

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case number: 4623/2012

In the matter between:

ANNELIZE RAUTENBACH N.O.

Applicant

and

CMW OPERATIONS (EDMS) BPK

Respondent

CONSIDERED: 10 DECEMBER 2015

JUDGMENT BY: RAMPAL, J

DELIVERED ON: 7 JANUARY 2016

[1] This is an applicant for leave to appeal. The applicant seeks leave to appeal against my judgment which was delivered on 19 February 2015. On that day I upheld the respondent's special plea of prescription. The respondent opposes the application.

[2] The applicant caused a summons to be issued against the respondent on 12 November 2012. The sheriff served the summons on 21 November 2012. The applicant sued in her representative capacity as the executor of the deceased estate of her late husband. She alleged that the respondent was an

appointed agent of her husband, the late APC Rautenbach. She further alleged that as such the respondent was obliged to have her husband properly insured but wrongfully failed to do so. These action proceedings were instituted in an effort to recover damages allegedly suffered as a result of the respondent's alleged failure.

- [3] The respondent repudiated the applicant's claim. The defendant's plea was filed. Together with the ordinary plea, the respondent also caused a special plea to be simultaneously filed. The gist of the respondent's special plea was that prescription had since extinguished the applicant's claim.
- [4] The parties agreed, at the commencement of the hearing, to have the issues separated. I was then called upon to adjudicate the respondent's special plea first. As already indicated, I upheld the special plea. The applicant was aggrieved by my decision. Her dissatisfaction precipitated the current application.
- [5] The grounds on which the application is based were set out in the notice filed on 3 August 2015.

- "1. Die agbare Hof het fouteer deur te bevind dat die verjarings termyn van die eis 'n aanvang geneem het op 27 Augustus 2009, en dat die eis derhalwe verjaar het op 26 Augustus 2012.
- 2. Die agbare Hof het fouteer om die getuienis van FUTTER te aanvaar dat daar op 28 Augustus 2009 'n gesprek plaasgevind het tussen FUTTER en Eiseres se agent, met die strekking dat

die agent te kenne gegee het dat Verweerder nalatig was deur nie sy kontraktuele verpligtinge nate kom nie, en moes die Hof die getuienis van die agent aanvaar het dat hy slegs gesê het dat Verweerder die saak met die versekeraar moet uitklaar.

3. Die agbare Hof het fouteer deur te bevind dat Eiseres (of haar agent) reeds op 27 Augustus 2009 voldoende kennis gedra het van die wesentlike feite waarop haar eis sou berus, om haar in staat te stel om 'n eis te kan instel.
4. Die agbare Hof het fouteer deur te bevind dat die eposse van FUTTER, en die gepaardgaande telefoon oproepe tussen die partye, Eiseres voldoende in kennis gestel het van die wesentlike feite waarop haar eis teen Verweerder gegrond is.
5. Die agbare Hof fouteer deur nie te bevind dat waar selfs Verweerder se werknemer HORN nie op 27 Augustus 2009 bewus was van die wesentlike feite waarop Eiseres eis gegrond is nie, die Eiseres nie van derglike feite bewus kon gewees het nie.
6. Die agbare Hof het fouteer deur te bevind, in die afwesigheid van enige getuienis daaromtrent, en waar dit nie Verweerder se saak was op die pleitstukke óf in die getuienis nie, dat Eiseres se agent nie dadelik, behoorlik, en onafhanklik gepoog het om die feite van die eis vas te stel nie.
7. Die agbare Hof het fouteer deur te bevind dat Eiseres se agent nie redelik opgetree het nie, en dat die agent derhalwe teen 1 November 2009 bewus kon gewees het van die wesentlike feite waarop die eis berus, aangesien dit nie Verweerder se saak was op die pleitstukke nie, en daar geen getuienis daaromtrent was nie.

8. Die agbare Hof het gefouteer deur te bevind dat FUTTER en HORN geen verpligting gehad, ten spyte van die Eiseres en die agent se navrae, om die ware stand van sake aan Eiseres te openbaar nie.
9. Die agbare Hof het fouteer deur nie te bevind dat Eiseres op 27 Augustus 2009 nie kon geweet het of die kort-betaling van die versekering te wyte is aan die verbreking van die kontrak deur Verweerder, óf deur die Versekeraar, en óf dit slegs 'n administratiewe fout was nie, en dat sy derhalwe nie kon geweet het of sy hoegenaamd 'n eis het nie, of indien sy 'n eis het, teen watter party, en waarop die eis gegrond is nie."

[6] On 28 July 2015 my secretary sent a notice to the parties. They were informed that the application for leave to appeal would be heard on Monday 14 September 2015 at 14:00; that they were at liberty to dispense with the formal hearing in order to let me adjudicate the application in chambers; that the applicant should file the grounds of her application within a specified date and that the parties should file the heads of arguments by specified days.

[7] The applicant's heads of argument were filed on 17 August 2015. The respondent's heads were filed on 17 August 2015. On 4 September 2015 the applicant's attorney, Mr CP Groenewald advised my secretary, Miss Ntlapa Mopeli, that the parties had agreed that the application be informally disposed of in chambers in accordance with paragraph 2 of the notice of setdown. Notwithstanding such practically expedient agreement, the matter remained unattended until 10 December 2015 on which date I

received an enquiry from Messrs Azar and Havenga Prokureurs. I was embarrassed to say the least. I apologise to all concerned for the inordinate delay. The delay was due to an oversight on my part.

- [8] Now I turn to the matter at hand. The applicants case was that her husband, the late APC Rautenbach, and the respondent entered into an agreement. She alleged that the material terms of the agreement were: that the respondent extended credit to her husband; that her husband would repay the respondent from the proceeds of the seasonal harvest earned; that the respondent would take out an insurance cover on the life of her husband in order to secure repayment of monies due to the respondent, in the event of her husband's death and that the proceeds of such an insurance policy would be utilised to settle her husband's indebtedness to the respondent.
- [9] The applicant alleged, and the respondent conceded at the trial, that the respondent breached its obligations to properly or adequately insure her husband. At the time he died, her husband was indebted to the respondent to the tune of approximately R791 442.67. The figure includes subsequent interest. However, the life insurance paid out to the respondent an amount of R300 000.00 only. As a result of such inadequate proceeds paid out, a staggering balance of R491 422.67 remained owing to the respondent by her late husband's estate. The action proceedings were concerned with the claim of that amount.

- [10] The respondent specially pleaded that the applicants claim had already prescribed at the time the summons was served on 21 November 2012. The respondent's special case or defence was that the applicant's cause of action arose on or before 24 July 2008 when her husband died but when a credit agreement between APC Rautenbach and the respondent was entered into. The respondent specially pleaded that the claim prescribed three years after it fell due.
- [11] The onus rested on the respondent to prove the date on which prescription commenced to run. The respondent had pleaded that prescription against the applicant's claim had commenced to run on 24 July 2008 or before then when the credit agreement was signed.
- [12] Given the respondent's special plea, Mr Swanepoel submitted that the respondent's special plea was materially defective. In the first place, he argued that the special plea was defective in that the respondent did not specially plead that prescription had commenced to run from 27 August 2009 or from any other date other than 24 July 2008. In the second place, counsel also argued that the special plea was defective in that the respondent did not specially plea that the applicant could, at any time before October 2010, have ascertained the correct facts from which her claim arose and the correct identity of the liable debtor by exercising reasonable care. [see section 12 [3] Prescription Act 68 of 1969].

[13] Mr de Bruin differed as regards the alleged defects that were contended *ex post facto* to be significant omissions in the respondent's special plea. Counsel argued that the respondent raised the special issue of prescription in its plea; (vide para 2.4 of the plea); that the applicant as the plaintiff replicated (vide para 1.2 replication); that it was obvious that the applicant's case depended on the provisions of section 12 [3] Prescription Act 68 of 1969 and that the particular section was pertinently raised by the applicant in her evidence. Moreover it was expressly stated, in the plaintiff's heads of argument relative to the trial, that the plaintiff's replication was based on the provisions of section 12 [3] Prescription Act 68 of 1969 (vide para [5] thereof).

[14] Besides the aforesaid considerations, the issue was fully canvassed by both parties at the trial. It must be stressed that it was so canvassed without any objection from either the applicant or the respondent. In the light of all these peculiar circumstances of this particular case, I was, therefore, perfectly entitled to globally adjudicate the issue taking into account not only the narrow confines of the pleadings but also the broader picture of the ambit of the issue as amplified by the evidence. **Shield v Milner** 1937 [AD] 201 at 105.

[15] In **Middleton v Carr** 1949 [2] SA 374 [A] at 386 Schreiner JA had this to say about unpleaded issues:

“Generally speaking the issues in civil cases should be raised in the pleadings and if an issue arises which does not appear from the pleadings in their original form an appropriate amendment should be

ought. Parties should not be unduly encouraged to rely, in the hope, perhaps, of obtaining some tactical advantage or avoiding a special order as to costs, on the Court's readiness at the argument stage, or on appeal to treat unpleaded issues as having been fully investigated."

- [16] I have considered the aforesaid decision. However, I am not persuaded that it can be said that the special defence raised by the respondent, which I earlier upheld, was an unpleaded issue as envisaged in that decision. The contention of the applicant was, because the respondent specifically pleaded a specific date he was inextricably tied up to that specific date and no other. The real issue, as I see it, was prescription and not the specific date per say. The precise date was a residual consideration. It was a variable between 21 November 2012, being the date on which the sheriff served the applicant's summons on the respondent and 24 July 2008, being the date on which the applicant's husband died.
- [17] The two days defined the perimeters of the respondent's alleged special defence or prescription. The latter indicated the earliest date on which such prescriptive defence could have arisen. The former indicated the latest date on which the running of prescription could have been interrupted. It was untenable, in my opinion to argue that the respondent was precluded from showing, by evidence, that prescription commenced running on any other day between those particular two days that demarcated the ambit of the prescription period. The date complained of fell squarely within the demarcated period of prescription. The applicant's argument would have made sense if the respondent's

evidence established, contrary to its pleading, that prescription started running prior to 24 July 2008. The situation was certainly different here. The scope of the special plea was narrowed and not broadened. The narrowing of the respondents defence entailed no prejudice, actual or potential, to the applicant.

[18] Mr Swanepoel submitted that since the respondent never raised, in its pleadings, the contention that prescription commenced running on 27 August 2009, or at any subsequent date, I could not correctly have come to such a finding, in the absence of an amendment of the respondent's pleadings. The submission was flawed. The essence of my finding was that the applicant could, by the exercise of reasonable care, have acquired constructive knowledge firstly of the identity of the respondent as the liable debtor and secondly of the facts from which her claim arose within a reasonable time commencing on 27 August 2009. I also found that the applicant could, long before 10 October 2010, have ascertained the correct identity and facts through the exercise of reasonable care.

[19] I wrote a comprehensive judgment and endeavoured to deal fully with the legal principles. It was nowhere suggested by the applicant in the current application that I misinterpreted or misunderstood or misapplied the applicable principles. I carefully analysed the facts and correctly applied the legal principles to those facts. I am persuaded by Mr de Bruin's submission that the underlying grounds on which the application for leave to appeal is

founded all deal with factual issues. None of them concern any question of law.

[20] The test to be applied in an application for leave to appeal has recently been qualified. Section 17 [1] [A] [1] of the Supreme Court Act 10 of 2013 provides that leave to appeal may only be granted where the judge is of the opinion that the appeal would have a reasonable prospect of success. Mr De Bruin submitted that the words “only” and the phrase “of the opinion” as used in the section should be given due and proper attention. The essence thereof is that it is now seriously incumbent upon the applicant to convince the court, on issues of fact and law, that a proper case has been made out for the court to form the opinion that there is a reasonable prospect of success and that there is material misdirection that rendered the judgment appealable. The applicant failed the test, in my view.

[21] Nothing significant turned on the omissions or defects in the respondent pleading. In view of all the reasons given above, I am not inclined or persuaded to form the requisite opinion in favour of the applicant. In the absence of such an opinion the application for leave to appeal cannot be granted. Such an application can only be granted provided I was convinced to form an opinion that an appeal would have a reasonable prospect of success. In my view it has not been shown that a reasonable prospect exists that another court may come to a different conclusion.

[22] In the result I make the following order:

22.1 The application for leave to appeal is dismissed;

22.2 The applicant is directed to pay the costs.

M.H. RAMPAL, J

On behalf of applicant: Adv. JJC Swanepoel
Instructed by:
Azar & Havenga Inc.
Bloemfontein

On behalf of respondent: Adv. J.P de Bruin
Instructed by:
Symington & De Kok
Bloemfontein

/PC