

STONER TRADING (PROPRIETARY) LIMITED
versus
RIOZIM LIMITED

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 17 March and 18 May 2016

Opposed Matter

R C Muchenje, for plaintiff
C Mabhande, for defendant

TAGU J: On 18 February 2015 the plaintiff instituted legal proceedings in this honourable court claiming the sum of ZAR 992 907.20 being the sum for chemicals and various products sold to the defendant. The defendant entered appearance to defend and requested for further particulars to enable it to plead. The plaintiff among other issues was requested to clarify whether or not the claim related to products allegedly supplied under the 2009 agreement or 2010 separate agreement.

In its declaration which was further amplified by the requested further particulars the plaintiff stated that in 2005 they entered into an agreement with the defendant in terms of which the plaintiff would sell chemicals and other products to the defendant on a cash and delivery basis. This agreement was terminated in 2009. In 2009 the parties then entered into another agreement wherein the plaintiff was to supply chemicals to the defendant on credit. In terms of this new agreement payment was to be made within 30-120days after the products had been supplied to the defendant. In 2010 the plaintiff supplied products to the defendant worth ZAR 992 907.20 to the defendant's Subsidiary Renco Mine on credit. The defendant failed to pay for the supplies. Between 2011 and 2012 there were several negotiations to pay the debt. In 2013 there was a complete change of management and the plaintiff's Chief Executive Officer approached the new Chief Executive Officer of the defendant a Mr Ashton Ndlovu, the new Financial Manager one Mr B Nkomo and new Group Procurement Manager

one Mr Lovemore Dube for negotiations. The parties then entered into another agreement in 2013 in terms of which the plaintiff would resume supplying the defendant with sulphuric acid on Cash-on-Delivery basis. Further it was agreed that defendant would pay cash on delivery of the sulphuric and pay a portion on the old debt. The defendant paid for nine consignments and failed to pay 3 consignments of the products as well as the old debt which is now the subject matter of the claim in this case.

The defendant upon being served with the further particulars raised a special plea of prescription. It is the defendant's contention that the plaintiff's claim is defective in that it has prescribed as envisaged in terms of The Prescription Act [Chapter 8:11]. It submitted in its heads of argument that s 15 (d) of the Prescription Act provides for a period of prescription of three years in the case of a debt such as *in casu*. It further submitted that s 16 of the same Act goes further and provides that prescription begins to run as soon as the debt is due. See *Patel v Controller of Customs and Exercise* 1982 (2) ZLR 82.

In particular the defendant alleges that the plaintiff claims an amount of ZAR 992 907.20 which arose in 2009 and 2010, accordingly the cause of action for the outstanding debt arose at the time when the duty to pay arose and the breach occurred. It claimed that the amount has been due for a period in excess of 3 years and has prescribed and prayed that the claim be dismissed.

The plaintiff opposed the application on the basis that the claim has not been prescribed. The plaintiff in its heads of argument submitted that the claim did not prescribe at law because it was interrupted by the acknowledgment of liability that was made by the defendant. It relied on the acknowledgment dated 31 December 2013 and the provisions of s 18 of the Prescription Act that says-

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

Further, the plaintiff submitted s 18 (2) goes further to state that:

“If the running of prescription is interrupted in terms of subsection (1), prescription shall commence to run a fresh from the date on which the interruption takes place or if at the time of the interruption or at any time thereafter the parties postpone the date of the debt, from the date upon when the debt becomes due again”

In *casu* the plaintiff submitted that the prescription period was interrupted by the agreement made by the parties, the last agreement being in 2013 when the defendant was supplied with sulphuric acid on cash while paying off the old debt that was due and owing.

To cement its argument the plaintiff submitted that the defendant tacitly acknowledged the debt due to the plaintiff by agreeing with the plaintiff for it to supply it with current orders while servicing the old debt. Otherwise it would not have made sense at all that the plaintiff would supply the defendant with new products when no commitment of an acknowledgment of liability was made to pay the old debt. It relied on the case of *Cape Town Municipality v Allie* 1981 (2) SA1 (C) where it was held that:

“the debtor’s words and conduct should be taken into account.” See *Agnew v Union and South West Africa Insurance Co Ltd* 1977 (1) SA 617 (A) at 623 B-C, *Jovenna Energy Services (Private) Limited v Pickglow Trading (Private) Limited and Vundhla v Dube & Anor* HB 47/07 (un reported judgment).

In my view the question that arises for determination is whether or not the plaintiff’s claim is defective at law in terms of the Prescription Act? An analysis of the submissions reveal that indeed the defendant was supplied with products worth ZAR 992 907.20 during the period 2009 and 2010 by the plaintiff on credit. The defendant failed to pay. As highlighted above the plaintiff constantly engaged the defendant’s old executive committee on the payments. A new executive came into place and at all material times acknowledged the debt due to the plaintiff and this culminated into a new agreement in 2013 wherein the plaintiff would supply the defendant with sulphuric acid on cash-on-basis while servicing the old debt. It would have made no economic sense for the plaintiff to enter into a new agreement with the defendant without assurances that the old debt was being serviced. Unfortunately the defendant even failed to meet its side of the new agreement leading to it being sued by the same plaintiff in a different case in HC 1463/15 which was referred to by the parties but is not before this court.

I am convinced that the running of prescription was interrupted by the new agreement that was made in 2013. The summons were issued in 2015 hence the new period of prescription had not passed. The special plea of prescription is not meritable.

In the result it is ordered as follows-

1. The Special Plea is dismissed.
2. Defendant to pay costs on an attorney client scale.