

SOUTH AFRICA / JUDGMENT

BKB Limited v Bezuidenhout (3115/2017) [2019] ZAECHGHC 18 (5 March 2019)

[2019] ZAECHGHC 18**COURT**

Eastern Cape High Court, Grahamstown

BEFORE

G H Bloem

CASE / FILE NUMBER

3115/2017

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****EASTERN****CAPE DIVISION, GRAHAMSTOWN****CASE****NO. 3115/2017****In**

the matter between:

BKB
LIMITED
Plaintiff
and
PIETER
BEZUIDENHOUT
Defendant

JUDGMENT

Bloem J.

[1] This is a claim for payment of the sum of R318 115.06 in respect of goods sold and delivered by the plaintiff to the defendant. The defendant's case is that the plaintiff's claim against him has prescribed and that he was in any event not indebted to the plaintiff.

[2] The plaintiff is a company while the defendant is an adult male.

In paragraphs 3 and 5 of its particulars of claim the plaintiff pleaded that:

“3. During the period 17 November 2012 to 14 January 2013 the Plaintiff and Defendant concluded an oral agreement in terms whereof the Plaintiff undertook to sell and deliver fertilizer to the Defendant at the Defendant’s special instance and request, from time to time.”

“5. It was an express, alternatively implied, alternatively, tacit term of the said agreement that:

5.1 Plaintiff would sell and deliver fertilizer to the Defendant at the Defendant’s special instance and request; and

5.2 Upon delivery of the said fertilizer, the Defendant would be invoiced, and payment would then be made upon demand for payment.”

[3] The plaintiff alleged that in accordance with the terms of the agreement it made nine deliveries to the defendant between 17 November 2012 and 14 January 2013. The defendant made two payments on 24 June 2014 and 25 June 2014 (the payment) to the defendant, leaving a balance of R318 115.06, the amount claimed in these proceedings. By registered letter dated 14 June 2017 the plaintiff demanded payment of the above amount from the defendant.

[4] In paragraphs 11 and 12 of its particulars of claim the plaintiff pleaded that:

“11. As at 14 June 2017 the remaining balance on the Defendant’s account was R318 115.06.

12. Notwithstanding the terms of the oral agreement, and the fertilizer supplied to the Defendant at the Defendant’s special instance and request, as pleaded above, the Defendant has failed to make payment in the sum of R318 115.06, either as he was obliged to do or at all.”

[5] The defendant pleaded that each delivery of fertilizer by the plaintiff to him was the subject of a separate agreement, that the payment related to specific deliveries made during November 2012 and related only to specific agreements in terms of which those deliveries were made, that each claim for payment would have arisen by no later than 14 January 2013, that the plaintiff’s claims have prescribed in terms of section 11 of the Prescription Act[1] since summons was served on him only on 20 July 2017,[2] more than three years after 14 January 2013.

[6] On the merits, the defendant pleaded as follows to paragraph 3 of the plaintiff’s particulars of claim:

“The defendant admits only that over the period November 2012 to January 2013 he and the plaintiff, from time to time, concluded various oral agreements in terms of which the plaintiff delivered fertilizer to him and, in terms of which the defendant would pay the plaintiff for fertilizer so delivered, on demand by the plaintiff. The further allegations in paragraph 3 are denied.”

[7] He denied the allegations contained in paragraph 11 of the particulars of claim and pleaded as follows to paragraph 12 thereof:

“15.1 ... it was a material term of the various agreements in terms of which the plaintiff, from time to time, delivered fertilizer to him, that he would pay any outstanding amounts on demand by the plaintiff.”

15.2 The two payments made by him, were made after demand by the plaintiff.

15.3 In the absence of any demand for further payment, he was not liable to make any further payments to the plaintiff as alleged in paragraph 12.”

[8] The defendant accordingly pleaded that it was agreed that he would make payment on demand by the plaintiff and that he was accordingly not liable to make payment to the plaintiff in the absence of demand. The defendant admitted that the plaintiff made demand and that he refused to make payment to the plaintiff because, so he pleaded, he was not indebted to the plaintiff.

[9] The issues to be decided are whether or not one or various agreements were concluded, the identity of the entity with whom the defendant concluded the agreement(s) and whether or not the plaintiff's

claim has become prescribed. The second issue did not arise on the pleadings. I was addressed on it at the hearing.

[10] Only one witness testified at the hearing. De Villiers du Plessis testified on behalf of the plaintiff. The defendant neither testified nor called witnesses to testify on his behalf. Mr du Plessis testified that he was employed as the depot manager of East Cape Agricultural Co-Op Limited (ECAC) at Elliot until it was taken over by BKB Limited (BKB), the plaintiff herein. He has known the defendant since the latter was a little boy who used to accompany his father, also a farmer, to the ECAC depot at Elliot where his father used to make purchases. The defendant took over as a farmer from his father. He initially did well for himself as a farmer. He had an account with ECAC which entitled him to purchase fertilizer and other farming requirements from it.

[11] One year the defendant planted a crop which was uninsured. The crop was severely damaged by hail. He unfortunately did not qualify for a production loan from the plaintiff. Because the defendant knew Mr du Plessis he approached him for assistance. Mr du Plessis approached a certain Visser Naude, one of the managers of a company with which the plaintiff had a close business relationship, and explained the defendant's problem to him. Mr Naude also knew that the defendant did not qualify for a production loan. The two of them spoke to the defendant over a period of time, sometimes at the plaintiff's offices and sometimes at the defendant's farm. It was ultimately agreed that the defendant should be assisted despite the fact that he did not qualify for a production loan. Mr du Plessis, acting on behalf of the plaintiff, entered into an agreement with the defendant in terms whereof he could purchase fertilizer from the plaintiff, that the plaintiff would deliver the fertilizer to him and that he did not have to pay the plaintiff until payment was demanded.

[12] He testified that the plaintiff made nine deliveries of fertilizer to the defendant. The first delivery was to the value R15 079.20. The defendant paid that sum in full. The second delivery was to

the value of R30 158.40 in respect whereof the defendant made part payment of R19 602.92, leaving a balance of R10 555.48.

The fourth delivery was to the value of R63 816.00 in respect whereof the defendant made part payment of R15 156.30, leaving a balance of R48 659.70. The defendant did not make payment in respect of the third, fifth to ninth deliveries, totalling R261 738.39, which, added to the outstanding balances of R10 555.48 and R48 659.70, amount to R320 953.57.

The plaintiff accordingly underclaimed by R2 838.51.

[13] Mr du Plessis testified that there was only one agreement between the parties. There was no evidence to the contrary, with the result that I accept his evidence of the existence of one agreement only.

[14] He furthermore testified that the name of his employer changed from ECAC to BKB during

2010. He conceded that he did not know when exactly ECAC ceased to exist and when BKB commenced to operate. He was however adamant that it was during 2010. When BKB started operating, he decided not to waste the many ECAC delivery books but continue using them for BKB deliveries. It was for that reason, he testified, that the first seven delivery notes issued

to the defendant still reflected ECAC's name. I accept, in the absence of evidence to the contrary, that when Mr du Plessis concluded the agreement with the defendant between November 2012 and January 2013, ECAC had ceased to exist and that he, on behalf of BKB, concluded the agreement with the defendant.

[15] The above conclusion finds support in the plea wherein the defendant admitted that during the above period he and the plaintiff, from time to time, concluded various oral agreements "in terms of which the plaintiff delivered fertilizer to him and, in terms of which the defendant would pay the plaintiff for fertilizer so delivered, on demand by the plaintiff." BKB is the plaintiff in the pleadings. Implicit in that admission is an acknowledgment that BKB was in existence between November 2012 and January 2013. Furthermore, at the commencement of the hearing the parties informed the court that the defendant admitted that BKB made the eighth and ninth deliveries to him on 27 or 28 December

2012. BKB could only have delivered the fertilizer to the defendant if it was in existence. In all the circumstances, I find that, although it was not an issue on the pleadings, it has been established by BKB, the plaintiff, that it was in existence when the agreement was concluded and when delivery took place. That disposes of the first two issues. I will now deal with the issue of prescription.

- [16] Mr Ronaasen, counsel for the defendant submitted that, because the second delivery was made on 19 November 2012 and the last delivery on 14 January 2013, the plaintiff's claim for payment has prescribed. Mr Cole, counsel for the plaintiff, submitted that the special plea of prescription should be dismissed because, so the submission went, it was a term of the agreement that payment would become due only on demand, that demand was only made by the plaintiff's attorney on 14 June 2017 and that prescription therefore only began to run from the date of demand. In the alternative counsel submitted that prescription was interrupted when the defendant made the payment to the plaintiff.
- [17] Section 14 of the Prescription Act deals with the interruption of prescription by acknowledgment of liability. It reads as follows:
- “(1) The running of prescription shall be interrupted by an express or tacit acknowledgment of liability by the debtor.*
- (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.”
- [18] Section 11 (a), (b) and (c) of the Prescription Act contains different periods of prescription. They vary from thirty years to six years. Section 11 (d) provides that, save where an Act of Parliament provides otherwise, the period of prescription of debts shall be three years in respect of debts not covered by section 11 (a), (b) and (c). The parties were in agreement that the period of prescription in this case was three years. If the plaintiff's contention regarding demand is not upheld or if it is found that the payment did not interrupt prescription, the special plea must be upheld because more than three years had elapsed between the delivery of the fertilizer and the service of the summons on the defendant on 20 July 2017.[3]
- [19] In *Trinity Asset Management (Pty) Ltd v Grindstone Investments 132 (Pty) Ltd*[4] Cameron J stated that the fact that the creditor has the exclusive power to demand that performance be made when he so chooses, has given rise to the general rule applying to loans ‘payable on demand’, “namely that prescription begins to run when the debt arises, unless there is a clear indication to the contrary.” Each case must of course be decided on its own peculiar facts. The circumstances under which the agreement was concluded and the material terms thereof are important facts which must be taken into account to decide whether the debtor is liable to make payment from the date when he or she has received payment or when demand is made.
- [20] In this case the circumstances indicate that the parties intended that prescription should not begin to run from the date of delivery of the fertilizer. Firstly, Mr du Plessis testified that, because of the situation in which the defendant found himself, it was agreed between the parties that the plaintiff would not be able to claim payment from the defendant until it had demanded payment from the defendant. When he was asked in cross-examination why it took the plaintiff more than four years to demand payment from the defendant, his evidence

was that the plaintiff tried to get the defendant back on his feet after the financial disaster which he suffered when the hail severely damaged his uninsured crop. Secondly, in opposition to the plaintiff's application for summary judgment, the defendant delivered an affidavit wherein he alleged in paragraph 5.3 thereof that it was a material term of the agreement that payment "would only be due and payable upon demand by the [plaintiff]." That version was in accordance with Mr du Plessis's evidence. Thirdly, in paragraph 15.3 of his plea the defendant pleaded that, absent any demand by the plaintiff for payment by him, he was not liable to make any further payment to the plaintiff. That was also the plaintiff's case. There was accordingly, on the pleadings and the evidence, agreement that the debt was neither claimable nor payable until demand was made.

- [21] In the circumstances, by agreement, prescription did not run until demand was made on or about 14 June 2017. Prior to then there was not a debt claimable by the plaintiff. Put differently, there was no debt in respect of which the defendant was under an obligation to perform.[5] It was only after the plaintiff had made the demand that the defendant became liable to make payment to it. In the circumstances, the plaintiff's claim against the defendant has not become prescribed. The special plea of prescription must accordingly be dismissed. In view of the above finding it is unnecessary to deal with Mr Cole's alternative submission to the effect that the special plea of prescription must nevertheless be dismissed because of the payment that the defendant made to the plaintiff during June and July 2014.
- [22] In all the circumstances, the plaintiff has established on a balance of probability that the defendant owes him the sum of R318 115.06, which claim has not prescribed.
- [23] At the hearing of the application for summary judgment, the parties agreed that the defendant should be granted leave to defend the plaintiff's action and that the costs occasioned by the application for summary judgment be reserved. Such an order was made. The plaintiff was successful in his claim against the defendant. There is no reason why the defendant should not be held liable for the costs occasioned by the application for summary judgment. Furthermore, it was only on the morning of the hearing that the defendant acknowledged that the plaintiff had made the eighth and ninth deliveries to him. At that stage the plaintiff had caused Blessed Garandwaku to travel to Grahamstown to give evidence in respect of those deliveries. The defendant should accordingly pay the costs of Mr Garandwaku's attendance at court on 18 February
2019. Lastly, without the evidence of Mr du Plessis, the plaintiff would not have proved its case against the defendant. Mr du Plessis should accordingly be declared a necessary witness.
- [24] Although the plaintiff could have instituted action against the defendant in the regional court,[6] I have, in the exercise of my discretion, decided to grant the plaintiff costs on the high court scale. That is so because in the affidavit which the defendant delivered in opposition of the application for summary judgment, he denied having ordered or received the fifth, sixth, eighth and ninth deliveries of fertilizer. Mr du Plessis testified that the defendant ordered

the fertilizer from the plaintiff which made nine deliveries to him. He furthermore testified that it was the defendant's signature on the four delivery notes, receipt of which the defendant denied in his aforesaid affidavit. Mr du Plessis's evidence in that regard was unchallenged. At the commencement of the hearing the defendant acknowledged receipt of the eighth and ninth deliveries, contrary to what he alleged in his aforesaid affidavit. He was accordingly not altogether frank with this court when he denied in his aforesaid affidavit having ordered and received the four deliveries of fertilizer. As a mark of this court's disapproval of the defendant's conduct in this regard, he must pay the costs of the action on the high court scale.

[25] In the result, it is ordered that:

25.1. The defendant's special plea of prescription be and is hereby dismissed.

25.2. The defendant shall pay to the plaintiff:

25.2.1. the sum of R318 115.06;

25.2.2. interest on the sum of R318 115.06 at the legal rate per annum from a date fourteen days after this judgment to date of payment thereof; and

25.2.3. costs of the action, such costs to include:

25.2.3.1. the costs occasioned by the application for summary judgment; and

25.2.3.2. the travelling and accommodation expenses relevant to Mr Garandwaku's attendance at court.

25.3. Mr du Plessis be and is hereby declared a necessary witness.

G H BLOEM

Judge of the High Court

For the plaintiff:

Adv S H Cole, instructed by Wheeldon Rushmere and Cole, Grahamstown.

For the defendant:

Adv O H Ronaasen SC, instructed by Roelofse Meyer, Port Elizabeth and Nettletons, Grahamstown.

Date heard:

18 February 2019.

Date of delivery of the judgment: 5 March 2019.

[1] Prescription Act, 1969 (Act No. 68 of 1969).

- [2] At the hearing the plaintiff's counsel undertook to make the return of service in respect of the summons available the court and the defendant. The return of service was filed of record on 28 February 2019.
- [3] Section 15 (1) of the Prescription Act provides that the running of prescription is interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt.
- [4] *Trinity Asset Management (Pty) Ltd v Grindstone Investments 132 (Pty) Ltd* 2018 (1) SA 94 (CC) at 125A.
- [5] *Standard Bank of South Africa Ltd v Miracle Mile Investments 67 (Pty) Ltd and another* 2017 (1) SA 185 (SCA) at 194A.
- [6] In terms of section 29 (1) (g) of the Magistrates' Court Act, 1944 (Act No. 32 of 1944) a magistrate's court has

jurisdiction in actions where the claim does not exceed R400 000.00. See Government Notice 216 in Government Gazette 37477 of 27 March 2014.

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