

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No: 549/2009

In the matter between:-

HSIN-HUIE PLASTIC CC

Plaintiff

and

ADRIAAN HENDRIK ODENDAAL

Defendant

JUDGMENT BY: THAMAGE, AJ

HEARD ON: 3, 4, 6 AND 12 SEPTEMBER 2013

DELIVERED ON: 26 SEPTEMBER 2013

[1] This matter involves a special plea of prescription. Plaintiff is Hsin-Huie Plastic CC, a close corporation duly registered as such and with registered office in Bloemfontein. Defendant is Adriaan Hendrik Odendaal a male attorney residing at the farm Braklaagte in the district of Vrede. Plaintiff's claim is for breach of the terms of contract entered into between himself and defendant alternatively that defendant was negligent in instituting an action on behalf of Mr Chung instead of citing plaintiff as second plaintiff under case number 3016/2006.

[2] Plaintiff prayers as per summons are as follows:

- “(a) Payment of the amount of R864 000,00;
- (b) Payment of interest on the aforesaid amount *a temporae morae* at a rate of 15,5%;
- (c) Costs of suit;
- (d) Further and for alternative relief.”

[3] At the beginning of the trial, the following was recorded as agreed upon by the parties:

- 3.1 That R500 000,00 is abandoned by the plaintiff and plaintiff will only proceed with a claim of R364 000,00;
- 3.2 That the merits are separated from the quantum;
- 3.3 That defendant’s special plea of prescription will be adjudicated first, the presentation of same will be by way of oral evidence.

[4] As per 3.3 above, defendant led evidence of Mr Odendaal (defendant himself) and plaintiff led evidence of Mr Chung (member of the plaintiff) and Mr Henning the current attorney for the plaintiff.

[5] The special plea is as follows:

“1.5 Eiser was, gevolglik, reeds op 7 Julie 2006 bewus van die bestaan van die skuld, soos bedoel in Artikel 12(2) van Wet 68 van 1969, alternatiewelik kon eiser deur die beoefening van redelike sorg reeds op 7 Julie 2006 van die bestaan van die skuld bewus geword het en moet die skuld geag word op 7 Julie 2006 opeisbaar te wees, soos bedoel in Artikel 12(3) van Wet 68 van 1969;

- 1.6 Die onderhawige aksie teen verweerder is deur die Griffier uitgereik op 2 Desember 2009 en daarna aan verweerder beteken;
- 1.7 Meer as drie jaar het verloop vanaf 7 Julie 2006 totdat eiser op 2 Desember 2009 aksie teen verweerder ingestel het;
- 1.8 Eiser se vordering teen verweerder het, weens die bepalinge van Wet 68 van 1969 verjaar alvorens aksie ingestel is.”

[6] After both parties had led evidence, I requested both counsel to submit written heads of argument which they did. I am indebted to their submissions.

[7] Facts are basically as follows:

- 7.1 Mnr Chung is a member of the plaintiff. Fire occurred at his building on the 19th July 2003, which building was owned by him and the equipment and stock was owned by the plaintiff. He then instructed Mr Snyman to institute an action against his neighbour (Mr De Bruin), whose negligence caused the fire. Mr Snyman's instructions were terminated and the current defendant was approached to carry on the instruction on or about 16 February 2005. On 20 April 2005, defendant addressed the letter to Steinbach & Oelofse and reference was made to Hsin Huie CC of which Mr Chung is a member.
- 7.2 Defendant then briefed Mr Grewar to draw particulars of claim and on that draft (which was in Afrikaans), Chung was the plaintiff. At about the 3rd July 2006, Mr Chung was in possession of the draft particulars of claim whereupon he raised his concern by letter of the correct citation of the then defendant as well as prescription of the fire claim. Mr Chung

does not know English nor Afrikaans and at all consultations, he used Ms Win Lee as his interpreter. A certain Joseph was the one who came with these words prescription and citation and this was communicated to Ms Win Lee who is the author of the letter to the defendant. Amongst other documents that were in possession of the defendant was an invoice of equipment and stock and that invoice was addressed to "Trackster (Pty) Ltd trading as CC Hsin-Huie Plastic (Pty) Ltd CC." Around the 18 October 2006, defendant's mandate was terminated.

7.3 Mr Henning was then instructed to proceed with the matter. He obtained the file from defendant on the 25th January 2007. He then consulted with Mr Chung around February 2007. Mr Henning, on perusal of the file, realised that reference has been made to the close corporation but summons were issued in Mr Chung's personal capacity. He could thus not institute another action or join the plaintiff as second plaintiff because the claim had prescribed on the 11 December 2006. Mr Henning then sent Mr Chung a letter in which he alluded the fact that plaintiff's claim against Mr De Bruyn had prescribed hence plaintiff's recourse was to institute an action against defendant (Mr Odendaal) hence the current matter.

[8] The issue to be decided is whether plaintiff's claim has prescribed. Defendant's counsel submitted that plaintiff's claim had prescribed hence this special plea; on the contrary, plaintiff's counsel submitted that it has not. According to the defendant, prescription started to run from the 7th July 2006 whilst plaintiff is of the view

that prescription started to run as from 11 December 2007 alternatively February 2007.

- [9] Section 11(d) of the Prescription Act 68 of 1969 provides as follows:

“The periods of prescription of debts shall be the following:-

- (a) Save where an Act of Parliament provides otherwise, three years in respect of any other debt.”

Section 12 provides as follows:-

- (1) Subject to the provisions of subsections (2)(3) and (4), prescription shall commence to run as soon as the debt is due ...

- (3) A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.” (my emphasis)

- [10] Prescription begins to run not necessarily when a debt arises but only when it becomes due. See Joubert, **LAWSA**, First Re-issue, Vol 21, p55. Joubert *supra* at p56 para [142] further states as follows:-

“So, because negligence does not become actionable without proof of damages, it is only after damages has been suffered that the cause of action becomes complete and time begins to run.”

- [11] It is prudent to consider when plaintiff's debt became due alternatively when the plaintiff's debt is deemed to have been due, in other words, when was the cause of action complete. Both counsel referred me to **Evins v Shield Insurance Co Ltd** 1980 (2) SA 814 and pages 838 to 839.
- [12] Counsel for defendant submitted that the debt became due the time Mr Chung read the draft particulars of claim wherein the plaintiff's name did not appear. I find it difficult to agree with this submission given the fact that the document presented to Mr Chung was a draft, written in Afrikaans, it was not summons as they were not yet issued. In terms of **Evins** case *supra*, no cause of action will arise until all the *facta probanda* had occurred.
- [13] Counsel for defendant further submitted that plaintiff's cause of action became complete the moment when the claim against Mr De Bruyn became prescribed. This submission is misplaced in that counsel failed to distinguish facts relevant to the facts in issue vis-à-vis facts in issue (*facta probanda*). The fact that the claim against Mr de Bruyn had prescribed is a fact relevant to the facts in issue but not the *facta probanda*. The absence of the plaintiff's name in a draft particulars of claim does not constitute a debt as envisaged by section 12 of the Prescription Act.
- [14] Section 12(3) of the Prescription Act is of the effect that the debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor as well as the facts from which the debt arise. Mr Chung got that knowledge when he received the letter

from Mr Henning indicating that plaintiff had not been included in the action and that the action against Mr De Bruyn had prescribed. I must at this point indicate that Mr Chung is not legally qualified and does not know English or Afrikaans. See **Ditedu v Tayob** 2006 (2) SA 176 WLD at 181:

“Clearly the plaintiff was unaware, after she received the amount of the settlement that her attorney had acted negligently. She was first apprised of this during 2003 when she consulted with her present attorney”
(my empahsis)

Similarly, plaintiff became aware of the claim against defendant after consultation and/or letter from his attorney, Mr Henning.

[15] I also have to consider whether the plaintiff by exercise of reasonable care, ought to have acquired knowledge of the debt; See **Gericke v Sack** 1978 (1) SA 821 A. On the other hand, the party pleading prescription should prove on a balance of probabilities that plaintiff had knowledge of the fact as envisaged by the Prescription Act. The exercise of reasonable care is measured as against a reasonable man under the circumstances. Mr Chung is a businessman but not a legally qualified person. The letter he wrote to defendant was written by Ms Win Lee as well as the terms of prescription and citations were from his friend Joseph. These contentions cannot be held against the plaintiff as it is common cause that plaintiff even during consultation with defendant as well as his current attorney, was using the services

of the interpreter. I find no basis that plaintiff by the exercise of reasonable care ought to have known of the debt.

[16] I have been requested by counsel for the plaintiff to order costs against the defendant, similarly, counsel for defendant requested me to order costs against the plaintiff even if the special plea is dismissed due to the fact that plaintiff on his further particulars induced the defendant to raise a special plea by stating that plaintiff became aware that he was not cited as plaintiff under case number 3016/2006 during July 2006. I am of the view that future submissions as to costs order are needed hence the costs order on this special plea is reserved.

ORDER

[17] The following order is made:

- 1. Special plea is dismissed.**
- 2. Costs are reserved.**
- 3. Matter is postponed *sine die*.**

S. J. THAMAGE, AJ

On behalf of plaintiff: Adv.J. J.F. Hefer
Instructed by:
McIntyre & Van der Post
BLOEMFONTEIN

On behalf of defendant: Adv. J. G. Gilliland
Instructed by:
Bezuidenhouts Inc.
BLOEMFONTEIN

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