

SOUTH AFRICA / JUDGMENT

Latib v Pro Sano Medical Scheme (6045/2008) [2012] ZAWCHC 234 (12 December 2012)

[2012] ZAWCHC 234

COURT

Western Cape High Court, Cape Town

BEFORE

A.G. Binns-Ward

CASE / FILE NUMBER

6045/2008

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IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No: 6045/2008

In the matter between:

SHABEER LATIBPlaintiff

and

PRO SANO MEDICAL SCHEMEDefendant

JUDGMENT:

12 DECEMBER 2012

BINNS-WARD J:

- [1] The plaintiff instituted action against the defendant claiming the following substantive relief (I quote from prayers (a) and
- (b) in the finally amended particulars of claim):
- (a) [An order that] Defendant is bound to comply with the terms of the agreement concluded on 27 October 2004 between Plaintiff and Defendant;
- (b) An order that the Defendant is liable to make payment to the Plaintiff for services, being -

- (i) Consulting services at R456,00 per hour for an average of 140 hours per month from September 2002, with annual escalations, to date of due termination of this agreement, which has not yet occurred;
 - (ii) The managed care system at the rate of R4,92 plus VAT, per member per month, with annual escalations from 1 May 2001;
 - (iii) Interest on the said amounts at the rate of 15,5% per annum from due dates subject to the following deductions -
 - (aa) the amount of R130 507.20 paid to the Plaintiff by the Defendant in or about September/October 2005 in part payment of the Plaintiffs claim in respect of the novated agreement;
 - (bb) any amount which the Court may determine that the Defendant is liable to pay to Diamond in respect of amounts claimed by the Plaintiff.
- [2] The claim is predicated on an agreement allegedly concluded between the parties on 27 October 2004. The agreement (which is denied by the defendant) is pleaded as follows in the plaintiffs particulars of claim, as finally amended:
54. At the conclusion of the said meeting of 27 October 2004, it was agreed between the parties that the indebtedness of Defendant to Plaintiff was orally novated as follows:
- 54.1. Defendant would make payment to Plaintiff in an amount to be agreed upon between Plaintiff and Defendant, or otherwise determined by a Court, in respect of Plaintiff's claims against Defendant for the services based on -
- (a) the Defendant's liability to the Plaintiff in respect of consulting services at R456.00 per hour for an average of 140 hours per month from September 2002 with annual escalations in accordance with industry standards to date of due termination of this agreement, which has not yet occurred;
 - (b) the Defendant's liability to the Plaintiff in respect of the managed care system at the rate of R4.92 plus VAT, per member per month, with annual escalations in accordance with industry standards from 1 May 2001.
- 54.2. Payment of the said amount to be determined was conditional upon-
- (a) Plaintiff agreeing to assist Defendant in its defence of Diamond's claim;
 - (b) Plaintiffs claim being adjusted by any amount which the Court may determine that Defendant was liable to pay to Diamond in respect of amounts claimed by Plaintiff.
- [3] The defendant raised a special plea of extinctive prescription. The parties agreed that it would be convenient to determine the special plea separately from and before the remaining issues in the case. To facilitate this, the parties settled a stated case in terms of rule

33. At the commencement of the hearing on 10 December 2012 I made a ruling in terms of rule 33(4) for the special plea to be determined separately, as sought by the parties.
- [4] For the purposes of the adjudication of the special plea the defendant accepted that an agreement as alleged by the plaintiff had been concluded.
- [5] The first head of relief (that sought in terms of prayer (a) quoted above) begs the question what it is that defendant would be required to do in order to comply with the alleged agreement. The answer shows that the first head of relief sought is essentially meaningless. Compliance with the agreement would entail agreeing with the defendant on an amount to be paid to it, subject to adjustment on the outcome of litigation between the Diamond and the defendant; alternatively submitting to a determination of the amount by the court. The terms of the alleged agreement did not bind the parties to take the agreement route and left it open to the plaintiff, if he so chose, to seek a determination from the court.
- [6] The second head of relief (that sought in terms of prayer (b) quoted above) is in effect a prayer for the determination contemplated in terms of the alleged agreement.
- [7] It is evident that agreement between the parties on the quantum, or a determination of the amount by a court, was a contractually

stipulated pre-requisite for the contemplated possible adjustment necessary to establish an eventual money claim by the plaintiff

against the defendant. The money claim would be quantifiable and exigible only after the determination of the litigation between

Diamond and the defendant. Thus the effect of the alleged agreement was to constitute a farther agreement between the parties, or a court determination as an element that had to be put in place before an exigible claim sounding in money could be enforced by the plaintiff against the defendant. As a consequence of the agreement the plaintiff could no longer just claim the amount he alleged had been due to him in terms of the service agreements allegedly in place between himself and the defendant; he had first to go through a process to establish a sum sounding in money, whether by agreement, or court determination.

- [8] It is that characteristic which makes the description of the agreement allegedly concluded on 27 October 2004 as being of a

novationary character understandable. As a result of the alleged agreement, certain claims going back to May 2001, which ordinarily

would have been extinguished by prescription in May 2004, were given a basis to be taken into account for subsequent recovery purposes

subject to be being brought within an agreed quantum, or one determined by the court. The alleged October 2004 agreement thus created scope, subject to compliance with its terms, for the recovery by the plaintiff of amounts which extinctive prescription would otherwise have excluded, thereby in a sense providing for the creation of debt that had not existed at the time of the conclusion

of the agreement. The alleged agreement thus undoubtedly created sui generis rights quite distinguishable from the ordinary right of a service provider to payment from its customer for services rendered.

[9] It is not in dispute that the relevant period of extinctive prescription in terms of the Prescription Act 68 of 1969 is that provided in terms of s 11(d); viz. three years. The summons was served on the defendant on 21 April 2008. Thus if prescription began to run when the alleged agreement was concluded, as contended by the defendant, the claim had been extinguished by prescription (unless prescription had at some stage in the intervening three and a half years been interrupted). The plaintiff, however, contends that the claim in terms of the agreement was not susceptible to prescription until the determination of the litigation between Diamond and the defendant, alternatively, the date of any earlier repudiation of the agreement by the defendant.

[10] Section 12(1) of the Prescription provides :

Subject to the provisions of subsections (2), (3) and (4) [none of which is applicable in the current matter] prescription shall commence to run as soon as the debt is due.

In Cape Town Municipality and Another v AUianz Insurance Co Ltd 1990

(1) SA 311 (C), at 321C, it was held 6A debt becomes due in terms of the Act when the creditor acquires a complete cause of action for its recovery: see HMBMP Properties (Pty) Ltd v Kins 1981 (1) SA 906 (N) at 910A. A cause of action is the entire set of facts which plaintiff must prove to succeed: see Evins v Shield Insurance Co Ltd 1980 (2) SA 814 (A) at 838G and , at 325J, 'it must be remembered that the normal position is... that you can only sue when you have a cause of action, and you only have a cause of action when the debt is due.'

[11] It is unnecessary for present purposes to review the extensive jurisprudence on the meaning of the word 'debt' in the

various provisions of the Prescription Act. Suffice it to say it includes claims for unliquidated damages and claims not sounding in money; see Benson and Another v Walters and Others 1984

(1) SA 73 (A), at 82D.

[12] In my judgment the required further agreement or court determination stipulated in terms of the alleged agreement of 27 October 2004 is analogous to the declaration in terms of s 64(1) of the Close Corporation Act 69 of 1984 that was under consideration in Burley Appliances Ltd v Grobbelaar NO and others 2004 (1) SA 602 (C). The plaintiff was entitled

from the moment of the conclusion of the alleged agreement of 27 October 2004 to approach a court for the determination alleged in paragraph 54.1 of his particulars of claim. The terms of the alleged agreement do not make the right to approach court for a determination contingent upon a failure by the parties to reach an agreement on quantum.

[13] Bearing in mind that a right and a 'debt' have been described as 'merely opposite poles of one and the same

obligation\ it is evident that the agreement that, upon its conclusion, brought the right to approach the court into existence,

also gave rise to the creation of the attendant debt. The obligation in question is that undertaken by the defendant to submit to the contractually stipulated determination; cf *Duet and Magnum Financial Services CC v Koster*

[2010] 4 All SA 154 (SCA), at para. 23-24.

[14] In the circumstances prescription commenced to run on 27 October 2004 and the right to claim the determination was extinguished by prescription three years later. In the result, summons having been served in April 2008, the defendant's special plea of prescription falls to be upheld in my view unless an interruption of prescription is established by the plaintiff (cf *L Pentz v Government of Republic of South Africa* 1983 (3) SA 584 (A) and *Aussenkehr Farms (Pty) Ltd v Trio Transport CC* 2002

(4) SA 483 (SCA), at para. 5 of the concurring judgment of Marais JA). The plaintiff relies on two payments by the defendant during 2005 to contend that prescription was indeed interrupted by an acknowledgment of liability by the defendant. I shall address that contention presently.

[15] In case I might be wrong in determining that prescription commenced running on 27 October 2004, it is appropriate to consider the defendant's alternative contention that it commenced to run on 14 April 2005, when the plaintiff was made aware of the defendant's repudiation of the alleged agreement. The plaintiff concedes that prescription would commence to run against him from the date of a repudiation by the defendant of the alleged agreement. What is in issue in this respect is the effect of a letter by the defendant's principal officer to the plaintiff, dated 5 April 2005. The defendant argues that the terms of the letter are so inconsistent with any acceptance by the defendant as being bound by the alleged agreement as to necessarily have constituted a repudiation thereof. The plaintiff, on the other hand, contends that the letter did not amount to a repudiation.

[16] The letter in question went as follows:

Dear Mr Latieb

RE: S. LATIB/PRO SANO MEDICAL SCHEME

Further to our meeting on 27 October 2004 and your letter to us dated 3 November 2004, Mr S Cloete, Mr Dawson and I presented your proposal for settlement to the Board of Trustees at a meeting held on 19 November 2004.

The Board of Trustees decided the following at this meeting:

- (a) “in line with an existing resolution taken on 27 August 2004, that Mr Latib not be paid anything as decided by a fully and legally constituted Board of Trustees meeting until such time as the DCSS case has been finalised;
- (b) Following the above, that a quantum will be decided upon by the B. O. T. and Mr Latib’s claim will be looked at to see if he is entitled to it. ”

The matter is receiving our constant attention and we will advise of any further development in this regard.

As requested in your letter dated 3 November 2004, the notes taken at our meeting with you on 27 October 2005 are attached. Unfortunately I do not have any transcripts of previous meetings held with you.

Furthermore we wish to apologise for the late reply to your letter, but we were hoping to have an outcome from the Diamond Computer Systems claim so that a more informative response could be given you, but unfortunately no outcome has not yet been obtained Thank you.

Yours faithfully

[17] The determination of whether or not the letter constitutes a repudiation of the alleged agreement turns on an objective assessment

of what the perception of a reasonable person placed in the position of the aggrieved party would be to the communication or conduct

concerned; see *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd*

[2000] ZASCA 82; 2001 (2) SA 284 (SCA). It is plain from the tenor of the plaintiffs attorney’s response to the letter that he regarded it as a repudiation. It is also apparent from the plaintiffs instructions given to his attorney in response to the letter that he too must have regarded it as a repudiation. As remarked, those responses are, however, not the determining criterion.

[18] In my view whereas the decision described in paragraph (a) of the letter under consideration is not irreconcilable with an indication to be bound by the alleged agreement, paragraph (b) is. It is inconsistent with any intention to agree upon the quantum, indicating instead an intention that the plaintiffs board of trustees would unilaterally determine it. Paragraph (b) is also irreconcilable with the notion that the defendant regarded itself as bound to pay plaintiff the agreed or determined quantum less any amount it was obliged to pay to Diamond (‘DCS S’). On the contrary, it indicates an intention to consider the plaintiffs claim after the conclusion of the litigation with Diamond and to determine then whether the

plaintiffs claim should be recognised or entertained. It is wholly inconsistent with the notion that a binding agreement in the terms alleged by the plaintiff had been concluded at the parties' meeting on 27 October 2004. Moreover, the outcome of the meeting between the parties on 27 October is described in the letter as having culminated in a 'proposal' by the plaintiff for the defendant's consideration; something plainly quite different from the conclusion of an agreement. The content of the letter thus unambiguously refutes any suggestion of an agreement having been concluded between the parties on 27 October. There is thus no doubting that the letter falls to be read as a repudiation of the alleged agreement, as indeed it was treated by the recipients. On the alternative approach too, service of the summons on 21 April 2008 occurred more than three years after the date upon which the repudiation was communicated.

[19] Finally, there is the issue of the alleged interruption of prescription consequent upon the payments made to the plaintiff in September and October 2005. There is no merit in the plaintiffs argument on this issue. It is clear from the relevant correspondence

that the payments in question related to the plaintiffs invoices for consulting services rendered in June and July 2002 and for the supply of spooled ribbons and paper in July 2002. None of that forms part of the pleaded claim - see para. [2], above.

[20] In the result the special plea of prescription is upheld and the action is dismissed with costs, including the costs of two counsel.

A.G. BINNS-WARD

Judge of the High Court

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