**REPORTABLE**

CASE NO: SA 57/2014

**IN THE SUPREME COURT OF NAMIBIA**

In the matter between:

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| **CHRISTELLE HARTZENBERG** | **Appellant** |
| and | |
| **STANDARD BANK NAMIBIA LIMITED** | **Respondent** |

**Coram:** DAMASEB DCJ, SMUTS JA and HOFF AJA

**Heard:** **26 October 2015**

**Delivered:** **13 November 2015**

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**APPEAL JUDGMENT**

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DAMASEB DCJ (SMUTS JA and HOFF AJA concurring):

Introduction

[1] In the court *a quo* the appellant (Ms Hartzenberg) was the first defendant and the respondent, Standard Bank Namibia Limited (SBN) was the plaintiff. The main issue raised in this appeal is when an additional claim can be added to an existing one without becoming prescribed under the Prescription Act[1] (the Prescription Act) in light of the fact that a proposed amendment to a conditional counterclaim was objected to on the ground that it sought to introduce a claim which had become

[1] Act 68 of 1969. In terms of s 11(d) of the Prescription Act a debt prescribes after a period of three years after the debt becomes due.

prescribed. It is trite that an amendment which introduces a new claim will not be allowed if it would resuscitate a prescribed claim.[2] SBN's objection to the proposed amendment is based on the premise that the claims encompassed in the proposed amendment are new debts that had prescribed, whereas Ms Hartzenberg maintains that they are the same debts as the original ones arising from the same or substantially same facts.

[2] There is also disagreement between the parties on a matter of procedure, namely, how SBN went about ventilating the objection to the proposed amendment to the conditional counterclaim. According to Ms Hartzenberg, an issue of this nature should not be decided as an exception, if evidence can be led to elucidate, interpret or clarify the issue to which the exception relates. She claims that if prescription were raised by way of special plea it would be possible for her to lead evidence, for example, that an admission of liability on the part of the plaintiff interrupted the running of prescription. SBN maintains, however, that it was common cause between the parties *a quo* that the proposed amendment fell to be decided exclusively on legal argument without recourse to trial and that it was permissible to raise prescription in the way it did and not by way of special plea.

The pleadings

[3] In its particulars of claim of May 2012 SBN, claiming to be the owner of a 2005 BMW 120i (the subject vehicle), sought an order for the delivery of the subject vehicle from Ms Hartzenberg who is in possession of it. Ms Hartzenberg delivered

[2] *Trans-African Insurance Co Ltd v Maluleka* 1956 (2) SA 273 at 279; *Miller v H L Shippel & Co (Pty) Ltd* 1969 (3) SA 447 (T).

a plea to the particulars of claim in which she denied SBN's ownership of the subject vehicle. She pleaded further that in the event that SBN is found to be the owner of 'some parts and/or components of the vehicle' same constituted a wreck which came into the possession of Auto Tech Panel Beaters CC (Auto Tech) which was cited as second defendant in the combined summons for the interest it had in the matter. Ms Hartzenberg pleaded in amplification that Auto Tech, using its own parts and components, transformed the wreck into a different vehicle and that 'the repaired vehicle no longer could be said to be the vehicle previously owned by' SBN.

[4] Ms Hartzenberg also delivered a conditional counterclaim in the event it is found that the reconstructed vehicle still belonged to SBN. She alleged in that conditional counterclaim that in 2007 a certain Namupolo delivered the vehicle to Auto Tech with an approximate value of about N$30 000, for repairs. When Namupolo failed to collect the vehicle, Auto Tech sued Namupolo 'for payment of the amounts' due to Auto Tech. Auto Tech obtained judgment against Namupolo and upon it being sold in execution, Auto Tech purchased it and repaired it in the amount of N$262 380,96. Ms Hartzenberg's pleaded case in the conditional counterclaim is that the wreck received from Namupolo had a negligible value when compared to the product that emerged after Auto Tech reconstructed it. According to her, it was the reconstructed vehicle which she 'during or about December 2010' purchased from Auto Tech 'at a discounted price of N$140 250'.

[5] Ms Hartzenberg further pleaded in the conditional counterclaim that in order to protect the purchase price paid to Auto Tech, she asked for and obtained from Auto Tech a security and or an indemnity. It was for that reason that Auto Tech

ceded to her its rights of action against the owner of the vehicle. The cession agreement was concluded on 4 July 2012 and supplemented on 23 August 2012. It is these two cessions that Ms Hartzenberg relies on for her claims against SBN. She alleges in the conditional counterclaim that if SBN were found to be the owner of the reconstructed vehicle, it would be 'unjustifiably and unjustly enriched' at the expense of Auto Tech, who in repairing the subject vehicle, advanced SBN's affairs. Auto Tech therefore, she claims, has an enrichment action against SBN 'for the extent of the costs of the repairs of the vehicle'.

[6] As an alternative to the enrichment claim, Ms Hartzenberg relies on *negotiorum gestio.* That claims is based on the ground that Auto Tech, recognising the ownership of the vehicle by SBN but without SBN's knowledge, managed SBN's affairs in relation to the vehicle *animus negotia gerendi* in effecting the repairs and that such management of SBN's affairs was reasonable. It is alleged that that entitled Auto Tech, as *negotiorum gestor*, to reimbursement for 'the necessary and useful expenses arising from the repairs to the vehicle'.

[7] The third alternative claim raised in the conditional counterclaim is that of a 'tacit mandate' arising from SBN's alleged failure in not informing Auto Tech to desist from effecting repairs to the vehicle, aware that its affairs were being managed by Auto Tech in relation to the subject vehicle. According to Ms Hartzenberg, on account of the alleged failure on SBN's part, it should be regarded as having tacitly authorised Auto Tech to repair the subject vehicle and in so doing assuming liability to reimburse Auto Tech 'for its reasonable expenses' in relation to the vehicle.

[8] On 29 November 2013 SBN delivered a plea to Ms Hartzenberg's conditional counterclaim.

[9] On 6 November 2013 (some 5 years after the year 2007), Ms Hartzenberg delivered a notice of intention to amend the original conditional counterclaim. The timing is relevant because the proposed amendments relate to facts that allegedly arose in 2007. The proposed amendment included two additional claims not alleged in the original conditional counterclaim. Of the two claims, the first is for an amount of N$7350, allegedly representing towing costs when the vehicle was conveyed from Oshakati to Tsumeb. The second claim is for an amount of N$156 630 representing storage costs allegedly incurred in respect of the subject vehicle from 17 January 2007 to 7 October 2010. It is these two additional claims which SBN objected to on 15 November 2013 and which are the subject of the present appeal.

[10] The objection is that the claims for both towing and storage arose more than three years before the date of delivery of Ms Hartzenberg's notice to amend. According to SBN, by introducing the storage claim and the towing claim, Ms Hartzenberg is seeking to 'impermissibly . . . resuscitate' claims which had become prescribed in terms of s 11(d) of the Prescription Act.

The application to amend

[11] The notice to amend having become opposed, Ms Hartzenberg filed a formal application to amend.[3] The founding affidavit is deposed to by her legal practitioner

[3] In terms rule 28(4) of the old Rules of the High Court, once an objection has been raised, the party desiring to pursue the amendment must bring a formal application for consideration by the court. See new rule 52(4).

of record, Mr Mueller, who averred that SBN's objection to the notice to amend is not predicated upon any prejudice, except the perceived prejudice arising from having to deal with a prescribed claim.

[12] Mr Mueller contended that it was improper for a plea of prescription to be determined or adjudicated as if raised as an exception as doing so precludes the possibility of Ms Hartzenberg leading oral evidence and cross-examining the witnesses of SBN. Without as much as foreshadowing the possibility that Ms Hartzenberg intends to do so or pointing to facts that would be relied on as operating to interrupt the running of prescription, Mr Mueller added that 'in the event' prescription is pleaded, 'oral evidence in relation to such plea is permitted, cross-examination is permitted and the ordinary rules relating to trial proceedings apply'. Mr Mueller also averred that by allowing the objection to be adjudicated as if it were an exception, Ms Hartzenberg 'would be deprived of the opportunity to avail herself of the right to lead oral evidence and to cross-examine witnesses'. Mr Mueller most crucially alleged that:

> 'Since the issues relating to the question whether the claims of the first defendant objected to by the plaintiff have become prescribed or not, adjudicated against what currently appears on record, would entail exclusively legal argument, it would not be necessary for me to with extensive elaboration and in detailed particularity set out in this affidavit the legal argument that the first defendant would rely upon at the hearing of this matter.' (My emphasis.)

[13] SBN's legal practitioner of record, Mr Behrens, in answer to Mr Mueller, deposed to an opposing affidavit on behalf of SBN. He therein denied that in the present case there would arise a 'deprivation' of Ms Hartzenberg's right to call oral

evidence and to cross-examine witnesses. He admitted the allegation that the matter fell to be determined exclusively by legal argument. He also denied that the two additional claims introduced by the amendment 'are a mere extension or supplementation or elaboration' of the original conditional counterclaim.

Proceedings in the High Court

[14] After hearing argument, the High Court upheld the objection to the proposed amendment and dismissed the application for leave to amend the conditional counterclaim, with costs.

Absence of reasons of court *a quo*

[15] Both parties are desirous to have the matter finalised although, they admit, it would have been preferable for this court to have the reasons for the order made by the court *a quo*. This court has recently reiterated the importance of reasons.[4] It is not only the court of appeal that needs the benefit of reasons but also the parties, especially the disappointed party. When the latter is furnished with reasons it may decide that the points it intended to raise may not have merit and therefore desist from prosecuting an appeal. That saves costs and avoids an unnecessary appeal and therefore advances the interest of the administration of justice, especially where the matter appealed against is interlocutory in nature and still needs to be referred back to the trial court.

[4] *Buhrmann & Partners Consulting Engineers v Günther Wilfred Garbade*, Case No SA 25/2012, delivered on 19 October 2015.

[16] The occasions where appeals are adjudicated upon without reasons must be very rare. The appellant must demonstrate that a genuine attempt was made to obtain the reasons and that the presiding judge was not forthcoming. That affords this court the opportunity to censure the judge if there is a need to do so. It is not a good argument to say that because the rules of court state the period within which judgment ought to be given, the fact that within that period such reasons were not given implies that the judge will not give the reasons.[5]

[17] Given the myriad of interlocutory skirmishes that occur during the lifespan of a case-managed case, it is a potentially impossible task to expect the managing judge to give fully researched judgments on each and every interlocutory motion that he or she has to adjudicate. However, as this court recognised, in *Buhrmann* parties have a right to reasons. In addition, the obligation (or rather discipline) to give reasons acts as an insurance against caprice and bias. The self-imposed discipline to give reasons for one's decisions has the salutary effect on the judicial officer that he or she can only act according to the law and the facts of the case; un-influenced by extraneous factors. That said, it must be accepted that the extent of the reasons to be provided will depend on the circumstances of the case. In some cases the reasons for the order/ruling will be obvious from the exchange between the parties and bench. As often happens, a particular point might even be conceded in argument and would clearly provide the basis for the ruling/order that follows. It would be pedantic in the extreme to expect written reasons in such circumstances.

[5] The new rule 32(3) states that an interlocutory ruling should be given within 15 days or if it involves a complex question of law, the ruling must be given within 30 days. Annexure 10 to the High Court Practice Directives states that reasons for interlocutory orders should be given within 4 weeks from the date of the request.

Another important consideration is whether or not the ruling on the interlocutory motion is appealable.

[18] If the court's order is appealable, the imperative to provide more detailed reasons for the ruling is greater, if only to assist the appellate court. Michael Legg observes:[6]

> '[T]he extent of a judge's duty to state reasons for a decision is related to the function to be served by the giving of reasons, the importance of the point involved and the likely effect of the decision on the rights of parties to the proceedings. The more significant the decision, even if interlocutory, the greater the need for, and extent of, reasons.'

[19] The following dictum of the Australian High Court (the highest court of that jurisdiction) in *Dowling v Fairfax Media Publications Pty Ltd (No 2)*[7] is apposite:

> '[T]the extent of the reasons given is to be proportionate to the significance of the issue being considered. Where the case management step is more contentious, the judge having heard from each party as to what they desire, they should then state their reasons in greater detail, either orally or in the form of a written judgment. It is not unheard of for a judge to ask the parties whether they require reasons for the decision or for one or more parties to request reasons. This type of interaction between the bench and bar table assists in balancing efficiency with judicial accountability.'

[20] It was because the parties were in agreement that the issue on appeal is a confined question of law that we agreed to hear the matter without reasons. We

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[6] Legg. M. 2011. *Case Management and Complex Civil Litigation*. The Federation Press, 246.
[7] [2010] FCAFC 28 at (131).

want to make clear that this should not be seen as a precedent for parties rushing to this court to have appeals determined without reasons.

Appellant's contentions on appeal

[21] On appeal, Mr Barnard on behalf of Ms Hartzenberg, relies principally on the South African case of *Rustenburg Platinum Mines v Industrial Maintenance Painting Services*[8] for the submission that the claims objected to are substantially the same as the original claim and therefore had not become prescribed. Mr Barnard buttresses his argument by reference to *Sentrachem Ltd v Prinsloo;*[9] *CGU Insurance Ltd v Rumel Construction*[10] and *Aeronexus Ltd v Firstrand Bank Ltd t/a Wesbank.*[11] Based on these South African cases, counsel contends that the South African courts adopt a more liberal and lenient approach to amendments adding new claims – an approach to be followed by our courts. I need to stress at once that South Africa has not yet introduced judicial case management and great care must be exercised in applying the practices of those courts when it comes to the approach our courts should take in adjudicating interlocutory motions. I need not say more about that in this appeal.

[22] *Rustenburg* is authority for the proposition that what prescribes is a 'debt' or 'a claim' and not a 'cause of action'. As I will presently show, that line of authority has been correctly followed by the High Court of Namibia. The reasoning goes that as long as the plaintiff institutes a claim within the statutory three year period, the

[8] [2006] 1 ALL SA 275.
[9] 1997 (2) SA 1 (A) at 15C–16D.
[10] 2004 (2) SA 622 (SCA).
[11] [2011] ZASCA 42.

interruption of prescription that was effected by the institution of the original claim would apply to any other causes of action that may relate to the same set of material facts that give rise to the claimant's right of action. Flowing from this, it is argued on behalf of Ms Hartzenberg that the further claims proposed to be added are simply an augmentation of the original conditional counterclaim.

SBN's contentions on appeal

[23] Mr Tötemeyer for SBN does not cavil the common law position as espoused in *Rustenburg,* but contests the claim that the proposed amendments arise from the same set of material facts as contained in the original conditional counterclaim. Mr Tötemeyer maintains that the new claims rest on an entirely different and unrelated factual matrix from the original claims and that the new claims would rest on entirely different evidence to sustain them, such as whether the towage and storage fees were in fact incurred, whether it was reasonable and necessary to incur such fees, and whether the fees themselves were reasonably priced.

[24] The thrust of SBN's argument in this court is that the two claims (towing and storage) are new debts which arise from facts which are entirely different and unrelated to those giving rise to the original conditional counterclaim. It is further contended that not only are the facts to be proved to establish a cause of action different as between the two sets of claims, but the relief sought differs substantially.

Law on amendment to introduce a new claim

[25] As far as I am aware, there is no judgment of this court, and counsel were not able to cite any, dealing with the proper approach to be taken when prescription

is raised to an amendment which introduces an additional claim. In *Basfour 2482 v Atlantic Meat Market*[12] Silungwe AJ stated that the fundamental or decisive question is whether the amendment is the same or substantially the same as the previous claim.

[26] The leading case in South Africa on a rule similar to our old High Court Rule 28 is that of *Rustenburg.* The facts of the case were as follows: A dispute arose between the parties concerning monies owed under a construction contract that were erroneously paid as the work entitling them to payment was not completed. The contractor repaid some of the money that was allegedly paid in excess, but refused to repay the rest. The claimant then sued the contractor for the balance based on restitution in that the contractor had been unjustly enriched at the claimant's expense and that the latter was entitled to repayment in *quasi*-contract. The claimant later sought to amend the claim to add an additional claim founded on a purported oral contract between the parties. This, evidently, is a different cause of action to one founded in unjust enrichment which seeks to reverse shifts in wealth between two parties, as opposed to vindicating their mutual agreements. It was held that the key to resolving the dispute was to inquire as to the exact definition of debt under the Act. The court relied on a minority judgment of Trollip JA in *Evins v Shield Insurance Co Ltd*[13] who construed 'debt' under the Prescription Act as connoting 'a claim' and not 'a cause of action'.

[12] 2011 (1) NR 164 (HC) at (8) and (13).
[13] 1980 (2) SA 814 (A)

[27] It was held in *Rustenburg* that a new claim does not arise merely because another cause of action is contemplated in an amendment. It was found that although the cause of action differed from the allegations set out in the particulars of claim, the relief claimed was the same. The court went about resolving the matter by comparing the allegations and the relief originally claimed against the proposed amendment to determine if the right of action sought to be enforced in either was in essence the same. The court was satisfied that what the claimant sought to recover was money admittedly paid by it to the defendant for work and material that had not as yet been done or supplied at the time of the payment. Thus, the debt sought to be recovered either by way of the particulars of claim as originally framed or in accordance with the alternatives as set out in the proposed amendment, was the same.

[28] What one discerns from the judgment are the following general principles:

(a) What prescribes is a debt or a claim and not a cause of action;

(b) An amendment will survive prescription if founded on the same or substantially the same debt as the original claim;

(c) The original claim and the one contained in the proposed amendment must arise from the same set of material facts. The court must compare the allegations and the relief to see if they are the same;

(d) The assessment of whether the debts are the same or substantially the same is necessarily a fact-sensitive question. Suffice it to say, it is unwise to ossify this assessment into rigid rules.

(e) Each case must of necessity depend on its own facts.

Law to facts

[29] The original conditional counterclaim in the amount of N$262 380,96 was allegedly for repairs and expenses incurred by Auto Tech in respect of the subject vehicle. It was in relation to that debt that the plaintiff obtained a cession from Auto Tech. The proposed amendment seeks to introduce two further claims as follows:

(a) storage for the period 17 January 2007 to October 2010 totaling N$156 630; and

(b) towing costs from Oshakati to Tsumeb in or about 2007 in the amount of N$7350.

[30] The claims sought to be introduced arose in 2007 as is apparent, and unless they are substantially the same as the original claim, they are hit by extinctive prescription.

The cases cited are distinguishable

[31] The following cases were relied on by the appellant in support of the present appeal: *Sentrachem Ltd v Prinsloo;*[14] *CGU Insurance Ltd v Rumel Construction*[15] and *Aeronexus Ltd v Firstrand Bank Ltd t/a Wesbank;*[16]. An examination of them will show how different they are to the case before us.

[32] In *Sentrachem,* a farmer used an integrated biological control method to eliminate a pest call red scale from his orchard. The defendants then recommended a pesticide to complement the biological control method to address the problem of eelworm, which had a negative impact on the methods used to control the red scale. This resulted in the obliteration of the farmer's crop, notwithstanding the fact that the plaintiff contacted the defendants when he noticed the rise of red scale. The plaintiff sued the defendants, arguing that they were negligent and demanding payment to the tune of the value of the destroyed crop. The plaintiff's lawyers sought to amend the statements of claim, adding further claims that the defendants averred were time-barred. The court allowed the amendment because (a) no further amounts were being claimed and (b) the actions brought were variations on the initial theme of negligence, and they were readily recognisable from the initial claims. In *Sentrachem,* the same amount was being claimed, under the original summons or under the amended version. In effect, the second was a fleshed out version of the original that made reference to the guarantee.

[33] In *CGU Insurance*, the plaintiff, an engineering concern, suing the defendant insurer, sought to amend their claim to include reference to two and not just one

[14] 1997 (2) SA 1 (A) at 15C–16D.
[15] 2004 (2) SA 622 (SCA).
[16] [2011] ZASCA 42.

contract of insurance. The substance of the dispute was whether the insurers were liable to the plaintiffs to indemnify them in respect of storm damage caused to the roads they were building in Mozambique. Under the second contract it was alleged that there was also a liability to indemnify the plaintiffs for the same damage. The court allowed the amendment. It is highly significant that the amended claim was, bar the exact contract sued upon, identical to the original claim. They both concerned the same amounts, and arose out of the same facts (ie the damage accruing to the construction during a period of storm). In reality it was the same debt in the broad meaning of that word, albeit pursued under a different cause of action (ie a different contract).

[34] In *Aeronexus,* the plaintiff serviced and cleaned aircraft. It entered into a contract with the defendant for such services that was to last for 12 months, and, if both parties agreed, would then extend indefinitely. As security, Aeronexus had a lien over the defendant's log books. It sought to exercise the power under these liens when the defendant could not pay Aeronexus upon its liquidation. After their liquidation, the defendants issued a guarantee that their bank would pay them the sum owed for the services, and the plaintiffs handed over the log books. The bank refused to honour the guarantee when *Aeornexus* issued a first summons. That summons claimed 'in respect of services rendered and goods sold'. Over three years later, they sought to amend the summons to incorporate reference to the guarantee. The claim thus relied on 'bank guarantee issued . . . pursuant to a lien exercised . . . against a third party'. The appeal succeeded and the claimants were allowed to amend their summons.

[35] Ms Hartzenberg as cessionary relies on two cessions, nothing else. Her right of recourse against SBN is no greater than that of the cedent (Auto Tech). The first cession is that of 4 July 2012 and it reads as follows:

> 'The cedent hereby cedes to the cessionary all its right, title and entitlement to claim from the owner of the vehicle with registration number N 876 T , a 2005 BMW 120i vehicle, the costs of the repairs effected to such vehicle in or about September 2010, by the cedent, totaling N$262 380, 96, as reflected by annexure "A" hereto.
>
> The parties record that the cessionary has purchased such vehicle from the cedent for valuable consideration and that, by having paid and still paying the purchase price for the vehicle, is entitled to the claims ceded to her.
>
> The cessionary hereby accepts what are ceded to her.' (My emphasis.)

It is immediately apparent that the cession relates to repairs of a vehicle and that the repairs occurred in September 2010.

[36] The second cession is dated 23 August 2012 and reads thus:

> '1. In addition to the cession of 4 July 2012, and to the extent that such cession only conferred upon or ceded to the cessionary limited rights, the cedent hereby cedes to the cessionary all its rights, title and entitlement to claim from the owner of the vehicle with registration number N 876 T, a 2005 BMW 120i vehicle, any amounts in terms of any cause of action arising from or related to the repairs effected to such vehicle by the cedent.
>
> 2. Without derogating from the generality of the above, the right, title and entitlement to claim from the owner of the vehicle shall encompass all claims in terms of causes of action such as:

2.1 enrichment;
2.2 *negotiorum gestio*; and
2.3 a tacit mandate to manage the affairs of the owner.

3. The parties record that the cessionary has purchased such vehicle from the cedent for valuable consideration and that, by having paid and still paying the purchase price for the vehicle, is entitled to the claims ceded to her.

4. The cessionary hereby accepts what are ceded to her.' (My emphasis.)

[37] Again, this supposedly augmented cession limits the rights to those 'arising from or related to the repairs effected to such vehicle by the cedent'. This must be understood by reference to the recordal in the first cession that the repairs were effected in September 2010. Nowhere in either cession is any mention made of events prior to 2010, yet as I will soon show, the two proposed amendments concern costs allegedly incurred on the vehicle prior to 2010.

[38] Against the backdrop of the cessions, I proceed to consider the proposed amendment in the light of the objections raised and the legal contentions of the parties.

[39] To buttress SBN's argument, Mr Tötemeyer argued that a comparison between the two sets of claims shows how different the two debts are from each other. The original conditional counterclaim requires proof (and corresponding rebuttal) that the repairs effected to the wreck by Auto Tech were:

(a) necessary or useful;

(b) fairly and reasonably incurred;

(c) reasonable and fair as to quantum; and

(d) advanced the interest of SBN.

In addition, counsel argued, it requires proof (and corresponding rebuttal) of the condition (value) of the wreck as received in relation to the parts allegedly contributed towards its salvage by Auto Tech.

[40] Mr Tötemeyer argued that the differences are apparent when one considers the factual substratum underpinning the two sets of claim. He argued that the further disputes that arise in relation to the storage claim are:

(a) where and for how long the wreck was stored;

(b) whether it was necessary or reasonable to store the wreck where it was stored, for the length it was stored and at the cost it was stored; and

(c) whether and how the costs incurred in storing the wreck advanced SBN's interest at Auto Tech's expense.

[41] Mr Tötemeyer does not in his heads of argument elaborate on the elements to be dealt with but in my view the towing claim will require proof and a corresponding rebuttal of:

(a) the actual towing;

(b) by whom it was done;

(c) the reasonableness of the manner it was done and costs involved; and

(d) how the towing advanced SBN's interest at Auto Tech's expense.

[42] The first proposed amendment which was objected to reads as follows:

> '3.12.2. Auto Tech furthermore had a claim of N$7350 arising from towing in costs when the vehicle was conveyed from Oshakati to Tsumeb.'

[43] On Ms Hartzenberg's own version, the person who 'delivered' the wreck to Auto Tech 'for repairs' was Namupolo. It is an important consideration that, again on Ms Hartzenberg's own version, Auto Tech instituted legal proceedings against Namupolo 'for payment of the amounts due to Auto Tech' and obtained judgment against Namupolo. It is a reasonable inference that those claims against Namupolo involved towing and storage. That must explain why the cession makes no reference to events prior to 2010 relative to the subject vehicle. Mr Tötemeyer is therefore correct in his submission that the allegations supporting the claim in paragraph 3.12.3 of the proposed amendment represent a new debt as they do not, objectively

assessed, arise from the same material facts as pleaded in the original conditional counterclaim.

[44] The second proposed amendment objected to reads:

> '3.12.3. Auto Tech also had a claim for payment of the storage costs incurred in respect of the vehicle from 17 January 2007 to 7 October 2010, at N$100 per day, plus VAT, amounting to N$156 630'.

[45] It is unnecessary to repeat the point I already made that the cession is limited to repairs to the vehicle that occurred in September 2010. The proposed amendment relies on facts unrelated to the repair of the vehicle and on costs allegedly incurred prior to 2010. The repairs referred to in the cession occurred in September 2010. No suggestion is made in the proposed amendment whether the storage after September 2010 is in respect of the wreck or the reconstructed vehicle.

[46] Mr Barnard argued that Ms Hartzenberg relies on rights she enjoys under the cessions ceded to her by Auto Tech 'arising from certain repairs and related expenses' to the subject vehicle. The repairs were allegedly done in 2010. (In fact, the alleged timing of the repairs, being September 2010, is confirmed in the 4 July 2012 cession.) Mr Barnard's reference to 'related expenses' is curious and is in any event not supported by the cessions. The fact that allegations are made in the pleadings about events prior to 2010 does not make it a good point. Those allegations can only survive if they can be justified by reference to the cessions. I agree with Mr Tötemeyer's submission that the cession only transferred to the cessionary a right of action (*locus standi*) and that the cessionary has no greater

right than the cedent enjoys. The cedent recognises in the cession that the claims it has against SBN relate to and arise from the repairs done on the car in September 2010.

[47] According to Mr Barnard, the two additional claims arise from the same material set of facts underpinning 'the pursuit of defendant's original claim'. Counsel suggests that they are no more than an augmentation of the original claim and that they fall squarely within the ambit of clause 2 of the second cession. The augmentation argument is unsupported by the terms of the cessions which, as I have shown, do not extend the rights being conferred to a period prior to 2010. The addition of clause 2 in the second cession does not assist Ms Hartzenberg because the rights of action referenced therein can only relate to the repair of the vehicle.

[48] For all the reasons I gave in respect of the towing claim, the claim for storage prior to 2010 cannot be sustained as being related to the repairs. Therefore, as regards the second claim for storage, Mr Tötemeyer is also correct when he says that the facts relied on in support of that claim do not arise from the same material facts as those that give rise to the original conditional counterclaim.

[49] I come to the conclusion, therefore, that the objection to the proposed amendment is a good one as the proposed amendments do not seek to enforce the same debt claimed in the original conditional counterclaim. The proposed additional claims are new debts which were instituted outside the prescription period and were properly refused.

Was the objection properly taken?

[50] During argument a suggestion was made by Mr Barnard that it was open to the appellant to lead oral evidence about the admission of liability. Mr Tötemeyer argued that the submission is in conflict with Ms Hartzenberg's own averments and the fact that it was common cause between the parties that the amendment sought and the objection raised thereto 'would entail exclusively legal argument'. Nowhere in the appellant's affidavit in support of the proposed amendment is any suggestion made that she intended to rely on oral evidence to show that there was an admission of liability that interrupted prescription.

[51] During argument Mr Barnard further suggested that the appellant had in her affidavit left open the possibility of leading oral evidence when she, in opposition to the respondent's choice of exception-like objection rather than by way of special plea raising prescription, stated that the former procedural device denied her the opportunity to avail herself the trial facilities of oral evidence and cross-examination. As I have already demonstrated, it was alleged by Mr Mueller and admitted by Mr Behrens that resolution of the dispute rested exclusively on legal argument. The concession by Mr Behrens must be seen against the background that he also denied that in this case there would be a deprivation of the trial facilities of leading evidence and cross-examination.

[52] I agree with Mr Tötemeyer that such avenue was not open to the appellant in view of the manner in which it conducted its case and the fact that the court was entitled to assume that it was common cause between the parties that the issue before it was to be determined strictly as a matter of legal argument.

[53] As the court pointed out to Mr Barnard during argument, if there was intended to be a reliance in due course on oral evidence showing the admission of liability interrupting prescription, it was incumbent on the appellant to, at the very least, foreshadow that in justification of the amendment sought. That was not done except by raising it as a hypothetical proposition.

[54] The new case management ethos compels parties to litigation to, at the earliest available opportunity, identify and inform the managing judge what the real disputes are between them. It is no longer acceptable for litigants to be evasive; and woe betide the pleader who relies on hypothetical propositions.

[55] It is inimical to the new ethos of judicial case management to fail to fully set out one's case at the earliest opportunity that becomes available. It was therefore safe for the court *a quo* to assume that the amendment sought was not dependent on the appellant in due course leading oral evidence to establish the interruption of prescription. It was therefore perfectly proper for the respondent to plead prescription by way of an objection.

[56] The ground of appeal premised on the manner in which SBN raised the objection is therefore also without merit and stands to fail.

Costs

[57] Both counsel agreed that costs must follow the event. I see no reason to depart from the general rule.

The order

[58] In the result the appeal is dismissed, with costs, consequent upon the employment of one instructing and one instructed counsel.

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DAMASEB DCJ

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SMUTS JA

_____
HOFF AJA

APPEARANCES

| | |
|---|---|
| APPELLANT: | T Barnard |
| | Instructed by Mueller Legal |
| Practitioners | |
| RESPONDENT: | R Tötemeyer |
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