

SOUTH AFRICA / JUDGMENT

Symes N.O and Another v Stuart Van der Merwe Inc and Others (24400/2015) [2018] ZAGPPHC 885 (17 May 2018)

[2018] ZAGPPHC 885

COURT

North Gauteng High Court, Pretoria

BEFORE

Sardiwalla

CASE / FILE NUMBER

24400/2015

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IN THE HIGH COURT OF SOUTH

AFRICA GAUTENG

LOCAL DIVISION, JOHANNESBURG

(1)

REPORTABLE:

YES/NO

(2)

OF

INTEREST TO OTHER JUDGES: YES/NO

(3)

REVISED

CASE NUMBER: 24400/2015

17/5/2018

In

the matter between:

MARYNA
ESTELLE SYMES N.O
First Plaintiff
LOUISE
MULLER N.O
Second Plaintiff
And
STUART
VAN DER MERWE INC
First Defendant
RUAN
KRUGER
Second Defendant
MARLON
LESLEY STUART
Third Defendant

JUDGMENT

SARDIWALLA J:

Introduction

- [1] This is an action for payments made contrary to an order of Court brought by the first and second plaintiffs in their capacities as the jointly appointed liquidators in the insolvent estate of a close corporation known as Senamele Building Construction & Cleaning CC (Registration No. 2005/007823/23)[1].
- [2] The first defendant, as represented by the second and third defendants, acted as attorneys on behalf of Senamele[2]
- [3] The defendants have raised a special plea of prescription by alleging that the plaintiffs' claim has prescribed[3].

Background

- [4] In terms of a memorandum of agreement relating to the membership of Senamele it was agreed that two membership interest groups would be created. The second membership interest group attended to managing and controlling the day to day operations and the first membership interest group had the right to nominate a member for the day to day management team. The first defendant was entitled to accept and execute instructions and mandates received from the second membership interest group (or those mandated by them) on behalf of Senamele[4]

[5] On or about June 2011 a dispute arose between the two membership interest groups and an urgent application was launched by the second membership interest group (second and third defendants) seeking an order that monies owed be paid into the first defendants account and to be held in the first defendant's trust account pending the

finalisation of Part B of the application[5]. The Court ordered as follows:

"1.1

1.2 The First Respondent is directed to pay all and/or any further monies, due, owing and payable to the first applicant into the aforementioned trust account, pending the outcome of the rule nisi and the relief sought in part B;

1.3

1.4 The fifth respondent (Standard bank) is directed to freeze the said bank account; Senamela Building Construction & Cleaning services, Standard Bank, Gezina, account number [...], branch code: 014845, pending the return day of the rule nisi and the relief sought in Part B."

Plaintiffs' version

[6] The present case relates to payments made during 30 August to 15 November 2011, after the handing down of the Court order. Plaintiffs submit that the instructions to the first defendant, relating to the

payments made, came from the second membership interest group (second and third defendants) and are therefore also delictually liable for the monies paid out.

[7] The company was finally wound up on 16 May 2013. The plaintiffs were appointed as joint final liquidators on 3 August 2013. The plaintiffs convened an insolvency enquiry in terms of the provisions of section

415 of the Companies Act, 61 of 1973 on 10 March 2014, 17 June 2014, 18 June 2014 and 10 September 2014 respectively. Therefore the plaintiffs submit that they only became aware of the payments made, during 30 August 2011 and 15 November 2011 by the first defendant acting on instructions from the second membership interest group (second and third defendants,) after the insolvency inquiry was held on 13 March 2014. Consequently summons was served on the defendants on 18 March 2016 for the payments made during the period of 30 August to 15 November 2011.

Defendant's version

[8] The Defendants raised a special plea of prescription alleging that the claim relating to monies paid between 30 August 2011 and 15 November 2011 had prescribed in terms of section 11 of the Prescription Act, 1969 in that a period of more than 3 years has passed since the payments were made.

[9] The defendants submit that the aforementioned approach fits in with the provisions of section 12(1) of the Prescription Act, 1969 which reads as follows:

".. .prescription shall commence to run as soon as the debt is due."

[10] The defendants allege that the cause of action originates from the payments made and prescription commenced to run the day after each of the payments. However the defendants do not allege that the plaintiffs or the first membership interest group ought to have been aware of the debt sooner by exercising reasonable care, or ought to have had the requisite knowledge on a particular date.

Issues

[11] It is by agreement that the issue of prescription be adjudicated separately from the remainder of the trial in terms of the provisions of Rule 33(4) of the Uniform Rules of Court. The only issues therefore to be determined by this Court are:

- (a) When did the claim arise, and
- (b) When did prescription begin to run?

[12] In *Fakie NO v CCII systems (Pty) Ltd* [2006] ZASCA 52; 2006 (4) SA 326 (SCA) the court held that: "It is a crime to unlawfully and intentionally disobey a court order. This type of contempt of court is part of a broader offence, which can take many forms but the essence of which lies in violating the dignity, repute or authority of the court."

Prescription

[13] Section 12 of the Prescription Act 68 of 1969 states that;

"12 When prescription begins to run

- (1) Subject to the provisions of subsections (2) and (3), prescription shall commence to run as soon as the debt is due.
- (2) ..
- (3) A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care."

[14] The term "due" is not defined in the Prescription Act. Its meaning was recently considered by the SCA in *Miracle Mile* where it was held:

"In terms of the [Prescription] Act, a debt must be immediately enforceable before a claim in respect of it can arise. In the normal course of events, a debt is due when it is claimable by the creditor, and as the corollary thereof, is payable by the debtor. Thus, in [Deloitte Haskins][6] at 532G-H, the court held that for prescription to commence running, 'there has to be a debt immediately claimable by the creditor or, stated in another way, there has to be a debt in respect of which the debtor is under an obligation to perform immediately'.

(See also *The Master v IL Back & Co Ltd* 1983 (1) SA 986 (A) at 1004F-H). In *Truter v Deyssel* 2006 (4) SA 168 (SCA) ([2006] ZASCA 16) para 16, Van Heerden JA said that a debt is due when the creditor acquires a complete cause of action for the recovery of the debt, i.e. when the entire set of facts which a creditor must prove in order to succeed with his or her claim against the debtor is in place".[7]

[15] A fundamental principle of prescription, which is much clearer under the current Prescription Act, is that it will begin to run only when the creditor is in a position to enforce his right in law, not necessarily when that right arises.[8]

[16] In Section 359(1) of the Companies Act, 61 of 1973 states:

"Civil proceedings are suspended upon the granting of a winding -up order. As such all civil proceedings by or against the company are suspended until the appointment of a liquidator".

Analysis

[17] The first defendant in terms of the Court order dated 30 June 2011 were to hold all monies owing, due and payable to the company in its trust account and were required to hold the monies until Part B of the application was finalized. However the first defendant made payments from the monies held in trust on the instruction of the second and third defendant (the second interest group) alone. In applying the principle of *Fakie* in the circumstances, the defendants were parties to the urgent application and thus aware that any payment in the absence of Part B having been finalised would be unlawful. To date Part B of the application has not been finalised. The fact that the payments were made to an unrelated company called Civil & Blasting solutions or that the first defendant previously acted for Civil & Blasting Solutions is irrelevant. The first defendant's authority to hold the funds arose as a result of the order granted and as such, the first defendant ought, despite its allegiance towards its clients being the applicants in the urgent application (the second and third defendants in the present matter) was as an attorney of the above honourable court and was to hold these monies as set out in the court order.

[18] In applying the principle held in *Miracle Mile* that a debt is due when it is immediately claimable by the creditor and immediately payable by the debtor, the debt only became claimable by the plaintiffs when they became aware of the identity of the debtor at the enquiry held on 13 March 2014. The complete cause of action was only established after the plaintiffs' conducted an enquiry in terms of the provisions of Section 415 of the Companies Act, 61 of 1973. This principle was also confirmed in *Truter*[9] where the SCA held that, for

the purpose of prescription, a debt is due when the creditor acquires a complete cause of action to approach a court to recover the debt. Although the right to reclaim the amounts paid by the first defendant arose the day after each payment was made, in absence of any knowledge that the payments were made on instruction from the second and third defendant (second membership interest group), the plaintiffs rights in law only became enforceable after the enquiry was held on 13 March 2014.

- [19] Further that in terms of Section 12(3) it states that a debt will not be deemed due until the identity of the debtor is known by the creditor. The defendants, it is important to note, has not alleged that the first membership interest group were in fact aware of the payments made or provided any proof that they were aware or reasonably ought to have been aware. The defendants' version that the plaintiffs awareness is irrelevant as they are only the liquidators and that the claim is vested in the close corporation also fails as the defendants in the first instance were prohibited by a Court order from conducting any business transactions relating to the close corporation until the finalization of Part B of the application. On the contrary it would be reasonable to presume that the plaintiffs' and or the first membership interest group would not be expected to be aware of any transactions given the Court order that was in place. The matter only came to light after the enquiry was conducted by the plaintiffs' in terms of Section 415 of the Companies Act. It is therefore irrelevant that at the time of the plaintiffs' awareness it was in their capacity as liquidators and not members of the close corporation.
- [20] In considering whether the defendants actions relating to the payments contra the Court order were unlawful, it is also important to determine whether even if in the absence of knowledge of the debt, if the plaintiffs' in their representative capacity in exercising their right to reclaim payment from 4 August 2013 would have prescribed.
- [21] In the present case the Court order dated June 2011 granted the winding up which was only concluded on 16 May 2013. Section 359(1) of the Companies Act suspends all proceedings by and against a company until the appointment of a liquidator. In the present case the liquidators were only appointed on 3 August 2013 and summons was served on the defendants on 18 March 2016. The plaintiffs' as liquidators of Senamele are legally and lawfully entitled to institute the action on behalf of the company. Even if on the defendant's version that prescription began to run from the date after each payment, and even if the first membership interest group were aware of the debt, Section 359(1) prohibited the first membership interest group from approaching a Court for remedial measures until the appointment of the liquidators, the plaintiffs in this matter. Further the defendant's version that prescription should alternatively run from the day after the appointment of the liquidators which is 4 August 2013, would also fail as prescription would therefore still run up until 4 August 2016. As summons was only served on 18 March 2016, the plaintiffs' claim would still not have prescribed.

- [22] Considering the above prescription would not have commenced as alleged by the defendants, the day after each payment was made, but would commence from the instance the plaintiffs' became aware that the debt was due which was after conducting the insolvency enquiry or after the appointment of the liquidators in order to approach a court for a remedy, which in this case is 13 March 2014 and 3 August 2013 respectively. Therefore the plaintiffs' claim would have only then prescribed on 14 March 2017 and 4 August 2016 respectively.
- [23] The defendants' version that prescription started running on the day the debt was due (the day after the payments was made) is incorrect as section 12(1) of the Prescription act is subject to section 12(3) which states that a debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises.
- [24] In the premises the plaintiffs could only have become aware of the cause of action (the payments made) upon the conducting of the enquiry in terms of the provisions of section 415 of the Companies Act, 61 of 1973. Thus prescription ought to have run from this period during the course of March 2014.
- [25] Accordingly make the following findings:
1. that the payments made contra the Court order by the defendants on instruction by the second membership interest group to have been unlawful;
 2. the claim for the action arose when the insolvency enquiry was held on 13 March 2014 and;
 3. Prescription begun to run from 14 March 2014 to 14 March 2017 and accordingly did not prescribe.

Order

1. The special plea is dismissed with costs.

SARDIWALLA J

JUDGE OF THE HIGH COURT, PRETORIA

APPEARANCES

Date of hearing:

6 March 2018

Date of judgment

17 May 2018

Counsel for the Plaintiff ADV J HERSHENSOHN

Applicant's Attorneys

PJ KLEYNHANS ATTORNEYS

Counsel for the Respondent ADV J VORSTER

Respondent's Attorneys VAN DER MERWE DU TOIT INC

- [1] Applicants Heads of Argument, paragraph 1
- [2] Pleadings bundle, Particulars of Claim, para 13, pg 13 and Plea, para 8, pg 45
- [3] Pleadings bundle, pg 43
- [4] Plaintiff' s Heads of argument, para
- [5] Plaintiff's Heads of argument, para 6
- [6] Deloitte Haskins above n 16.
- [7] Standard Bank of South Africa ltd v Miracle Mile Investments 67 (Pty) Ltd [2016] ZASCA 91; 2017 (1) SA 185 (SCA) (Miracle Mile) at para 24.
- [8] See Lubbe " Die Aanvang van Verjaring waar die Skuldeiser oor die Opeisbaarheid van die Skuld kan Beskik" (1988) 51 THRHR 135.
- [9] Truter v Deysel [2006] ZASCA 16; 2006 (4) SA 168 (SCA) at para 16.

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