also found that only the identity of the party pursuing the debt had changed, while the nature of the debt remained unchanged throughout.



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