

SOUTH AFRICA / JUDGMENT

Sentrachem Limited v Terblanche (47159/2011) [2015] ZAGPPHC 936 (9 December 2015) [2015] ZAGPPHC 936

COURT

North Gauteng High Court, Pretoria

BEFORE

Engelbrecht

CASE / FILE NUMBER

47159/2011

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REPUBLIC OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA,

GAUTENG

DIVISION,

PRETORIA

CASE

NO: 47159/2011

HEARD

ON: 17/08/2015

NOT

REPORTABLE

NOT

OF INTEREST TO OTHER JUDGES

REVISED

9/12/2015

In

the matter between:

SENTRACHEM

LIMITED PLAINTIFF

and

A

L

TERBLANCHE DEFENDANT

JUDGMENT**ENGELBRECHT A J**

- [1] This is a civil trial in an action for undue enrichment.
- [2] The defendant was employed by Agricura and is a former member of the Sentrachem Group Pension Fund (The Fund). The Fund underwent a surplus apportionment exercise in terms of the Pension Funds Act, 1956. The defendant received two payments from the Fund. Both payments were made on the 06th October 2010.
- The first payment, R94 614.99 was paid out of membership contributions from Agricura. The defendant as an employee of Agricura was entitled to the payment. The defendant also accepted the calculation of said payment as correct.
 - The second payment, R453 972.31 was paid out of membership contributions of Fedmis. The defendant was not an employee of Fedmis and thus not entitled to last mentioned payment.

The impugned payment to the defendant happened when he was allocated a new member record number following a take-over by Sentrachem Limited. By so doing the defendant's membership was duplicated when in truth and in fact he, the defendant, was only a member of one pension fund and thus entitled to one surplus apportionment payment.

- [3] Plaintiff seeks to recover this second payment together with interest and costs from the defendant.
- [4] Immediately upon realising the mistake, the Fund made several attempts to recover the money, to no avail.
- [5] On 17 August 2011 the Fund, instituted action against the defendant.
- [6] On 13 December 2011 the Fund was placed in liquidation. On the same day, the Funds actuary, Mr Jeremy Peter Andrews, was appointed Liquidator of the Fund.
- [7] Prior to his appointment as Liquidator of the Fund, Mr Andrews assisted the Trustees of the Fund with the surplus apportionment exercise. Sentrachem Limited, a duly incorporated company and member of the Board of Trustees, had withdrawn its participation in the Fund. The Fund had already been closed for new members as far back as 1993. Almost all the active members had transferred to Sanlam or other pension funds. Only two active working members and fourteen members who received disability pension remained.
- [8] Sentrachem Limited had withdrawn its participation in the Fund.
- [9] By the 11 December 2013 Mr Andrews had finalised the dissolution of the Fund but for the claim against the defendant.

- [10] Having dissolved the Fund, but for the claim, Mr Andrews sought to be relieved of his duties as liquidator. This occasioned the cession of the aforementioned claim to Sentrachem Limited.
- [11] On 27 September 2013 a Cession and Assignment agreement was concluded between Mr J P Andrews and Sentrachem Limited in respect of the claim for the impugned payment which was instituted on 17 August 2011. Clause 3 of the Cession and Assignment agreement reads as follows:
- "3.1 The cedent hereby cedes, transfers and makes over to the cessionary the cedent's right, title and interest in and to the said claim.
- 3.2 The cession will come into effect if and only when the High Court grants a final order under case number 47159111 substituting the cessionary as plaintiff in the action in the place of the cedent.
- 3.3 Should the order for any reason be overturned or rescinded, then the cession will be deemed to have been rescinded ab initio.
- 3.4 The cedent does not warrant the validity of the claim and is not to be liable to the cessionary for any fees, costs or charges that may be incurred in prosecuting the claim, or for any damages that may be sustained by the cessionary if the claim proves irrecoverable for any reason whatsoever".
- [12] This Cession and Assignment agreement prompted Counsel for the plaintiff to apply for leave to substitute Sentrachem Limited for Mr Andrews as plaintiff and subsequently also to amend the particulars of claim. On 22 November 2013 the Court directed that the Cessionary, Sentrachem Limited, be substituted as the plaintiff in the main action instituted by the applicant in the place and stead of applicant. In terms of the Cession and Assignment agreement, the Cession was only effective from that date.
- [13] In addition to the substitution order the Cessionary was granted leave to file an amended combined summons and particulars of claim reflecting the new description of the respondent as plaintiff instead of the applicant. Such was to be done within ten days of said order.
- [14] Plaintiff filed an amended combined summons and particulars of claim on 04 December 2013. The particulars of the claim in essence remained the same save that it made plain that the plaintiff is now Sentrachem Limited. This prompted the defendant to amend his plea to include the following:
- 14.1. That the impugned payment was made on 06 October 2010 and became due on 07 October 2010. And, that at the time of substitution and amendment, 03 December 2013, plaintiff's claim for the overpayment had prescribed. Likewise the action against defendant had prescribed.

14.2. That the amended particulars of claim of the plaintiff do not refer to any payment made to the defendant by the plaintiff.

14.3. In the alternative, that the plaintiff has no locus standi in iudicio to prosecute said claim against the defendant.

[15] The facts are common cause or not seriously disputed, I therefor find it unnecessary to set out and analyse all the facts. The common cause facts are:

[15.1.] the name, status and employment history of the defendant is not in dispute.

[15.2.] The Fund correctly paid an amount of R94 614.99 to the defendant on 06 October 2010.

[15.3.] the amount of R453 972.31 was paid to the defendant.

[15.4.] the undue enrichment became due on 07 October 2010.

[15.5.] the Fund originally instituted the claim against the defendant.

[15.6.] The Fund was duly represented by Mr Andrews and substituted by Sentrachem Limited in terms of the court order.

[16] Counsel for the plaintiff submitted that the plaintiff is entitled to be refunded for the impugned payment. He further submitted that the defendant knew that he was not an employee of Fedmis and therefore not entitled to the impugned payment. And, there was in fact no reason for them to come to court.

[17] Counsel for the defendant contended that the claim of the plaintiff has been extinguished by prescription.

[18] What this court has to determine is:

- Whether the claim and action had prescribed;
- Whether Sentrachem Limited had locus standi iniudicio.

A definitive finding on any of the two issues would be dispositive of the claim.

[19] The relevant provisions of the Prescription Act 68 of 1969:

Section 10 regulates the extinction of debts by prescription and specifically refers on to chapters 111 and 1V of said Act.

- Section 11(d) reads as follows "save where an act of Parliament provides otherwise, three years in respect any other debt".
- Section 15 regulates judicial interruption of prescription:

(1)"The running of prescription shall, subject to the provisions of subsection (2) be interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt".

(2) Unless the debtor acknowledges liability, the interruption of prescription in terms of subsection (1) shall lapse and the running of prescription shall not be deemed to have been interrupted, if the creditor does not successfully prosecute his claim under the process in question to final judgment or if he does so prosecute his claim but abandons the judgment or the judgment is set aside"

[20] In *Macleod v Kweyiya* 2013 6 S A 1 (SCA) para13 it was held that " It is the negligent and not an innocent inaction that S 12(3) of the Prescription Act seeks to prevent and courts must consider what is reasonable with reference to the particular circumstances in which the plaintiff found himself or herself'. The plaintiff therefor has a duty to institute proceedings in order to recover a debt as soon as possible, but within three (03) years.

[21] The facts of this case are similar to the *Standard General Insurance Co Ltd v Eli Lilly (S A) Ply Ltd (FBC Holding (Ply) Ltd Third Party)* 1996(1) S A 382. On page 387 par G-H of the latter judgment Streicher J said the following:

"The defendant referred me to cases in which it was decided that when a court has to decide whether a summons interrupts prescription the question to be decided is whether the right that is sought to be enforced and the relief claimed in the amended claim is the same or substantially the same as the right of action and the relief claimed in the original claim and submitted that the claim now before the court is substantially the same as the original claim(see *Wavecrest Sea Enterprises (Pty) Ltd v Elliot* 1995 (4) SA 596 (SE) at 6001-601B and the cases referred to therein) As I have already indicated prescription can only be interrupted by process whereby the creditor claims payment of the debt. Before the amendment the creditor had not claimed payment of the debt and by the time that the amendment was applied for the debt had already become prescribed".

This matter overruled the decision in the *Barrie Marais en Seuns and another -case(1995(1) SA 469 W)* and endorsed the *Sentrakoop*

Handlaars Bpk v Lourens and Another 1991 (3) SA 540 (W)

I am therefore of the view that the claim prescribed on 07 October 2013 which is approximately one month and fifteen days after the three year time limit. My conclusion in respect of Prescription renders it unnecessary to elaborate on *locus standi iniudicio*.

[22] There is no reason why the costs should not follow the result.

[23] I accordingly make the following order:

The special plea is upheld and the plaintiff's claim is dismissed with costs.

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION

On behalf of the Plaintiff: Adv D P de Villiers

Instructed by: Fasken Martineau Attorneys

On behalf of the Defendant: Adv W F Pienaar

Instructed by: Cremer & Strydom Attorneys.

Date of hearing: 17-20 August 2015

Date of judgment: November 2015.

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