

SOUTH AFRICA / JUDGMENT

Bhagwandeem v Walter Sisulu University (1848/2013) [2016] ZAECHGHC 125 (3 November 2016) [2016] ZAECHGHC 125

COURT

Eastern Cape High Court, Grahamstown

BEFORE

Pickering

CASE / FILE NUMBER

1848/2013

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IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, GRAHAMSTOWN)

Case no: 1848/2013

Date heard: 28 October 2016

Date delivered: 3 November 2016

In the matter between

VINODH RAMDEEN BHAGWANDEEN

Plaintiff

vs

WALTER SISULU UNIVERSITY

Defendant

JUDGMENT

PICKERING J:

- [1] On 28 May 2013 the plaintiff, an adult male and former Director of Student Affairs of the Walter Sisulu University (“WSU”) issued summons against WSU, the latter being a duly established University with its principal place of business at Mthatha.

- [2] Five claims were pleaded in all. In all but one claim, namely claim 1, the defendant has pleaded that the claims have become prescribed. At the commencement of the hearing before me I was advised that the parties were agreed that the special pleas in respect of prescription be determined separately from the merits. Accordingly the matter proceeded only on the issue of the special pleas raised in respect of claims 2 to 5.
- [3] It is common cause that on 31 May 2010 and at East London plaintiff and defendant entered into a “Retrenchment Agreement” (Exhibit A) in terms whereof plaintiff terminated his employment relationship as Director of Student Affairs with WSU with effect from 31 May 2010. The agreement made provision for the payment by defendant to the plaintiff of certain amounts in respect of salary as well as in regard to plaintiff’s entitlement, inter alia, to payment for accumulated leave; a bonus; payment of normal benefit entitlements for a period of 6 months in lieu in notice; and a severance payment in respect of every year of completed service.

- [4] Clause 2.2.4 provided as follows:

“All legitimate and legal claims of the employee still outstanding will be paid.”

It is this clause which has given rise to the proceedings before me.

- [5] The relevant claims are, briefly, as follows:

5.1 In respect of claim 2 plaintiff claims remuneration for an outstanding official travel claim which arose during 2009 and 2010.

5.2 In respect of claim 3 plaintiff claims reimbursement for the costs of an official trip undertaken by him to Asia during March 2009.

5.3 In respect of claim 4 plaintiff alleges that in terms of a motor vehicle policy he was entitled to the balance of an insurance payment which defendant received from the insurer after the vehicle had been destroyed in an accident during 2004.

5.4 In respect of claim 5 plaintiff alleges that in breach of his contract of employment defendant failed to provide him with a new motor vehicle for the period 1 April 2006 to 1 March 2008 and that in consequence thereof he suffered certain damages.

- [6] In his evidence plaintiff stated that during 2009 reports emerged of wide-spread corruption at WSU involving, inter alia, lecturers

passing students in exchange for sexual favours. An investigative report into the matter was, according to plaintiff, buried by the then Vice Chancellor. Because of plaintiff’s uncompromising stance against corruption there was much agitation to have him removed from his position. Things reached a head when another person was appointed to his post despite the fact that plaintiff still occupied it. He was told by the Executive Director of Human Resources that the Vice Chancellor wanted him out of the University at all costs.

[7] On 27 May 2010 he met with the Director of Legal Services, Ms. Madhi. She told him that the Vice Chancellor had instructed

that he was to leave the University. She presented him with a Voluntary Severance document. He refused to sign it because it did not provide for the payment of outstanding monies to which he alleged he was entitled as set out in claims 1 to 5.

[8] After certain negotiations Ms. Madhi drafted the retrenchment package, Exhibit A. As set out above this retrenchment package

included clause 2.2.4. According to plaintiff the word “legitimate” was included at his insistence. He stated that it was understood between himself and Ms. Madhi that as long as his

outstanding claims were approved and the correct procedure with regard to supporting vouchers was followed, they would be met by

defendant. The specific amounts claimed by plaintiff in respect of each claim were not, however, discussed. The parties then signed the retrenchment agreement on 31 May 2010.

[9] No payment was forthcoming from defendant in respect of these claims, however, and, accordingly, plaintiff issued summons on 28 May 2013.

[10] It is common cause that, as at 31 May 2010, before the retrenchment package was signed, claim 4 and part of claim 5 had already become prescribed and that, absent any interruption of prescription, claims 2 and 3 had thereafter become prescribed prior to the issuing of summons.

[11] Plaintiff, however, relies on the provisions of clause 2.2.4 as having interrupted prescription and pleads in a replication that in respect of each of the claims prescription of his “legitimate” claims “was interrupted by the defendant’s admission of 31 May 2010 that it would pay all plaintiff’s legitimate and legal claims that were outstanding at the time of the agreement.”

[12] Plaintiff relies in this regard on section 14(1) of the Prescription Act 68 of 1969 which provides:

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

[13] Mr. Boswell, who appeared on behalf of plaintiff, submitted that the provision in clause 2.2.4 that all legitimate and legal claims of the plaintiff still outstanding would be paid by the defendant constituted an express acknowledgment of liability by defendant. Mr. De la Harpe, who appeared on behalf of defendant, submitted to the contrary that such clause was in effect no more than an acknowledgment of a willingness to consider and pay any further and additional claims on condition that they were legitimate and that it was clearly not an acknowledgment of liability either expressly stated or tacitly conveyed.

- [14] Mr. Boswell submitted further with regard to the plea of prescription in respect of claims 4 and part of 5, which claims had already prescribed as at the date of signature of the retrenchment agreement, that clause 2.2.4 amounted to a renunciation by defendant of prescription. In this regard he referred to *Brown v Courier* 1963 (3) SA 325 (NPD) the headnote of which at 325B – C correctly reflects what was stated in the judgment and reads as follows:

“The true conception of renunciation of prescription is not that it is a waiver but a new contract contained in an undertaking or promise to pay the prescribed debt. The question in relation thereto always is whether the words or conduct of the debtor are to be construed as amounting to an undertaking or promise to pay the debt.”

See too: *Debbo v Claude Whitecross Garage* 1962 (2) SA 177 (ECD).

- [15] In my view, leaving aside for the moment the issue as to whether clause 2.2.4 constitutes an express or tacit acknowledgment of liability by the defendant in respect of the relevant claims, Mr. Boswell’s submission cannot succeed inasmuch as the clause provides for the payment only of “legitimate” claims.
- [16] “Legitimate” is defined in this context in the Concise Oxford English Dictionary as “conforming to the law or to rules.” I agree with the submission by Mr. De la Harpe that on an ordinary and proper interpretation (as to which see *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA)) a “legitimate” claim cannot include a claim which has already become prescribed. It is not possible, in my view, to construe clause 2.2.4 as amounting to an undertaking or promise by defendant to pay such claims as had already become prescribed. In my view therefore the submission that defendant renounced prescription cannot succeed.
- [17] The next issue is whether clause 2.2.4 amounted to an acknowledgment of liability by the defendant such as to interrupt the running of prescription.
- [18] I have been referred in this regard to a number of authorities including *Agnew v Union and South West Africa Insurance Co Ltd* 1977 (1) SA 617 (AD) and *Cape Town Municipality v Allie* NO 1981 (2) SA 1 (CPD). The case of *Benson and Another v Walters and Others* 1984 (1) SA 73 (AD) is, in my view, decisive of the present matter.
- [19] In *Benson supra*, an attorney, Walters, acted for the appellant, Benson. Benson then terminated Walter’s mandate and called for complete accounts “for all cases handled on my behalf or on behalf of my company” as well as for the relevant files. Walters refused to hand over the files “until my bills have been paid.” Benson then consulted another attorney, Luck, who wrote to Walters on 26 October 1976 as follows:

“Our client requires taxed bills of cost in respect of each file and you may give us notice of taxation in this connection. We are informed that our client has paid you R5 000 on account of your fees and disbursements and we have been authorised to guarantee to you payment of whatever shortfall you are able to establish after taxation.”

[20] Walters handed over the files and in due course they were taxed. A shortfall was established but when Walters demanded payment thereof from Benson the latter sought an order declaring that by that time Walters’ claims had become prescribed. The matter eventually found its way to the then Appellate Division where it was submitted on appeal on behalf of Walters that the abovementioned letter of 26 October 1976 constituted an admission of liability by Benson in regard to the fees and disbursements owing to Walters.

[21] Van Heerden JA, with whom Rabie CJ, Corbett JA and Trengrove JA concurred (Nicholas JA dissenting) referred at 86 H – 87 C with approval to the case of *Petzer v Radford (Pty) Ltd* 1953 (4) SA 314 (N) where Broome JP stated:

“To interrupt prescription an acknowledgment by the debtor must amount to an admission that the debt is in existence and that he is liable therefore.”

[22] At 87 B – C Van Heerden JA stated:

“In Markham v SA Finance and Industrial Co Ltd 1962

(3) SA 669 (A) at 676 this Court referred to Petzer's case as authority for the proposition that an admission in terms of s 6 (1) of Act 18 of 1943 had to be an admission of present liability. It seems clear that Rumpff JA approved of the view of Broome JP that a mere acknowledgment that a debtor incurred an obligation is not necessarily tantamount to an acknowledgment of liability.”

[23] The learned Judge continued at 87 C – F:

“I revert to the terms of the crucial letter. It certainly contained a conditional undertaking to pay, but in my view not an admission of existing liability. The distinction can best be illustrated by assuming that Luck had explicitly denied that an amount of more than R5 000 would be taxed, but in order to secure the release of Benson's files had nonetheless guaranteed payment of any unanticipated shortfall. In the postulated case the letter would still have contained a conditional undertaking to pay, but quite clearly not an admission of liability; on the contrary an express denial of liability. It will therefore be seen that such an admission does not flow from the undertaking as such.

It is true that in the letter actually written by him Luck did not specifically deny liability. But neither did he admit liability.

No doubt Luck implicitly admitted that Benson owed Walters some unascertained amount in respect of fees and disbursements, but in view of the alleged payment of R5 000 by Benson it was an acknowledgment that an indebtedness had been incurred but not an acknowledgment of an existing liability. What Luck in effect said was that he did not know whether an amount of more than R5 000 would be taxed and therefore did not know whether Benson was liable to make a

payment to Walters, but that, if a liability did exist, his firm would pay the amount thereof. In my view this did not constitute an admission of liability.”

[24] In my view the facts in the present matter are virtually on all fours with those in Benson supra. In my view, clause 2.2.4, properly construed, was no more than an undertaking to pay such claims of the plaintiff as he might in future succeed in establishing were “legitimate and legal”. At best for plaintiff the clause was an acknowledgment that an indebtedness had been incurred together with a conditional undertaking by defendant to pay any such claims as were so established. It was not an acknowledgment of existing liability and it did not therefore serve to interrupt the running of prescription.

[25] In the light of the finding that clause 2.2.4 is neither an express nor a tacit acknowledgment of liability on the part of the defendant it follows that by the date of service of the summons on defendant on 28 May 2013, claims 2, 3, 4 and 5, which had all arisen more than three years prior thereto, had become prescribed.

[26] The following order will therefore issue:

“1. Claims 2, 3, 4 and 5 are dismissed with costs.

2. Plaintiff is ordered to pay the costs of the determination of the separated issue relating to prescription.

J.D. PICKERING

JUDGE OF THE HIGH COURT

Appearing on behalf of Plaintiff: Adv. Boswell

Instructed by: Neville Borman & Botha Attorneys, Mr. Powers

Appearing on behalf of Defendant: Adv. De la Harpe

Instructed by: Netteltons Attorneys, Mr. Nettelton

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