



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable
Case No: 20157/2014

In the matter between:

**UTi SOUTH AFRICA
(PROPRIETARY) LIMITED**

APPELLANT

And

TRIPLE OPTION TRADING 29 CC

RESPONDENT

Neutral citation: *UTi South Africa v Triple Option Trading* (20157/14) [2015]
ZASCA 101 (3 June 2015)

Coram: Maya, Shongwe, Leach, Zondi JJA and Gorven AJA

Heard: 21 May 2015

Delivered: 3 June 2015

Summary: Prescription – extinctive prescription – whether the appellant’s amendment had introduced a cause of action which had become prescribed – no new cause of action introduced – claim not prescribed. Special plea of lack of jurisdiction correctly dismissed.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Masipa J and Bashall AJ sitting as court of appeal):

- 1 The appeal is upheld with costs.
- 2 The cross-appeal is dismissed with costs.
- 3 Paragraph 17 of the order of the court a quo is set aside and replaced by the following:
‘17.1 The appellant’s appeal against the magistrates’ court order upholding the special plea of prescription is upheld with costs.
17.2 The order of the magistrates’ court is substituted with the following order:
“Both special pleas are dismissed with costs.”’

JUDGMENT

Zondi JA (Maya, Shongwe, Leach JJA and Gorven AJA concurring):

[1] This appeal, which is with the leave of the Gauteng Division of the High Court, Johannesburg (Masipa J and Bashall AJ), concerns a special plea of prescription together with the costs order against the appellant. The cross-appeal, which is also with the leave of the court a quo concerns a special plea of jurisdiction. These issues arose in the following circumstances.

[2] On 14 March 2007 the appellant sued the respondent in the Germiston Magistrates’ Court claiming a sum of R274 786,70. This amount was alleged to have been the outstanding balance for certain customs clearing, forwarding and export

agency services rendered and disbursements incurred by the appellant on behalf of the respondent from time to time, during the period 15 January 2005 to 16 May 2006, pursuant to various agreements. The appellant annexed to its particulars of claim the customs clearance letter of authority ('the letter of authority'); certain standard trading conditions and various invoices. Properly construed, the agreements for services rendered at the instance and request of the respondent were reflected in the invoices annexed. The paragraph dealing with this was introduced by a number of paragraphs which were largely superfluous and, if anything, rendered the particulars vague and embarrassing. Further particulars that were delivered by the appellant to the respondent in response to the latter's request for further particulars revealed that the two documents put up by the appellant in support of some of the superfluous averments indicated an agreement concluded in 2004 with Pyramid Freight (Pty) Ltd (Pyramid Freight) and not the appellant. Further particulars also revealed that the appellant had, in fact, on 6 December 2004 bought Pyramid Freight's business assets and, in terms of the sale agreement, had acquired all contracts to which Pyramid Freight was a party, which existed before 1 August 2004.

[3] In the mistaken belief that its cause of action arose from the 2004 agreement between Pyramid Freight and the respondent, the appellant amended its particulars of claim on 22 July 2009 to reflect that the agreement was concluded between Pyramid Freight and the respondent and that the appellant had derived its rights from this agreement when it purchased Pyramid Freight. This was incorrect. The agreement between the respondent and Pyramid Freight related to contracts which arose prior to 1 August 2004. Those on which the appellant sued were variously concluded between 15 January 2005 and 16 May 2006. The appellant and the respondent were direct parties to these agreements. They had nothing to do with Pyramid Freight. The amendment to the pleadings was therefore an exercise in futility. It replaced irrelevant averments with alternative averments that were equally irrelevant to its claim.

[4] The respondent filed a special plea in which it contended that the appellant's cause of action in the amended particulars of claim had prescribed. It alleged that a debt for which the appellant sued became due and payable during the period 15 January 2005 to 16 May 2006. The respondent accordingly contended that the amendment introduced a new cause of action which prescribed on 17 May 2009.

[5] The second special plea raised by the respondent was that the magistrates' court did not have jurisdiction to determine the action. In support of that special plea, the respondent referred to clause 36 read together with the non-variation clause of the standard trading conditions (clause 33) of the agreement with Pyramid Freight which it contended excluded it. Its contention was that the effect of clause 36 was to confer exclusive jurisdiction on the high court. This clause provided that the respondent consented to the 'non-exclusive jurisdiction' of the high court in which Pyramid Freight's head office was situated.

[6] These two special pleas were set down separately and argued in the magistrates' court before any other issues. The magistrates' court upheld both the special pleas. It upheld the special plea of prescription on the basis that the appellant's cause of action under the original summons was for payment of the sum of R274 786.70 for services rendered by it to the respondent in terms of various agreements entered into between the appellant and the respondent. Under the amended particulars of claim the appellant's cause of action was based on various agreements entered into between Pyramid Freight and the respondent. The magistrates' court accordingly held that the right sought to be enforced in the amended particulars, was a different right. For that reason, it held that the amendment introduced a new cause of action which had prescribed by the time it was introduced by way of amendment. It held that the service of the original summons did not interrupt the running of prescription on the new cause of action.

[7] In upholding a special plea of jurisdiction, the magistrates' court held that clause

36 of the standard trading conditions of Pyramid Freight, on which the appellant claim was founded, ousted the jurisdiction of the magistrates' court. In the absence of a proper consent in terms of s 45 of the Magistrates' Courts Act 32 of 1944 it did not have jurisdiction to hear the matter.

[8] On appeal, the court a quo dismissed the appeal on the special plea of prescription and confirmed the magistrates' court order upholding the special plea. But it upheld the appeal on the special plea of jurisdiction and set aside the magistrates' court order upholding the jurisdiction point and substituted it with one dismissing the special plea on jurisdiction. The appellant appeals against the order that its claim had prescribed while the respondent cross-appeals against the order dismissing its plea of lack of jurisdiction.

[9] Counsel for the appellant submitted that the finding by the court a quo, that the appellant in its amendment had introduced a new cause of action, was wrong. He argued that the right which was sought to be enforced both in the original particulars of claim and in the amended particulars of claim was the same. I agree.

[10] Properly construed, the appellant's claim as set out in the original summons issued on 14 March 2007 is for payment of the sum of R274 786.70 being the balance outstanding for services rendered and disbursements incurred by the appellant on behalf of the respondent at the latter's special instance and request during the period 15 January 2005 to 16 May 2006 pursuant to a series of agreements. Those services and disbursements were not rendered and incurred under the agreement between the respondent and Pyramid Freight, the terms of which are irrelevant to the pleadings. The claim was at all times for payment for services rendered at the special instant and request of the respondent under contracts concluded between it and the appellant. As is set out in the invoices, these were to be in terms of the appellant's standard conditions of contract.

[11] I did not understand counsel for the respondent to have disputed that proposition in argument. He took issue with the fact that the invoices sent to the respondent fail to stipulate the date on which the alleged services were rendered and the nature of those services. That contention is, however, untenable if regard is had to the fact that each invoice bears the appellant's name, sets out the date on which the respondent's shipment arrived in Durban and the date on which each invoice was generated. And those dates fell within the period 2005 to 2006. Summons was issued in March 2007 well before the claims had prescribed. There is therefore no merit in the special plea of prescription.

[12] With regard to the special plea of jurisdiction, which is the subject of the cross-appeal, counsel for the respondent submitted that the court a quo erred in dismissing it. He argued with reference to clause 33 (non-variation clause) and clause 36 of the agreement that the parties had agreed that the high court would have exclusive jurisdiction to determine all the disputes arising from that agreement irrespective of the quantum involved. The second leg of his argument was that the quantum of the appellant's claim in any event, exceeds the jurisdiction of a magistrates' court as to that amount.

[13] But this presupposes that the Standard Terms and Conditions of Pyramid Freight govern the agreements between the parties. They clearly do not do so. The debate as to the meaning of clause 36 is therefore irrelevant. As to the second point, the invoices are pleaded as being separate contracts. None of the amounts claimed in any invoice exceeds the jurisdiction of the magistrates' court. The appellant was entitled to bring the action in the magistrates' court. For these reasons the cross-appeal should fail.

[14] In the result I make the following order:

- 1 The appeal is upheld with costs.
- 2 The cross-appeal is dismissed with costs.

3 Paragraph 17 of the order of the court a quo is set aside and replaced by the following:

‘17.1 The appellant’s appeal against the magistrates’ court order upholding the special plea of prescription is upheld with costs.

17.2 The order of the magistrates’ court is substituted with the following order:

“Both special pleas are dismissed with costs.”

D H Zondi
Judge of Appeal

Appearances

For the Appellant: A G Sawma SC
Instructed by:
Wright, Rose-Innes Inc, Bedfordview
c/o Phatshoane Henney Attorneys, Bloemfontein

For the Respondent: J P Spangenberg
Instructed by:
Vally Chagan & Associates, Fordsburg
c/o Christo Dippenaar Attorneys, Bloemfontein