

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA



CASE NO.: 4747/2020

- (1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO
(3) REVISED.

28/08/2021

In the matter between:

LIBERTY GROUP LIMITED

Plaintiff

and

HFM MANAGEMENT COMPANY (Pty) LTD
(REG No. 2014/115504/07)

Defendant

JUDGMENT

van der Westhuizen, J

- [1] The plaintiff claimed from the defendant repayment of an amount of R500 000.00 paid to the defendant in terms of a High Level Deal

Structure New Franchise-Funded Agreement. The defendant filed a special plea of prescription and pled over on the merits.

- [2] The parties agreed to separate the issues and that only the special plea stood to be adjudicated upon. I so ruled.
- [3] The plaintiff and the defendant entered into a High Level Deal Structure New Franchise-Funded Agreement (Funding Agreement) during 2014. The plaintiff instituted action for the repayment of funds paid to the defendant in terms of the said agreement. Subsequent to the concluding of that agreement, the defendant signed a Confirmation of Settlement and Undertaking to Repay (Acknowledgement of Debt). That Acknowledgement of Debt is to be read together with the Funding Agreement as the former refers to the provisions of the latter.
- [4] It is required that the said two agreements entered into between the parties be interpreted in order to adjudicate upon the plaintiff's claim and the defendant's special plea. It is trite law that the interpretation of contracts and other documentation is a question of law, not fact. Consequently, the interpretation of a document is to be determined by a court.
- [5] The parties agreed to enter into a partnership in terms whereof the plaintiff undertook to fund the venture to enable the defendant to establish and grow the operation. The funding would occur in three units of one million rand each. A total deal value would be a maximum amount of three million rand. It was further stipulated in the Funding Agreement that the funding would be released on a per unit basis. The funding of units two and three would only be released once the preceding unit had achieved certain targets that were stipulated in the Funding Agreement. The Funding Agreement further stipulated that each funding period would be over a period of 48 months from the start date of each unit.

- [6] Further in terms of the Funding Agreement 50% of the funding amount would be advanced in Months 1. A further 20% would be advanced in Months 4 based on tracking of targets in months 3. A further 15% in Months 10 and 15 based on tracking of targets in Months 9 and 15. It followed that funding of each unit would be over a 48 month period.
- [7] It follows from the foregoing that funding in respect of unit 1 would be over a 48 month period commencing on the payment of the initial R500 000.00. The initial payment of R500 000.00 was made by the plaintiff to the defendant during June 2014.
- [8] In the Acknowledgement of Debt, it is recorded that the defendant is indebted to the plaintiff in an amount of R500 00.00. That document further recorded that the said amount is due owing and payable by the defendant to the plaintiff in accordance with the provisions of the Funding Agreement.
- [9] The Funding Agreement further stipulated that should 50% of the prescribed targets of each unit not be met as required, then the entire funding agreement would terminate.
- [10] From the allegations in the pleadings it is gleaned that the defendant failed to achieve the first milestone in the first 3rd month period after the commencement of the first period. No allegation was pled that the defendant did not even achieve the first milestone at least within the 48 months after the commencement of the first unit. Accordingly, it is found that the funding agreement in respect of the first unit terminated at the end of the 48 month period of the first unit as stipulated in clauses 6 and 7 thereof.
- [11] It being common cause between the parties that in view of the fact that the defendant failed to reach the first milestone, the plaintiff made no further payments.

- [12] Following on the fact that the defendant failed to comply with the first condition, that of achieving the first milestone, the plaintiff instituted the action for repayment of the initial funding amount made to the defendant.
- [13] The special plea of prescription recorded the concluding of The Funding Agreement on 15 May 2014. It further recorded that the initial funding amount was paid during the first month following on the concluding of the said agreement, i.e. June 2014. The defendant further pled that the plaintiff made no allegation in respect of any further steps of interventions taken between June 2014 and January/February 2020 when summons was issued and served. The plea concludes that a period of more than 3 years elapsed before the plaintiff attempted to recoup the initial funding amount. Consequently, the defendant pled that in terms of the provisions of the Prescription Act, 68 of 1969 (the Act), and in particular section 11(a) to (d) thereof, the plaintiff's claim became prescribed prior to the institution of this action.
- [14] The defendant further alleged that the plaintiff did not replicate on the plea of prescription, thus no delay or interruption of the running of prescription provided for in sections 13, 14 and 16 of the Act was alleged.
- [15] The defendant submitted in its heads of argument, and in oral argument, that in terms of section 14 of the Act, the running of prescription shall be interrupted by an express or tacit acknowledgement of liability on the part of the debtor. It was further submitted on behalf of the defendant that the signing of the Confirmation of Settlement and Undertaking to Repay on 21 May 2014 constituted an interruption of the running of prescription. The defendant further submitted that on 20 May 2015, the running of prescription started afresh and was completed on 20 May 2018. The defendant concluded that when summons was issued in January 2020, the plaintiff's claim for repayment had become prescribed. That submission was premised upon the allegation that in the present instance the debt became due as soon as the plaintiff became aware of the debt being due in view of the fact that the

defendant did not reach the first milestone at the end of the third month. It was submitted that the full amount would be payable immediately in the fourth month. The plaintiff accordingly knew that no further payments would be made in terms of the said agreement. Consequently, so it was submitted by the defendant, prescription commenced running in the fourth month. Further in view thereof that the signing of the acknowledgement of debt interrupted the running of prescription until 20 May 2015. It commenced running once again on 21 May 2015 for a period of three years until 20 May 2018.

- [16] Applying the cannons of construction, contextually considered, and with a purposive approach, the purpose of the contracts under scrutiny is satisfied by the undisputed pleadings.
- [17] In this regard, the plaintiff submitted that the Acknowledgement of Debt specifically records that the defendant is indebted to the plaintiff in the amount of R500 000.00 being the debit amount owing on the defendant's commission account with the plaintiff as at 21 May 2014. That amount was due, owing and payable by the defendant to the plaintiff in accordance with the provisions of the High Level Deal Structure New Franchise-Funded Agreement concluded between the parties on 15 May 2014. The Acknowledgement of Debt further provided that in the event that the defendant achieved all the targets as stipulated in the said agreement, the plaintiff would write off the R500 000.00. Conversely, should the defendant fail to reach all the targets in terms of the said agreement, the amount repayable would be calculated at the percentage of Net Production Credits and Net Case Count not achieved multiplied by the amount advanced in terms of the Funding Agreement. The foregoing was admitted by the defendant in its plea.
- [18] Further in this regard, the plaintiff submitted that the date for repayment of monies by the defendant thus became due at the termination of the funding period, at least in respect of the first unit. In my view that submission is correct. To hold otherwise would cast a different and

skewed interpretation on the terms of the Funding Agreement and the Acknowledgement of Debt. There is accordingly no merit in the defendant's special plea that the due date for repayment of the initial payment of R500 000.00 was during the fourth month following on the conclusion of the Funding Agreement.

- [19] In terms of the Funding Agreement, the funding periods terminate 48 months from the start date of each unit. This was admitted by the defendant in its plea. In terms of the Acknowledgement of Debt, the first funding period terminated 48 months from 21 May 2014 when the first payment was made. The said 48 months thus terminated on 20 May 2018. Consequently, the running of prescription only commenced 20 May 2018. The 3 year-period of the running of prescription would thus only lapse on 19 May 2021.
- [20] As recorded earlier, the plaintiff instituted action for the repayment of the initial R500 000.00 in January 2021, well within the three year period from May 2018.
- [21] From the foregoing, the real dispute in the matter relates to the date upon which the plaintiff became aware of the debt being due, owing and payable. As recorded earlier, the defendant contended that the plaintiff became aware that the defendant had missed the first milestone and that such occurred during month 4. Accordingly, the plaintiff became aware of the debt during month 4. The 3 year period of prescription came to end during May 2018 in view of the Acknowledgement of Debt signed during May 2014. For all of the foregoing, that contention holds no water. It ignores the specific terms of the Funding Agreement read with the Acknowledgement of Debt.
- [22] Consequently, having regard to the period of funding for each of the three units being 48 months, after commencement of each funding period as recorded earlier, that contention of the defendant is incorrect and without merit. I have found that at the end of the 48 month period,

since the initial payment was made, was the date upon which, in terms of the Funding Agreement read with the Acknowledgement of Debt, the amount of R500 000.00 became due, owing and payable by the defendant. That 48 month period would end during May 2018.

[23] Accordingly, I find that the plaintiff's claim has not become prescribed and the defendant's special plea of prescription stands to be dismissed.

[24] The plaintiff sought rectification of the description of the defendant in the Acknowledgement of Debt. The Acknowledgement of Debt, incorrectly reflected the defendant as Syndesis Consulting with registration no. 2006/033268/23 instead of reflecting the defendant as HFM Management Company (Pty) Ltd with registration no. 2014/115504/07. That error was made *bona fide*. The defendant admitted the error. Accordingly, the plaintiff is entitled to rectification of the Acknowledgement of Debt.

I grant the following order:

1. Annexure B to the particulars of claim dated 22 January 2020 is rectified as follows:

1.1 to reflect HFM management Company (Pty) Ltd
(Registration No: 2014/115504/07) as "*the Debtor*"
thereon;

1.2 that the first paragraph on page 1 thereof read as follows:
"in the sum of R500 000.00 (five hundred thousand rand only), being the debit amount owing on the Debtors commission account with the Creditors as at 21 May 2014, and which amount is due owing and payable by the Debtor to the Creditor in accordance with the provisions of a High Level Structure New Franchise - Funded Agreement ("the Agreement") concluded between the debtor and the

Creditor on May 2014 and which liability the Debtor has undertaken to discharge.”; and

- 1.3 to reflect that Mr Jacobus Van der Merwe signed the document for and on behalf of the defendant on page 4 thereof.
2. The defendant's special plea of prescription pleaded at paragraphs 1.1 to 1.5 of the defendant's plea dated 23 March 2020 is dismissed.
3. The defendant is to pay the costs.


C J VAN DER WESTHUIZEN
JUDGE OF THE HIGH COURT

On behalf of Applicant: Instructed by:	Adv. R Goslett Gerings Attorneys
On behalf of Respondent: Instructed by:	Adv. M van Wyngaard Hefferman Attorneys
Date of Hearing:	13 May 2024
Judgment Delivered:	28 August 2024