REPORTABLE

THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE HIGH COURT, CAPE TOWN

CASE NO: 4254 / 2008
(RELATED CASE NO: 10452 / 2004)

In the matter between:

RUSSEL ERIC BURNETT Plaintiff

versus

DELOITTE & TOUCHE 1st Defendant

ROBYN CAMPBELL 2nd Defendant

JUDGMENT : 20 APRIL 2010

BOZALEK J:

[1] This matter comes before the Court pursuant to an order in terms of Rule of Court 33(4) that the first and second defendant's special plea of prescription be determined prior to the remaining issues in the matter.

[2] No evidence was led, the parties having instead agreed that the defence would be adjudicated as a stated case as contemplated in Rule 33(1). The agreed facts are ascertained by reference to a document in which the defendants sought and obtained certain admissions from the plaintiff for the purposes of the hearing, cross referenced to the pleadings and affidavits in this action as well as in earlier litigation involving the parties.

THE RELEVANT FACTS

[3] Plaintiff claims damages as against first defendant, a partnership of public accountants and auditors, alternatively, as against second defendant who at the material time was either a partner or an employee of first defendant. The claim arises out of the alleged breach of an agreement on the part of one or both defendants in terms whereof second defendant was required to make a determination of the value of the equity and shareholders loan account in a company previously purchased by plaintiff.

[4] The background facts are that during October 2002 plaintiff purchased the shares and loan account in the company from one Mr. Andrew Fyfe ("Fyfe") paying him R1m on account.

[5] A dispute arose between plaintiff and Fyfe over the sale agreement with plaintiff contending that Fyfe and his auditors had grossly misrepresented the company's financial position and that he, plaintiff, had relied upon these misrepresentations in purchasing the business.

[6] The dispute was referred to arbitration, the hearing of which commenced in mid-2004 before senior counsel. In November 2004 the matter was settled by what may be called the first settlement agreement. In essence this provided that an independent determination would be made of the value of the equity and shareholders loan account in the company as at 30 September 2002. It was agreed that the purchase price as between plaintiff and Fyfe would be adjusted to accord with the value so determined. Second defendant was duly appointed by plaintiff and Fyfe as the referee who would perform the valuation in accordance with an agreed procedure.

[7] On or about 12 November 2004 second defendant handed down a valuation of the combined equity and the shareholders loan account ("the first valuation") in the sum of R1 370 000.00 The effect of this valuation was that plaintiff became liable to pay the differential, R370 000.00, to Fyfe.

[8] Plaintiff was immediately aggrieved by the valuation and within weeks his legal representatives were formally contending in correspondence that second defendant's determination was tainted by various procedural irregularities and that it fell to be set aside.

[9] By no later than 13 December 2004, apart from the procedural irregularities, plaintiff was further of the view that the valuation was unreasonable, irregular and wrong; furthermore, that it was so grossly excessive in relation to the true value of the business that it bore no reasonable relationship thereto or to what a willing buyer would pay to a willing seller. Plaintiff was further of the view that the valuation was arbitrary and one at which no reasonable referee conducting the determination fairly could reasonably have arrived.

[10] On 13 December 2004 plaintiff instituted an action in this Court, under case no. 10452 / 2004, against Fyfe and the present defendants to set aside the first valuation. Those proceedings culminated on 26 February 2007 with the conclusion of an agreement ("the second settlement agreement") providing that the first valuation would be set aside and the shares and loan

account in the business would be re-valued. That agreement was made an order of court.

[11] In terms of the order of court the first valuation was set aside and declared not to be binding on the parties. Furthermore, another referee was to be appointed to determine the value of the equity and shareholders loan account in the company and a mechanism was set in place for the appointment of such a person.

[12] This valuation was effected by a Mr. Warren Watkins ("Watkins") on 1 June 2007 when he valued the shares and shareholders loan account at R94 586.00. In consequence of this valuation ("the second valuation"), plaintiff became entitled to payment from Fyfe of the sum of R900 000.00 odd, being the difference between the R1m paid on account to Fyfe and the second valuation. In terms of further provisions of the second settlement agreement, plaintiff also became entitled to payment by Fyfe of the costs of the arbitration proceedings, the costs of second defendant as a referee, various other costs as well as the payment of interest by Fyfe on the amounts owing to plaintiff.

[13] Fyfe refused to pay any such monies and instead launched an action in July 2007 against plaintiff and Watkins to set aside the

second valuation. In response plaintiff launched, under case 11161 / 2007, an application against Fyfe and all other interested parties for the second valuation to be made an order of court.

[14] Those proceedings culminated on 24 August 2007 with the conclusion of a third settlement agreement as between plaintiff and Fyfe which disposed of all the issues in the existing litigation. In settling with Fyfe, plaintiff accepted payment of the sum of R1.5m, a sum considerably less than his full claim, allegedly because Fyfe was unable to pay any greater amount. In October 2007 Fyfe made payment to plaintiff of his obligations in terms of the third settlement agreement whereupon plaintiff withdrew his action against him.

[15] On 7 March 2008 plaintiff instituted the present action against defendants for damages representing the amount plaintiff had been unable to recover from Fyfe, including the difference between what plaintiff would have received from Fyfe had defendants initially effected the first valuation 'correctly', the costs of the second valuation exercise by Watkins and the costs wasted in the earlier litigation. In his particulars of claim plaintiff relies, as part of his cause of action, upon the setting aside of the first valuation, the second valuation and Fyfe's alleged inability to pay more than R1.5m in settlement of plaintiff's

claims. In their special plea Defendants aver that plaintiff's claims became due by no later than 12 November 2007, being three years after second defendant handed down the first valuation. Summons having only been served in March 2008, defendants aver that in terms of the provisions of Chapter 3 of the Prescription Act no 68 of 1969, plaintiffs' claims had prescribed.

THE DEFENDANTS' CASE

[16] On behalf of the defendants it was contended in argument that prescription began running in respect of plaintiff's damages claim by no later than 13 December 2004, the date on which plaintiff instituted his first action against Fyfe and defendants. By this date, it was contended, plaintiff had obtained an informal valuation from yet another firm of accountants which concluded that the shares and loan account had a nil value and had himself concluded that the initial valuation was wrong both for substantive and procedural reasons. Accordingly, it was argued, by December 2004 in satisfaction of the requirements of s 12 of the Prescription Act 68 of 1969, plaintiff had knowledge both of the debtor of and the breach/es of the underlying agreement upon which he relied.

[17] It was further contended, with reference to the pleadings both in the first and in the present action, that, in seeking damages from defendants, plaintiff had relied on the same breaches of contract initially cited. Notwithstanding that any loss suffered by plaintiff may have occurred at a date later than the breach/es of contract, at worst for him he should have interrupted prescription within the three year period by instituting action and suing for a declarator that defendant/s were liable to him for any damages he had sustained. Seen from another perspective, it was argued, any action instituted by plaintiff against defendants for damages immediately after the first valuation could not have been the subject of a successful exception.

PLAINTIFF'S CASE

[18] Plaintiff approached the matter from a different perspective, namely, that this Court was not simply dealing with an action for breach of contract but, crucially, one arising from the malperformance of contractual obligations within the context of arbitral proceedings. It was contended that essential elements of plaintiff's cause of action were the setting aside of the first valuation and the making of the favourable second valuation. It was argued that there was a substantial difference between a simple contractual claim and one arising from malperformance of contractual obligations in an arbitral context.

[19] Until such time as an arbitral award was set aside (or abandoned) it was binding upon and enforceable against the parties thereto. In the circumstances, prescription had not begun to run, at the very earliest, until plaintiff succeeded in setting aside the first valuation pursuant to the order of court obtained on 26 February 2007. In fact, it was contended, prescription had not begun to run prior to the second valuation, namely 1 June 2007, since before this step plaintiff would have been unable to establish he had suffered damages. Somewhat tentatively, it was further suggested that prescription had begun to run even later, when plaintiff established that Fyfe was financially unable to pay the full damages he had suffered. Whichever was the correct date, the action had been instituted within three years of setting aside of the first valuation in February 2007 and therefore, by any reckoning, the special plea of prescription had to fail.

[20] In the alternative, it was contended there were purely contractual grounds why the "debt" had not become due within the meaning of the Prescription Act before June 2004. Amongst these were the fact that plaintiff, having incurred an unfavourable arbitration award by reason of the first valuation, had not suffered damages but merely the loss of a suit.

DISCUSSION

[21] S 12(1) and (3) of the Prescription Act provide, respectively, that:

> *"Prescription shall commence to run as soon as the debt is due."*

and:

> *"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".*

[22] Before 1984, the wording of s 12(3) excluded contractual causes of action from the deeming provisions with resultant anomalies. An example thereof was *Electricity Supply Commission v Stewarts and Lloyds of SA (Pty) Ltd*[1] a matter involving an action for breach of contract after a defective pipe was installed. It was held that the breach was committed, and thus prescription began running, when the work containing the defective pipe was handed over and not when the pipe malfunctioned, with the consequence that the time at which the plaintiff became aware of the breach and of such loss was not relevant in ascertaining the date that the debt arose.

[23] Notwithstanding the statutory amendment it has long been recognised that prescription does not commence to run until the creditor has knowledge of all facts giving rise to the debt.

[1] Reported initially at 1979 (4) SA 905 (W) and then on appeal at 1981 (3) SA 340 (A).

Thus in **Wessel's Law of Contract in South Africa** 2nd Edition at para 2780 the learned author states:

> *"It is therefore essential to the defence of prescription that the creditor should have been entitled to bring his action at the moment from which the debtor claims that prescription runs in his favour."*

[24] In *Truter and Another v Dyssel*[2] it was held that under s 12 of the Act, prescription of a debt began running when the debt became due and the debt became due when the creditor acquired knowledge of the facts from which the debt arose. In other words, the debt became due when the creditor acquired a complete cause of action for the recovery of the debt or when the entire set of facts upon which he relied to prove his claim was in place. It was held further that, for the purposes of prescription, "cause of action" meant every fact which it was necessary for the plaintiff to prove in order to succeed in his claim. It did not comprise, however, every piece of evidence which was necessary to prove those facts.

[25] In **Extinctive Prescription** Juta & Co Ltd (1996), Loubser, the author deals with the question of the onset of prescription in contractual claims and, more specifically, with the issue of whether the date of breach invariably constitutes the onset of prescription. He states in this regard:

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[2] 2006 (4) SA 168 (SCA).

> *"Occurrence of loss will not necessarily coincide with the conduct that constitutes breach of contract. Where the act constituting the breach creates the potential of loss, but it is not yet possible to determine the extent of the loss or, for that matter, whether loss will occur at all, the debt should not be considered due for the purposes of prescription".*[3]

Dealing with the contention that the contemplation of damages is sufficient, Professor Loubser states at page 84:

> *"the mere potential of future loss is in itself not sufficient for a cause of action to arise."*

[26] Similar sentiments were expressed in *Swart v Van der Vyver*[4] where the court stated:

> *"Of skadevergoeding verskuldig is, asook die vraag waarin dit bestaan, is regsvrae, terwyl die bepaling of skatting van die omvang daarvan 'n feitelike vraag is. (Domat, Les loix civiles dans leur ordre naturel, Strahan se vertaling I.III.V, para. 1890-1891). Die blote feit dat kontrakbreuk gepleeg is gee nie noodwendig 'n eis om skadevergoeding nie. Om skadevergoeding te kan verhaal moet bewys word dat skade gely is. Steenkamp v Juriaanse, 1907 T.S. 980 op bl. 986. "*

[27] The central issue in the present matter is when the plaintiff acquired knowledge of the identity of the debtor and the facts in terms of which the debt arose. There is clearly no all-encompassing answer as to when prescription begins in relation to a claim for contractual damages since the particular circumstances of each case will play a determinative role. I am in agreement with Mr. Kirk-Cohen, who appeared on behalf of plaintiff, that the fact that the breach took place in the context

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[3] At page 78.
[4] 1970 (1) SA 633 (A) 643 B - D.

of an arbitral dispute between plaintiff and Fyfe is fundamental to an analysis of the issue.

[28] The process of arbitration is an important and valued element of our legal system. It recently underwent constitutional scrutiny in *Lufuno Mphaphuli and Associates (Pty) Ltd versus Andrews and Another*[5] and received a seal of approval. The majority of the court held that the values of the Constitution would not necessarily best be served by interpreting s 33(1) of the Arbitration Act 42 of 1965, which sets out the limited number of grounds upon which a court of law may set aside an arbitral award, in a manner that enhances the power of courts to set aside private arbitration awards. The Court stated:

> *"Indeed, the contrary seems to be the case. The international and comparative law considered in this judgment suggest that courts should be careful not to undermine the achievement of the goals of private arbitration by enlarging their powers of scrutiny imprudently".*[6]

The above *dictum* of O'Regan ADCJ, concurred in by the majority of the Court, underscores the respect given by the courts to the process of private arbitration and, by extension, to arbitral awards flowing therefrom.

[29] Although plaintiff had knowledge of the alleged breaches of the underlying agreement by December 2004, his cause of action

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[5] 2009 (4) SA 529 (CC).
[6] At page 235.

encompasses more than simply such a breach or breaches. In his particulars of claim plaintiff specifically pleads the setting aside of the first valuation by an order of court and the making of the second valuation of the equity and shareholders loan account in the company. Until such time as plaintiff set aside the first valuation, it continued to bind him and Fyfe. The continuing existence of the binding valuation would, I consider, have been a complete answer to any action for damages instituted by plaintiff. The special plea of prescription ignores this critical fact by focussing solely on plaintiff's rejection of the first valuation based upon the alleged breaches of the underlying agreement.

[30] It is thus an essential element of plaintiff's cause of action that the first valuation complained of had first to be set aside. This is illustrated by the fact that, in the absence of the arbitral process, plaintiff could merely have treated second defendant's malperformance as a repudiation and terminated the contract. That option was not open to plaintiff in the present matter since the breach or breaches took place in an arbitral context and plaintiff could not rely on them as the basis for a damages claim until the arbitral valuation was set aside. As Mr. Kirk-Cohen submitted, it is no answer to an adverse arbitration award to contend merely that an arbitrator (or valuator) has breached the underlying arbitration agreement. All other things being

equal, in the absence of sufficient grounds to set aside the award it remains final and binding on the parties to the agreement. Were it otherwise, a party aggrieved by an adverse arbitration award could simply sue the arbitrator *ex contractu*. Acceptance of such a proposition would, in my view, undermine the foundations of the law and practice of arbitration.

[31] It is indeed so that, as Mr. Goddard, who appeared for the defendants, pointed out, as far as the alleged underlying contractual breaches are concerned, the particulars of the action instituted by plaintiff in 2004 and the present action are similar in many respects. However, this fact in itself has limited significance. In the first action the relief sought, relying on these alleged breaches, was the setting aside of the arbitral award. In the present action plaintiff's claim for damages is based upon the defendants' alleged contractual breaches and the consequent setting aside of the arbitral award.

[32] I conclude that prescription did not commence running in the present matter until, at the earliest, the first valuation or arbitration award was set aside on 26 February 2007. It follows from this finding that the special plea of prescription must fail since the present action was instituted within a period of three years from that date.

[33] In the light of this finding it is unnecessary for me to consider whether prescription could not have commenced running any earlier than 1 June 2007 when the second valuation was made. Similarly, I need not consider the more doubtful proposition that there was a yet later date before which prescription could not have commenced running, namely, when it came, or should have come, to plaintiff's knowledge that he would be unable to recover his full claim from Fyfe.

[34] For these reasons I consider that the special plea of prescription must fail, with costs following the result. Counsel advised that from time to time two counsel had acted for the plaintiff and in the result the following order is made:

> **The special plea of prescription is dismissed with costs, such costs to include the costs of two counsel where so employed and to be payable by first and second defendants jointly and severally, the one paying the other to be absolved.**

L. J. BOZALEK, J
JUDGE OF THE HIGH COURT