



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

CASE NO: 19733/2017

In the matter between:

SIYABULELA MAKUNGA

Plaintiff

and

**BARLEQUINS BELEGGINGS (PTY) LTD T/A INDIGO
SPUR**

Defendant

Coram: Bishop, AJ

Dates of Hearing: 27 November 2023; 1 December 2023

Date of Judgment: 1 December 2023

JUDGMENT

BISHOP, AJ

[1] The Plaintiff (**Mr Makunga**) had 1 096 days to serve a summons to enforce any rights he may have against the Defendant arising from a contract to transport restaurant staff. More precisely, he had 1 578 240 minutes. The Sheriff served his summons on the 1 096th day at 15:08. If the summons had been served just 532 minutes later (0.03% of the time available), I would have upheld the Defendant's special plea of prescription. Such are the fine margins of litigation.

[2] The Defendant is the owner of the Indigo Spur in Somerset West. The restaurant needed transport for its employees – someone to bring them to work in the morning, and take them home when their shifts ended. It had regularly hired taxi drivers to perform this service, generally on a month-to-month or week-to-week basis.

[3] Sometime in 2013 or 2014, the Defendant concluded a contract with Mr Makunga. It was not agreed whether the contract was written or verbal. Mr Makunga asserted it was a written agreement signed by a manager of the Defendant, Mr Leonard Visagie, and witnessed by another manager, Mr Heyns. Mr Smailes – the director of the Defendant – claimed no knowledge of the written agreement. But he admitted that the Defendant had hired Mr Makunga to transport the Spur's employees.

[4] The parties also did not agree on the terms of the agreement. Mr Makunga claimed that the written agreement required the Defendant to use his services for six years. He explained that he had previously been hired to provide transport services for the Defendant in 2012, and his services were summarily terminated. When he was asked to do so again, he insisted on a written contract he drafted protecting his rights. Mr Smailes admitted the previous arrangement, but claimed he would not have agreed

to a six-year term and that he always hired transport service providers on a month-to-month basis.

[5] These debates about the existence of a written contract, and the terms of any unwritten contract, will arise in the trial on the merits. It is not necessary to resolve them now and I do not do so. To resolve the special plea I assume that there was a contract on the terms Mr Makunga pleaded.

[6] So during October 2014, Mr Makunga was providing transport for the Defendant's employees. On the evening of 27 October 2014, he arrived at the Spur to pick up employees and take them home. An unnamed manager told the employees not to get into Mr Makunga's vehicle, and told Mr Makunga that the Defendant had terminated its contract with him. The reasons for this decision were not fully explained are not relevant at this stage. What happened next is central.

[7] Mr Makunga claimed that he did not argue with the unnamed manager. Instead, he came to the Spur over the next few days to talk to Mr Smaile. In testimony, his reasons for wanting to talk to Mr Smailes differed slightly. At one point he said that Mr Smailes (unlike the unnamed manager) knew about the agreement. At others he said that Mr Smailes would be able to overrule the manager and adhere to the agreement. But whatever language he used, it was plain that he hoped that Mr Smailes would intervene and ensure that the Defendant adhered to its agreement.

[8] Mr Makunga's testimony was that he was unable to meet Mr Smailes until Thursday 30 October 2014. On that day he met Mr Smailes in the parking lot of the Waterstone Mall where the Spur is located and they agreed to a meeting at the Spur the next day at 10:00. Mr Smailes had no memory of the event. He could not deny it occurred.

[9] On 31 October 2014, Mr Makunga went to the Spur for the meeting. Mr Smailes did not arrive. Mr Makunga tried to call him, but Mr Smailes did not answer. By 12:00, Mr Smailes had still not arrived, and Mr Makunga left. When he did so, he informed Mr Visagie that he regarded the contract as terminated. Mr Smailes had no knowledge of these events. Mr Visagie is deceased and so could not be called to confirm or deny them.

[10] In an affidavit Mr Makunga mistakenly filed in support of “condonation”, but really to explain his position on prescription, he said that he accepted the Defendant’s repudiation of their contract not on 31 October 2014, but on 3 November 2014. He explained this discrepancy in his testimony by explaining that he was still open to reinstating the contract if Mr Smailes contacted him over the weekend to explain why he did not attend their agreed meeting. He did not communicate again with the Defendant after 31 October 2014 to cancel the contract.

[11] Fast forward three years: The sheriff served Mr Makunga’s summons at 15:08 on 30 October 2017. The Defendant filed its special plea of prescription on 14 December 2017. It alleges that, on Mr Makunga’s own particulars, the agreement was terminated on 27 October 2014, and therefore the summons had to be filed by 26 October 2017. As it was only served on 30 October 2017, the claim had prescribed.

[12] Neither the plea, nor the special plea claims that Mr Makunga was in fact in breach on 27 October 2014, and that the unnamed manager, in light of the breach, cancelled the contract. The Defendant appears to accept – at least for the purposes of the special plea – that the Defendant repudiated and Mr Makunga elected to cancel.

[13] The key question, then, is when the alleged debt arose – when the Defendant purported to cancel the agreement on 27 October 2014, or when Mr Makunga claims

he elected to terminate the agreement on 31 October 2014. If it is the former, the claim has prescribed. If it is the latter, Mr Makunga squeaked in just before the guillotine fell at midnight on 30 October 2017.

[14] That is because of the basic principle of our law that “[w]hen circumstances justifying the cancellation of a contract arise the innocent party is faced with an election whether to cancel or to abide by the agreement.”¹ The cancellation takes effect from the time it is communicated to the other party.² Therefore, if the innocent party elects to cancel, prescription only starts to run from the date that he makes that election.³ Before then there is no debt that has become “due”.

[15] Mr Makunga’s version was that the unnamed manager’s claim on 27 October 2014 that he terminated the agreement was a repudiation. It triggered his right to either enforce the agreement, or cancel it. He exercised his election to cancel only on 31 October 2014 when he communicated that position to Mr Visagie. The Defendant’s version was that he immediately accepted the termination.

[16] When the matter came before me, the first question was who had the onus to establish prescription. Ordinarily, that duty rests on the party pleading prescription.⁴ It is only if it is apparent from the other party’s pleadings that the claim has prescribed, and he pleads interruption, that the onus and the duty shifts. The Defendant argued

¹ F du Bois et al *Wille’s Principles of South African Law* (9 ed) at 878.

² *Phone-a-copy Worldwide (Pty) Ltd v Orkin* 1986 (1) SA 729 (A) 751A-C.

³ *HMBMP Properties (Pty) Ltd v King* 1981 (1) SA 906 (N) at 912H.

⁴ *Macleod v Kweyiya* 2013 (6) SA 1 (SCA) at paras 10-11.

that, in this case, it emerged from the pleadings themselves that the claim had prescribed and therefore he had the onus.

[17] What was Mr Makunga's pleaded case? It was not expertly pleaded. It narrates what happened on 27 October 2014 and then states that the "restaurant manager there and then unilaterally terminated the agreement". But the vital paragraph is the next one, which reads: "When subsequently asked by the Plaintiff to intervene and uphold the agreement, on various occasions in the period between October and December 2014, the Director of the Defendant, Mr Robin R Smailes, refused and/or failed to do so."

[18] It seems to me that implicit in this claim is that Mr Makunga did not regard the contract as terminated until he had sought to resolve the issue with Mr Smailes. Otherwise, it would make no sense to try to "uphold the agreement". If it had been repudiated by the unknown manager, and Mr Makunga had already elected to cancel on 27 October 2014, there would be nothing to uphold. While it is not put in this language, properly interpreted Mr Makunga's claim is one of repudiation on 27 October 2014, and exercise of the election to cancel later in October. In evidence, it became clear he claimed that occurred on 31 October 2014.

[19] That construction is consistent with what he pleads later: "The Defendant's cancellation of the agreement was a repudiation of the agreement and as a result the Plaintiff suffered damages." Although inelegantly pleaded, what Mr Makunga is asserting is that, on 27 October 2014 the Defendant repudiated the agreement by purporting to cancel it. Later in October or December he accepted the repudiation and cancelled the agreement. That is consistent with his evidence.

[20] The Defendant argued that the fact he claimed damages for that week implied that he had already terminated the agreement before 31 October 2013. But, after termination, Mr Makunga could claim damages for the breach, which would include any non-payment for the last week of October, even if he only cancelled on 31 October 2014. And even if the claim for that week is inconsistent with having terminated on 31 October 2014, the result would be that he could only claim damages after the date of cancellation; it does not alter the fundamental nature of the claim. That is not a basis on which to hold that the entire claim has prescribed.

[21] Accordingly, the vital question of fact is whether Mr Makunga cancelled the contract immediately on 27 October 2014, or only on 31 October 2014 (or any time thereafter). Both Mr Makunga and Mr Smailes gave evidence before me.

[22] I have related Mr Makunga's version above. He stuck to that version. I found him a credible witness. His memory of the events was clear and his version was not meaningfully shaken in cross examination. Mr McLachlan urged me to conclude that Mr Makunga's version was too convenient and had been constructed purely to meet the special plea of prescription. He relied on the inconsistencies between the particulars of claim and Mr Makunga's evidence, and the inconsistencies between Mr Makunga's affidavit and his testimony. He also argued that Mr Makunga's version, conveniently, cannot properly be tested because the person to whom he communicated his decision to cancel – Mr Visagie – is deceased.

[23] I accept that Mr Makunga's version is convenient. It allowed him to sneak in with but hours to spare. But that does not mean it is untrue. His version has a strong air of probability. He was confronted with a termination by a person with whom he had not negotiated the agreement. He did not immediately accept the agreement was over,

and sought to “uphold” the agreement by appealing to Mr Smailes. He wished to do so in person. It took him a few days to find Mr Smailes and to set up a meeting. None of this is inherently improbable. In addition, his particulars of claim state that he sought to uphold the agreement during October 2014. Although he did not specify a date, it is consistent with his ultimate version.

[24] Accordingly despite the obvious convenience of Mr Makunga’s version, there is no basis to reject it as untrue.

[25] Mr Smailes, by contrast, had no direct recollection of the relevant events. He accepted that Mr Makunga was driving for the Defendant at the relevant time (although he denied there was a written contract). He did not dispute that his manager had purported to terminate the agreement on 27 October 2014. And he had no recollection of whether Mr Makunga had approached him in the following days to discuss the agreement. He was asked expressly in cross-examination whether he could recall being approached by Mr Makunga. He said he simply could not recall. As Mr McLachlan accepted, that means that the case turns entirely on whether I accept Mr Makunga’s evidence. For the reasons I have given, I do.

[26] Mr Makunga asked me to conclude that Mr Smailes was dishonest. I do not believe he was. I believe he stated honestly that he could not recall. I do not believe that the loss of recall was an artifice. It would have been far more beneficial to the Defendant’s case for Mr Smailes to claim perfect recollection and deny Mr Makunga ever sought to meet with him. He did not do so. The fact that he remembered some events that occurred around the same time but not others is not evidence of dishonesty. That is how memory works – it is not linear and predictable, recalling everything perfectly from a certain date and nothing before that date. We recall some

events and not others, and some with great clarity and others only vaguely. Mr Smaile's testimony was perfectly consistent with that reality.

[27] I therefore accept both witnesses were as truthful as they could be given the passage of time. As only he could recall the event, I accept Mr Makunga's evidence, which was materially undisputed on the key fact – Mr Makunga only elected to cancel on 31 October 2014 when he communicated that decision to Mr Visagie.

[28] The result is that the special plea must be dismissed.

[29] Mr Makunga asked for a punitive costs award. I see no basis for such an award. The special plea has failed, but it was not unreasonably or vexatiously pursued. Mr Makunga's version was only properly set out in evidence. An ordinary award of costs is appropriate. It is not clear what costs Mr Makunga incurred in opposing the special plea because he represented himself from 2020 when his attorneys withdrew. But if there were any costs, he is entitled to them.

[30] Finally, I must mention Mr Makunga's heads of argument. He filed heads of argument which contained extensive reference to case law. In cross-examination, he was asked whether he prepared them himself. He said he had, relying only on the assistance of Google. Mr McLachlan expressed his disbelief. In argument he told me that many of his colleagues were equally incredulous and were convinced only a lawyer could have drafted the heads. I admit that I have seen worse heads of argument prepared by members of the Bar. But this does not evince dishonesty to me. Rather, it shows Mr Makunga's perseverance and commitment, and the fact that lawyers need to watch out for artificial intelligence. One day soon, the computers are coming for our jobs.

[31] I therefore make the following order:

1. That the Defendant's special plea is dismissed.
2. That the Defendant shall pay the Plaintiff's costs.

M J BISHOP
Acting Judge of the High Court

Counsel for Plaintiff:

In person

Counsel for Defendant:
Attorneys for Applicant

Adv HG McLachlan
Welgemoed Attorneys