



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT**

Case no.: I 1343/2000

In the matter between:

GEORGE FREDERICK WESSELS N.O

PLAINTIFF

and

AUSSENKEHR FARMS (PTY) LTD

DEFENDANT

Neutral citation: *Wessels v Aussenkhr farms (Pty) Ltd (I 1343/2000) [2012] NAHCMD*
10(04 October 2012)

Coram: SHIVUTE J

Heard on: 8 May 2002

Delivered on: 04 October 2012

Flynotes: Oral agreement for the supply and delivery of agricultural chemicals by the plaintiff to defendant- existence of the agreement disputed – Issue of *locus standi* and prescription raised in *limine* by the defendant.

Summary: Points in limine raised by the defendant – On prescription, counsel for the defendant argues that the date on which the agricultural chemicals were delivered because that is the date on which the defendant became liable to pay the amount – Such argument based on s 12(1) of the Prescription Act, 1969 (Act 68 of 1969) – Facts

reveal that Africur CC ceded all its rights, title and interest in any and all debts which are owed or become owing to it to ABSA and Sanachem – Counsel for defendant argues that it is trite law that in the context of a cession of a debt, the cessionary replaces the cedent and has exclusive right to claim the debts so ceded – Action instituted by another party apart from plaintiff does not interrupt prescription.

Held - Trite law that a cedent cannot claim for repayment of a debt ceded by it - Africur CC ceded to Sanachem all its reversionary rights in terms of any debts ceded to any other financier or discounter and not its reversionary rights in respect of its debt towards Sanachem – That the law applicable is that of insolvency as contained in the Insolvency Act, 1936 (Act 24 of 1936) – Section 83 of the Insolvency Act – Issues is whether the ‘creditor’ involved a cedent or the cessionary – Insolvency law accordingly applicable where the cessionary’s estate is declared insolvent .

Held – Upon the insolvency of the debtor’s estate the ceded debt vests in the trustee (being the liquidator in the present case) subject to the cessionary’s special rights, namely a guaranteed security – The trustee is therefore in law entitled to claim payment from the debtors of the insolvent Africur CC – Plaintiff does thus have *locus standi* to institute these proceedings – The court therefore held that the remaining issue to be determined is whether Africur CC was authorized to receive the acknowledgments of debt from the defendant which would interrupt prescription – In this case Africur CC was expressly prohibited from acting as the creditor’s agent or partner for any purpose and therefore the acknowledgments of debts and the agreement to postpone the due date for payment are of no legal force and consequence .

Held: That only upon insolvency of the cedent's estate do the proceeds of the ceded debt vest in the trustee, prior to this the ceded debt vests in the cessionary’s estate – In the event the cessionary’s estate is declared insolvent, the proceeds of the said debt remain in the cessionary’s estate until the debt by the cedent is settled – Prescription was accordingly not interrupted and the claim therefore prescribed prior to the date on which it was instituted.

ORDER

The following order is made:

1. The answers to the questions posed in the case stated are as follows:
 - (a) The plaintiff does have *locus standi* to institute these proceedings.
 - (b) The claim against the defendant has prescribed.
2. One of the special pleas raised by the defendant has been upheld with costs, such costs to include the costs of one instructing and one instructed counsel.

JUDGMENT

SHIVUTE J: [1] The plaintiff, in his capacity as a duly appointed liquidator in the insolvent estate of a close corporation known as Africur Close Corporation (Africur CC), instituted action in this court claiming payment in the amount of R437 479,47 with interest calculated as set out in para 2 of the plaintiff's amended particulars of claim as well as costs of suit. The plaintiff alleged that this amount was owed to Africur CC pursuant to an oral agreement in terms of which Africur CC would supply and deliver certain agricultural chemicals (also referred to in the agreement as 'goods') to the defendant. The defendant in turn undertook to effect payment for the supply of the said agricultural chemicals within 30 days of invoice (also referred to in the agreement as 'statement'). The parties agreed that interest on the amounts payable would be calculated at the prime bank rate determined from time to time by commercial banks in the Republic of South Africa plus 2% calculated on the amount of the statement, from thirty days of date of statement. The plaintiff alleged that Africur CC had complied with its obligations in terms of the oral agreement by delivering agricultural chemicals worth R437 479,47 and that the defendant had failed and/or refused to pay the aforementioned amount.

[2] The defendant admitted that it had refused, but with good reasons, to effect payment of the amount claimed for by the plaintiff and further alleged that it was entitled to an abatement of the account due to returned and/or undelivered goods. The

defendant denied the existence of an oral agreement; disputed the prices reflected by the plaintiff as the prices for the goods allegedly delivered, and denied that all the goods listed in the plaintiff's amended particulars of claim had been delivered to it. The defendant also raised two special pleas with regard to plaintiff's claim. Firstly, that the plaintiff did not have *locus standi* to institute the claim; and secondly, that the plaintiff's claim had prescribed. The parties have applied that the aforesaid two special pleas raised by the defendant be adjudicated separately and that the remaining disputes stand over for later determination.

Admitted facts

[3] By way of a stated case in terms of rule 33(4) of the rules of Court, the parties agreed to the following facts, amongst others, relevant to the two special pleas to be adjudicated upon:

- (a) Africur CC delivered certain agricultural chemicals to the defendant during the course of 1996 and 1997.
- (b) Africur CC was placed in final liquidation on 11 November 1997 and plaintiff was duly appointed as liquidator in the insolvent estate of Africur CC on 26 November 1997.
- (c) The last delivery by Africur CC of the aforementioned agricultural chemicals to the defendant occurred on 25 July 1997. The defendant agreed to assume that, solely for the purposes of the stated case, said delivery took place. The invoice for said delivery was dispatched to defendant on 31 July 1997.
- (d) On 15 May 1996 Africur CC entered into a written agreement with Sanachem (Pty) Ltd (Sanachem) in terms of which it had ceded all its rights, title and interest in and to all claims that it may acquire from time to time against any of its debtors, howsoever arising and ceded, assigned

and transferred to Sanachem all reversionary rights and all residual rights, title and interest in and to all debts already ceded to any financier or discounter. The agreement provided that Africur CC undertook *inter alia*, not to act as agent or partner of Sanachem (or Sentrachem).

- (e) On 19 August 1996 Africur CC concluded a written agreement with ABSA Bank Limited (ABSA) and Cuffin (Pty) Ltd styled 'Invoice Discounting Agreement' in terms of which it ceded, assigned and made over to ABSA all its rights, title and interest in and to all amounts whatsoever nature, howsoever arising and by whomsoever owing to Africur CC or which may at any future time become owing to Africur CC.
- (f) Plaintiff has not pleaded that Africur CC at any stage acted as agent on behalf of either Sanachem and/or ABSA.
- (g) At the time when this action was instituted both cession agreements were valid and in operation.
- (h) Africur CC placed on record that it at no stage to date of filing the stated case incurred any financial liability to ABSA; conducted any business relationship with ABSA; and ABSA had not endeavoured to enforce the agreement or to rely thereon.
- (i) On 31 July 1997 and 11 August 1997 the defendant acknowledged liability to the plaintiff in terms of the debt, which acknowledgements are accepted by both parties as constituting admissions to Africur CC of a liability to pay Africur CC's claim.
- (j) Africur CC has at all times collected debts owing to it and recovered same with the full knowledge and consent of Sanachem and Sanachem never collected such debts.

Counsel's submissions

[4] The plaintiff was represented by Mr D G Grobler while the defendant was represented by Mr T A Barnard.

[5] By agreement between the parties, counsel for the defendant was heard first on the special pleas raised by the defendant since the defendant bore the onus in that regard. As mentioned before, one of the special pleas raised by counsel for the defendant was that of prescription. Counsel submitted that prescription should run from the date on which the agricultural chemicals were delivered because that is the date on which the defendant became liable to pay the amount. This, he submitted is the correct interpretation to be given to s 12(1) of the Prescription Act, 1969 (Act 68 of 1969).¹ He contended that the last date upon which prescription would have commenced running was on 25 July 1997 and would have been completed on 25 July 2000. In the event that the court should find that prescription had been interrupted by the acknowledgments of liability made by the defendant on 11 August 1997, counsel argued that then prescription would have been completed by 11 August 2000. It is common cause that the summons in these proceedings was served upon the defendant on 8 August 2000. Counsel for the defendant submitted furthermore that the claim had clearly prescribed if it had not been interrupted by the acknowledgments of liability. He went on to argue, however, that the acknowledgments did not interrupt prescription by virtue of the second special plea raised by the defendant, namely that by either or both cession clauses Africur CC had divested itself of all and any of its rights and/or entitlement to claim against defendant and that any party whose standing relating to the enforcement of the claim of Africur CC, is dependent on the rights of Africur CC. Plaintiff is such a party and therefore has no standing to enforce the claim against the defendant.

[6] It was counsel for the defendant's further submission that the phrase 'due' employed in s 12(1) of the Prescription Act, 1968 (the Act) should be interpreted as meaning the date from which the plaintiff could issue summons and/or enforce payment

¹Section 12 (1) thereof provides that: 'Subject to the provisions of subsection (2) and (3), prescription shall commence to run as soon as the debt is due'.

of the amount owing. The agreement between the parties provided that the defendant would make payment for the deliveries within 30 days from the date upon which the invoice (referred to in the agreement as 'the statement') had been issued to the defendant. In the light of the fact that the last statement had been issued to the defendant on 31 July 1997 and payment should have been effected before 30 August 1997, prescription would only commence, so it was submitted, from this date and be completed on 30 August 2000. Counsel for the defendant further contended that the defendant and Africur CC had agreed to postpone the due date of payment by the defendant until 15 January 1998, being the date upon which the harvest season would end. Therefore, so counsel argued, prescription commenced afresh from 15 January 1998 and is completed on 15 January 2001. He further submitted that Africur CC was entitled to agree to such an acknowledgement and postponement of the due date for payment. In making this submission, counsel relied on the reasoning adopted in the judgment of the South African Supreme Court of Appeal in *Aussenkehr Farms (Pty) Ltd v Trio Transport CC 22(4) SA 483 (SCA)*.

[7] The second special plea raised by counsel for the defendant, namely that plaintiff's claim had prescribed has a direct bearing on the counter argument made by him in meeting counsel for the plaintiff's submissions on the point. For this reason the discussion on prescription and the counter argument will be amalgamated into a single discussion.

[8] It will be recollected that counsel for the defendant raised the absence of *locus standi* as a special plea. It will also be recalled that Africur CC ceded all its rights, title and interest in any and all debts which are owed or become owing to it to ABSA and Sanachem. Counsel for the defendant listed numerous cases in support of the contention that Africur CC was no longer a creditor of the defendant. He went on to argue that it is trite law that in the context of a cession of a debt, the cessionary replaces the cedent and has exclusive right to claim the debts so ceded. The cession to Sanachem or ABSA not having been cancelled, either Sanachem or ABSA are the holders of all the rights in a claim against the defendant and is the only creditor of the

defendant recognized by law. The agreement between Africur CC and Sanachem states explicitly that Africur CC must not act as its agent or partner. Therefore, in the light of these facts, the defendant submitted, Africur CC or any of its agents, including the duly appointed liquidator (the plaintiff), may not sue on behalf of Sanachem (who is the creditor) and more particularly not in his own name (as the liquidator in this case has done) for the debts ceded (including the debt owed by the defendant) to Sanachem. The defendant's counsel further submitted that the acknowledgments of debt made by the defendant to Africur CC did not interrupt prescription, for the reason that such acknowledgements must be made to the creditor, its agent or representative, of which the plaintiff is none. The plaintiff not having instituted action in his capacity as creditor of the defendant, the institution of the action by him on 8 August 2000 or on any date thereafter did not interrupt the running of prescription. The claim became prescribed on 11 August 2000. Therefore, the acknowledgements and the action instituted are of no legal force or effect. The plaintiff's claim is essentially the claim of Africur CC which was later ceded to Sanachem or ABSA. The claim having prescribed, the liquidator in the estate of Africur CC had not had any entitlement or standing to pursue the proceedings on behalf of an insolvent entity that had divested itself of the of all rights in such claim against the defendant.

Analysis of the facts and the law

[9] In an attempt to assist the Court to decide whether the plaintiff's claim has in fact prescribed as submitted on behalf of the defendant, both parties submitted differing arguments as to the interpretation to be given to the term 'due' used in s 12(1) of the Act. The phrase 'due' is not defined in the Act. However, in the context in which the term has been employed in this specific section, it has been defined by case law and its definition has been approved in many cases. One such case is *Western Bank Ltd v S J J Van Vuuren Transport (Pty) Ltd and Others* 1980 (2) SA 348 (T) at 349 where it was stated in the headnote as follows:

'The words "debt is due" in s 12(1) of the Prescription Act 68 of 1969 must be given their ordinary meaning, namely that the debt is immediately claimable or the debtor is under an obligation to pay the debt immediately.'

The matter of *List v Jungers* 1979 (3) SA 106 (AD) draws a distinction which sheds ample light on any remaining doubts that may exist in the meaning to be given to the word 'due'. At 121 C – D it is stated as follows:

'The difference relates to the coming into existence of the debt on the one hand and the recoverability thereof on the other hand. See *Apalamah v Santam Insurance Co Ltd and Another* 1975 (2) SA 229 (D) at 232. It is a distinction which is recognised by the Legislature in the 1969 Prescription Act; s 12 provides that prescription begins to run "as soon as the debt is due", whereas s 16, which relates, not to the running of prescription, but to the application of the Act, significantly refers to "a debt which arose".'

[10] In applying the above principles to the facts of this case, it is clear that the date upon which the plaintiff could institute action against the defendant is the date upon which prescription had commenced. The last date upon which delivery was made is 25 July 1997, as agreed between the parties. The defendant had to effect payment of the amount it owed to plaintiff thirty days from the date of statement. Therefore on 30 August 1997 (date of invoice was 31 July 1997), prescription had commenced and the debt became due and payable, thus the last requirement necessary to institute the action was met. Before this date, plaintiff could not immediately institute action for the recovery of the amount due. Prescription was completed on 30 August 2000. Whether any event had interrupted the running of prescription, will be discussed later in this judgment.

[11] As previously mentioned, the remaining aspect of the special plea raised by the defendant was the alleged lack of *locus standi* on the part of the plaintiff and Africur CC.

It will be recalled that Africur CC ceded all its rights, title and interest in any and all debts accruing to it to ABSA and Sanachem. In terms of the written agreement, being a cession *securitatem debiti* with Sanachem, Africur was prohibited from acting as agent or partner of Sanachem. Therefore, so defendant's counsel submitted, the plaintiff had no *locus standi* to enforce the claim and the proceedings instituted by him do not interrupt prescription and are of no legal force or effect. This, counsel for the defendant contended, is the correct interpretation to be given to s 15(1) of the Act, in terms of which the creditor must serve notice on the debtor of any process whereby the creditor claims payment of a debt. Counsel cited and quoted numerous cases in which this point was confirmed and submitted that it had become trite law that a cedent cannot claim for repayment of a debt ceded by it.

[12] While conceding that the position contended for by counsel for the defendant on this score represents the correct position in law, counsel for the plaintiff argued, that the principles set out in the cases cited by counsel for the defendant were not of application in the present case for the reason that the law of insolvency rather was applicable in this case and therefore the above principles were to be applied subject to the Insolvency Act, Act 24 of 1936 (the Insolvency Act).

[13] Counsel for the defendant's counter-argument on this score was that the Insolvency Act was not of application at all to this case since neither the defendant nor Sanachem (the creditor) was insolvent. Sec 83 of the Insolvency Act reads as follows and it has become necessary to quote the section in full:

'83 Realization of securities for claims

(1) A creditor of an insolvent estate who holds as security for his claim any movable property shall, before the second meeting of the creditors of that estate, give notice in writing of that fact to the Master, and to the trustee if one has been appointed.

(2) If such property consists of a marketable security or a bill of exchange, the creditor may, after giving the notice mentioned in subsection (1) and before the second meeting of creditors, realize the property in the manner and on the conditions mentioned in subsection (8).

(3) If such property does not consist of a marketable security or a bill of exchange, the trustee may, within seven days as from the receipt of the notice mentioned in subsection (1) or within seven days as from the date upon which the certificate of appointment issued by the Master in terms of subsection (1) of section *eighteen* or subsection (2) of section *fifty-six* reached him, whichever be the later, take over the property from the creditor at a value agreed upon between the trustee and the creditor or at the full amount of the creditor's claim, and if the trustee does not so take over the property the creditor may, after the expiration of the said period but before the said meeting, realize the property in the manner and on the conditions mentioned in subsection (8).

(4) If no trustee has been appointed before the said meeting, the creditor may, with the permission in writing of the Master and before the said meeting, realize in manner and on the conditions mentioned in subsection (8) any such property which he is not entitled to realize in terms of subsection (2).

(5) The creditor shall, as soon as possible after he has realized such property, prove in terms of section *forty-four* the claim thereby secured and he shall attach to the affidavit submitted in proof of his claim a statement of the proceeds of the realization and of the facts on which he relies for his preference.

(6) If he has not so realized such property before the second meeting of creditors, he shall as soon as possible after the commencement of that meeting deliver the property to the trustee, for the benefit of the insolvent estate and if the creditor has not delivered the said property to the trustee within a period of three days as from the commencement of the said

meeting the trustee may demand from him delivery of such property. If the creditor fails to comply with such demand of the trustee, the Master, at the request of the trustee and after notice to the creditor shall direct the deputy-sheriff within whose area of jurisdiction the property is situate to attach the property and to deliver it to the trustee, and in that case the creditor shall be liable for the deputy-sheriff's costs, as taxed and allowed by the Master. If those costs cannot be recovered from the creditor, they shall be paid out of the estate as part of the costs of the sequestration.

(7) When the trustee has received the property mentioned in subsection (6), the said creditor may prove his claim and place a value upon the said property in terms of subsection (4) of section forty-four.

(8) The creditor may realize such property in the manner and on the conditions following, that is to say-

(a) if it is any property of a class ordinarily sold through a stockbroker the creditor may forthwith sell it through a broker approved of by the trustee or the Master;

(b) if it is a bill of exchange, the creditor may realize it in any manner approved of by the trustee or by the Master;

(c) if it consists of a right of action, the creditor shall not realize it except with the approval of the trustee or of the Master;

(d) if it is any other property, the creditor may sell it by public auction after affording the trustee a reasonable opportunity to inspect it and after giving such notice of the time and place of the sale as the trustee directed.

(9) As soon as the trustee has directed a creditor in terms of paragraph (d) of subsection (8) to give notice of a sale by public auction,

the trustee shall give notice in writing to all the other creditors of the estate in question of the time and place of the proposed sale.

(10) Whenever a creditor has realized his security as hereinbefore provided he shall forthwith pay the net proceeds of the realization to the trustee, or if there is no trustee, to the Master and thereafter the creditor shall be entitled to payment, out of such proceeds, of his preferent claim if such claim was proved and admitted as provided by section *forty-four* and the trustee or the Master is satisfied that the claim was in fact secured by the property so realized. If the trustee disputes the preference, the creditor may either lay before the Master an objection under section *one hundred and eleven* to the trustee's account, or apply to court, after notice of motion to the trustee, for an order compelling the trustee to pay him forthwith. Upon such application the court may make such order as to it seems just.

(11) If a creditor has valued his security when proving his claim, the trustee, if authorized by the creditors, may, unless the creditor has realized his security in terms of subsection (2) or (3), within three months as from the date of his appointment or as from the date of the proof of the claim (whichever is the later) take over the property (whether movable or immovable) which constitutes the security at the value placed thereon by the creditor when his claim was proved: Provided that if two or more creditors have a pledge or special mortgage of the same property, a creditor who has valued his security shall be deemed to have valued, and the trustee shall be entitled to take over, only the preferent rights of the creditor in respect of the property, and not the property itself. If the trustee does not, within that period, take over the said property or security he shall realize it for the benefit of all creditors whose claims are secured thereby, according to their respective rights.

(12) If the claim of a secured creditor exceeds the sum payable to him in respect of his security he shall be entitled to rank against the estate in respect of the excess, as an unsecured creditor, and if the net proceeds

of any such property exceed all claims secured thereby the balance, after payment of those claims, shall be added to the other free residue (if any) in the estate in question.

(13) The preceding provisions of this section shall apply *mutatis mutandis* in respect of any creditor for value of a solvent spouse mentioned in section *twenty-one*, who holds as security for his claim against that spouse any movable property belonging to that spouse.'

[14] The issue to be decided here is whether 'creditor' mentioned in s 83(1) includes the cedent or the cessionary.

[15] In *Bank of Lisbon and South Africa Ltd v The Master and Others* 1987 (1) SA 276 (A), Galgut AJA stated that in cessions in *securitatem debiti*, as in all contracts, the purpose and object which the parties had in mind must not be ignored. The cession agreement between Africur CC and ABSA provides that the rights, title and interest in and to all debts accruing to Africur CC is ceded to ABSA 'as security for the due and punctual payment by the seller to ABSA of all amounts...owing by [Africur CC] to ABSA'. This clearly envisages an intention for the cession to be one *in securitatem debiti*.

[16] In the stated case, the parties agreed that the cession agreement with Sanachem is one *in securitatem debiti*. The question that now arises is whether any of these two cessionaries were creditors of Africur CC at the time Africur CC was liquidated. Africur CC was not indebted to ABSA at any stage to date of filing the statement of the case. This much has been agreed. It was, however, indebted to Sanachem. The proceeds of the debts ceded therefore fall into the estate of Sanachem, even upon Africur CC's insolvency. The aforementioned proceeds therefore accrue to the estate of Sanachem and not to Africur CC. The situation illustrated above is accordingly applicable where the cessionary's estate is declared insolvent. When the cedent's estate is declared insolvent, the following becomes applicable:

[17] In *Land- en Landboubank van Suid-Afrika v Die Meester en Andere* 1991 (2) SA 761 (A) it was stated in the headnote as follows:

'...where a debtor pledged his rights of action in *securitatem debiti*, the debtor as cedent retained dominium of such rights in the form of a reversionary interest therein, while the creditor as cessionary acquired a restricted real right in the rights of action to exercise such right in the event of non-payment of the principal debt;

...in the event of insolvency of the debtor, the debtor's reversionary interest vested in the trustee of the insolvent estate while the creditor acquired a guaranteed security which conferred upon him a preferential right to the right of action.

... further, that the Land Bank was in terms of s 34(3)(b) entitled to attach S's (cedent) reversionary interest, but not the ceded rights of action held by O Co-op (cessionary) as guaranteed security.

... accordingly, that O Co-op was entitled to rely on its preferent claim.'

[18] Hefer JA stated in *Millman NO v Twiggs and Another* 1995 (3) SA 674 (AD) at 674 that:

'When a right is ceded with the avowed object of securing a debt the cession is regarded as a pledge of the right in question: *dominium* of the right remains vested with the cedent and vests upon his insolvency in his trustee, who is under the common law entitled to administer it "in the interests of all the creditors, with due regard to the special position of the pledge".'

[19] It is necessary to recapitulate by noting that Africur CC ceded to Sanachem all its reversionary rights in terms of any debts ceded to any other financier or discounter and not its reversionary rights in respect of its debt towards Sanachem.

[20] Thus upon the insolvency of the debtor's estate the ceded debt vests in the trustee (being the liquidator in the present case) subject to the cessionary's special rights, namely a guaranteed security. The sequestration of a debtor's estate, such as Africur CC, establishes a *concursum creditorium*. Consequently, nothing may be done by any of the creditors to alter the rights of other creditors². 'Movable property' referred to in sect 83(1) of the Insolvency Act is defined in sec 2 as meaning 'any kind of property and any right or interest which is not immovable property'.

[21] Sec 2 of the Insolvency Act defines the word 'security' referred to in sec 83 as follows:

'Security, in relation to a claim of a creditor of an insolvent estate, means property of that estate over which the creditor has a preferent right by virtue of any special mortgage, landlord's hypothec, pledge or right of retention.'

'Property' is defined in the same section as meaning:

'movable or immovable property wherever situate within the Republic and includes contingent interests in property other than the contingent interests of a fidei commissary, heir or legatee'

[22] Incorporeal rights such as the rights obtained by the cession in *securitatem debiti* are included in 'movable property'³. The *dominium* in the book debts ceded by Africur CC to Sanachem and/or ABSA remained with Africur CC as the cedent. The dominium constitutes a right or interest in property which in turn constitutes property of the insolvent estate. Sec 83 of the Insolvency Act is thus applicable. The trustee is therefore in law entitled to claim payment from the debtors of the insolvent Africur CC. Plaintiff does thus have *locus standi* to institute these proceedings.

²See Mars: The Law of Insolvency in South Africa 8th ed. De La Rey at 136 to 137 and the cases referred to therein.

³Bank of Lisbon and South Africa Ltd v The Master (above) at 290I

[23] The next issue for decision and which flows from the above finding is that of representation. Was Africur CC authorized to receive the acknowledgments of debt from the defendant which would interrupt prescription?

[24] Firstly, Africur CC did not receive express authority to act as Sanachem's agent or partner in the cession agreement. In fact, it was expressly prohibited from doing so by the agreement. Counsel for the plaintiff contended in his oral arguments and with reference to the judgment in *Aussenkehr Farms (Pty) Ltd v Trio Transport* that Africur CC acted as the agent for Sanachem in that it collected the proceeds of the debt from the defendant and did not pay it directly into Sanachem's bank account and there was no embargo placed on the plaintiff immediately utilizing these proceeds as he saw fit. It was found in the *Trio Transport* case that the plaintiff was an agent of the creditor even if the parties did not specifically plead agency.

[25] In the *Trio Transport* case the cession agreement expressly provided that the plaintiff would act as agent for the bank and collect all debts. This is not the situation here as Africur CC was expressly prohibited from acting as the creditor's agent or partner for any purpose. This appears to me to be an adequate answer to the inquiry; the express written intention of the parties is to be given force and effect. In my view therefore the acknowledgments of debts and the agreement to postpone the due date for payment are of no legal force and consequence.

[26] In amplification of the above finding, it is worth pointing out that only upon insolvency of the cedent's estate do the proceeds of the ceded debt vest in the trustee, prior to this the ceded debt vests in the cessionary's estate. In the event the cessionary's estate is declared insolvent, the proceeds of the said debt remain in the cessionary's estate until the debt by the cedent is settled. Prescription was accordingly not interrupted and the claim therefore prescribed prior to the date on which it was instituted.

Order

[27] In the result, the following order is made:

2. The answers to the questions posed in the case stated are as follows:

(c) The plaintiff does have *locus standi* to institute these proceedings.

(d) The claim against the defendant has prescribed.

2. One of the special pleas raised by the defendant has been upheld with costs, such costs to include the costs of one instructing and one instructed counsel.

P SHIVUTE
JUDGE

APPEARANCES

APPELLANT: D G Grobler
Instructed by Theunissen, Louw & Partners, Windhoek

DEFENDANT: T A Barnard
Instructed by Diekmann & Associates, Windhoek