

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 5972/2008

In the matter between:-

IVECO SOUTH AFRICA (PTY) LTD

Plaintiff

and

DIRK SAMUEL BOTHA

Defendant

HEARD ON: 11 MARCH 2011

JUDGMENT BY: RAMPAL, J

DELIVERED ON: 2 JUNE 2011

[1] This is an application for leave to appeal. The order appealed against was given by Moolla AJ and delivered on 28 October 2010. The applicant was the defendant and the respondent the plaintiff. I shall refer to the parties as the defendant and the plaintiff. The plaintiff opposes the defendant's application.

[2] The defendant previously had shares and a loan account in a company called Duewest Properties (Pty) Ltd. The defendant was the sole shareholder in the company. The sole asset of this company was an immovable property, technically known as erf 23859, Pinetown in KwaZulu Natal. On 21 May 2003 the

plaintiff, the defendant and the company concluded a written agreement. The plaintiff acquired 100% of the defendant's shares in the company as well as the defendant's loan claims against the company in terms of the tripartite share sale agreement.

[3] During the negotiations preceding the aforesaid agreement, the defendant represented to the plaintiff that, apart from his loan account, the company was not indebted to any third party. The plaintiff accepted that there were no outstanding third party liabilities in Duewest Properties (Pty) Ltd. Moreover, such state of affairs was also warranted in the written agreement.

[4] The plaintiff's initial objective was to acquire title in the immovable property that constituted the sole asset of the company. Its election to purchase the defendant's share rather than the immovable property itself was premised on the representation made by the defendant that the company had no liabilities to third parties. The effective date of the agreement was 23 July 2003, being the date on which certain mortgage bonds over the property were cancelled.

[5] Subsequent to the effective date it emerged that, contrary to the

warranty, the company was still indebted to the Inner West Municipal Council at Pinetown in the sum of R330 190,40 as on the effective date.

[6] The plaintiff became aware of the claim by the aforesaid municipality on or about 2 January 2004. However, at that stage the plaintiff and indeed the defendant as well, were uncertain of the exact outstanding amount due to the municipality by Duewest Properties (Pty) Ltd. The defendant's immediate reaction was that the whole thing was a mistake and he undertook to take the matter up with the municipality to clear it up.

[7] The uncertainty regarding the quantum of the municipality's claim remained for a long time. On 8 September 2004 the plaintiff called upon the defendant to see to it that the claim of the municipality was paid within 14 days and warned that unless the defendant complied, legal steps would be taken against him. The defendant requested time to resolve the matter with the municipality. The plaintiff granted the defendant extensions from time to time. The final extension the plaintiff extended to the defendant was 15 December 2005. Notwithstanding the extensions the defendant could not resolve

the matter with the municipality. The defendant disputed the computation and the component items of the claim of the municipality. There was a great deal of correspondence exchanged between the defendant and the municipality, to no avail.

[8] After 15 December 2005 the plaintiff took it upon itself to do something about the matter. Eventually and on 17 July 2007 the plaintiff fully paid the claim owed to the municipality by Duewest Properties (Pty) Ltd. On 26 March 2008 the plaintiff sent a demand to the defendant for the payment of the amount R1 507 147,95. The defendant did not comply with the demand. Subsequently, the plaintiff sued the defendant.

[9] The grounds of the appeal were that Moolla AJ erred in finding that the plaintiff's claim had not prescribed in terms of the applicable legislation; that the plaintiff had proved, on a preponderance of probabilities, that interruption of prescription had taken place; that the running of prescription was interrupted until 15 December 2005 by agreement; that the contention of the defendant to the effect that to interrupt the prescription acknowledgement of liability and not merely acknowledgement of indebtedness was required, had no substance; that there

was an agreement to postpone the date on which the debt became due and that the defendant had admitted liability to the municipality concerned. Moreover, the defendant relied on a negative misdirection. He alleged that the court erred by failing to determine a specific date on which prescription was interrupted.

[10] The issue in this matter is whether there was acknowledgement of liability by Duewest Properties (Pty) Ltd or the defendant on its behalf to interrupt the running of prescription. The residual issue, which arises only if the main issue is answered in the affirmative, is precisely on which specific date did the parties agree, if they ever did, to interrupt the running of prescription. As regards the onus the legal position is as follows:

The defendant avers prescription, therefore the defendant bears the onus of showing that the debt became due on a date prior to 17 September 2008 in order to succeed with the special plea. The plaintiff bears the onus of showing that the running of prescription was interrupted or postponed.

[11] It will therefore be readily appreciated that the issue revolves around the interpretation of section 14, Prescription Act, 68 of 1969. Subsection 1 thereof provides:

“14 Interruption of prescription by acknowledgement of liability

- (1) The running of prescription shall be interrupted by an express or tacit acknowledgement of liability by the debtor.”

Subsection 2 provides:

- (2) If the running of prescription is interrupted as contemplated in subsection (1), prescription shall commence to run afresh from the day on which the interruption takes place or, if at the time of the interruption or at any time thereafter the parties postpone the due date of the debt from the date upon which the debt again becomes due.”



[12] The main contention advanced by the defendant was that section 14(2) does not operate disjunctively. Its operation depends on that of section 14(1). Section 14(1) activates section 14 (2). The latter only comes into play provided there has been interruption of prescription as contemplated in the former. If no finding has been made in terms of subsection 1, subsection 2 does not come into play all on its own.

[13] It was the finding of the court that the plaintiff became aware of the quantum of the claim on 18 August 2004 when the municipality furnished the plaintiff’s attorney with the clearance

certificate concerning the erf at Pinetown. Implicit in that finding was the conclusion that if the debt became due on 18 August 2004 then the defendant had discharged the general onus of showing that the debt became due sometime before 17 September 2008. Such onus includes not only that the claim has prescribed in terms of section 14, but also that section 12(3) is not applicable. This means that the claim had in any event prescribed because the creditor became aware of the identity of the debtor and all the facts of the underlying cause of action before the lapse of the three year period. See **GERICKE v SACK** 1978 (1) SA 821 (AD) at 828 and 829.

[14] The residual issue the court virtually had to determine, was whether the ordinary running of the prescription was interrupted. If the inception date of the three year prescriptive process was 18 August 2004, as the court found, then the expiry date thereof was 17 August 2007.

[15] Although the court found that prescription started to run from 18 August 2004, the defendant's contention was that, in fact, prescription started running from the date of the breach and not from the date on which the debt was quantified.

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ONDERNEMINGS CC cited by Saner: **Prescription in South African Law**, p. 3-48(2) to p. 3-40(3). See also **KOTZÉ v ONGESKIKTHEIDSFONDS VAN DIE UNIVERSITEIT VAN STELLENBOSCH** 1996 (3) SA 252 (C).

It then became incumbent upon the plaintiff to discharge the particular onus of showing that at a certain point in time, somewhere between the fixed date of inception and the fixed date of expiry, the ordinary running of the prescriptive process was halted or interrupted. **ABSA BANK BPK v DE VILLIERS** 2001 (1) SA 481 (SCA) at 486 – 487.

- [16] In his judgment Moolla AJ also found that various correspondence the parties exchanged over a stretch of time, constituted interruption of the prescription in terms of section 14(1). Those were the letters in terms of which the plaintiff granted an extension of time to the defendant to resolve this dispute with the municipality about the quantum of the claim. The last extension granted to the defendant for that purpose, expired on 15 December 2005.

- [17] On behalf of the defendant, Mr. Zietsman contended that the

court erred in making such a finding. The crux of his argument was that an interruption was not a process but rather an event. The plaintiff had failed, he argued, to prove at which specific moment in time, between the aforesaid fixed beginning and the fixed ending of the running of prescription, the parties had agreed to interrupt such running of prescription. In the absence of such a proven specific date of an interruptive agreement, the prescriptive period could never have ceased to run uninterruptedly.

[18] The court found and declared that prescription commenced running afresh on 15 December 2005 (*vide* par. 2 of the order). This finding was also under attack. The essence of Mr. Zietsman's contention was that the court erred in determining the specific date on which prescription commenced to run afresh in terms of section 14(2) since the court had not determined a specific date on which the running of extinctive prescription was interrupted in terms of section 14(1) in the first place. Counsel submitted that it had to be proven by the plaintiff that the process was first stopped (subsection 1) before it was resumed (subsection 2).

[19] The court also found that the defendant had acknowledged the

debt of the municipality which forms the basis of the plaintiff's claim.

[20] The defendant contended that the court erred in making such a finding. In the first place it was argued that there was a genuine dispute between the defendant and the municipality concerning the quantum of the claim. The submission was then made that unless and until the defendant had admitted the quantum as well and the dispute thereby resolved, there could have been no acknowledgement of liability in terms of section 14(1). The section expressly requires acknowledgement of liability and not merely acknowledgement of indebtedness. **ROAD ACCIDENT FUND v MOTHUPI** 2000 (4) SA 38 (SCA) on 56 par. [37]. In contrast see **AUSSENKEHR FARMS (PTY) LTD v TRIO TRANSPORT CC** 2002 (4) SA 483 (SCA) on 491 par. [17].

[21] In developing that argument further, Mr. Zietsman contended that even if the defendant had acknowledged liability to the municipality, which allegation the defendant denies, it would still not have assisted the plaintiff's case anyway. There had to be direct acknowledgement of liability by the defendant to the plaintiff and not to a third party, in this case the Inner West Municipality. In the absence of such proven acknowledgement

of liability, counsel submitted, there could have been no interruption of prescription in terms of section 14(1). If that was so, then it followed as a matter of logic, that the running of prescriptive process which was never interrupted before, could not have commenced afresh in terms of section 14(2) as the court found.

[22] I have considered the submissions made on behalf of the plaintiff as well, although I did not spell them out in this judgment. It was for the defendant and not the plaintiff to persuade me that there were prospects of success if the matter was allowed to go on appeal. I have weighed both submissions. It may well be that the court committed certain appealable misdirections on two or more grounds as relied upon by the defendant. Therefore, I am persuaded that another court may come to another conclusion, different from the one reached by the court of first instance. In the light of this I am inclined to grant leave to appeal to the defendant.

[23] In **BENSON AND ANOTHER v WALTERS AND OTHERS** 1984 (1) SA 73 (A) the court was divided by four to one on the question whether an acknowledgement of indebtedness could effectively interrupt prescription even before the debt itself has

been quantified. The minority answered the question in the affirmative, whereas the majority answered it in the negative. Mr. Zietsman relied on the majority view. In **MOTHUPI'S** case, *supra*, at 56 G – H par. [38] the court quoted the minority view. On the strength of this Mr. Vetten submitted that the minority view in **BENSON'S** case seemed to enjoy support in **MOTHUPI'S** case. Mr. Zietsman conceded that that argument was plausible. Obviously I refrain from expressing any view. Once again I refer to the case of **AUSSENKEHR FARMS**, *supra*, at p. 491 G where the court held that acknowledgement of indebtedness coupled with a request for an extension of time interrupted the running of extinctive prescription. For those reasons both counsels were agreed that should I be inclined to grant the defendant leave to appeal, the matter should be referred directly to the Supreme Court of Appeal so that final clarity on the point of law could be sought and obtained.

[24] Accordingly I make the following order:

- 24.1 The applicant's (defendant) application for leave to appeal succeeds.
- 24.2 The applicant is granted leave to appeal directly to the SCA.
- 24.3 The costs of this application shall be costs in the appeal.

M.H. RAMPAL, J

On behalf of plaintiff: Adv. P. Zietsman SC
Instructed by:
McIntyre & Van der Post
BLOEMFONTEIN

On behalf of defendant: Adv. S. Vetten
Instructed by:
Lovius Block Attorneys
BLOEMFONTEIN

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