

DEEP OVERSEAS COMPANY
versus
YORK DALE ENTERPRISES (PVT) LTD
and
FREE WORK INVESTMENTS (PVT) LTD
and
AYUB BHAI PATEL

HIGH COURT OF ZIMBABWE
CHAREWA J
HARARE, 14 February 2018 & 28 March 2018

Opposed Application – Special Plea

Advocate Hungwe, for the plaintiff
F Chinwadzimba, for the 1st & 3rd defendants

CHAREWA J: The plaintiff, a peregrine company, issued summons against the defendants, jointly and severally, claiming payment of \$290 866.50 arising out of a balance due on goods sold and delivered at the defendant's specific instance and request, interest at the bank rate of 24% per annum from due date to date of full payment, collection commission and costs of suit.

The defendants raised a special plea predicated on two grounds: firstly that plaintiff is a peregrine which has not tendered security for costs and is thus non-suited and secondly, that in any event the claim has prescribed.

The facts

It is not in dispute that the plaintiff is a company registered and trading in India. Further, it is common cause that the parties entered into contracts for the supply, by plaintiff to defendant, of bicycles, spares, tubes and tyres between 2012 and 2013. It is further common cause that summons were only issued on 4 September 2017.

First and third defendant entered appearance to defend and filed a special plea. Second defendant has not sought to defend the claim.

Parties' submissions

The defendants submit that because the plaintiff is a *peregrinus* with no assets in Zimbabwe, and has not provided security for costs, its claim should not be heard. However, this submission was abandoned as there was no allegation made or evidence on the papers, that the defendants had demanded such security for costs, and plaintiff had refused or failed to supply the same.

The more substantial submission is that the plaintiff's claim has prescribed. It is defendants' contention that prescription began to run from 31 December 2012 when the debt became due. Therefore, by January 2016, the debt had prescribed. Thus any purported acknowledgement of debt entered into sometime in April 2016 could not interrupt prescription which had already run its course. In any event, the purported acknowledgment of debt is only in respect of first defendant and for only \$25775. Besides, such acknowledgement of debt is defective and is in any case a forgery.

For its part, the plaintiff submits that the claim is still valid as prescription was interrupted by the first defendant's acknowledgment of debt. Further, plaintiff argues that prescription was interrupted by payments made by the defendants, which effect is further tacit acknowledgment of debt.

The Law

It is trite that prescription is subject to interruption by an acknowledgment of debt. Further, as long as a party is making regular scheduled payments without default, prescription does not begin to run, since a party is not *in mora*.

Advocate *Hungwe* also conceded that an acknowledgement of debt does not interrupt prescription after the expiry of the prescription period. What may be in issue is whether the acknowledgment of debt is a new agreement subject to its own prescription period which begins to run from the date of such acknowledgment.

It is also trite that a special plea of prescription is an alternative to pleading on the merits which has the effect of definitively disposing of a matter without going to the merits.

The issues

The issues for determination are therefore

1. Whether or not the plaintiff's claim had prescribed as at the time summons were issued;
2. And if it had, to what extent and against which defendants?

Analysis

Claim against the first defendant

From the declaration, it is clear that the claim as against first defendant is predicated on an invoice raised some time in 2012 in terms of Invoice Number DO YDE/133/12 in the amount of \$25 775. The actual date of the invoice has not been disclosed by the parties.

According to the undisputed assertion by the plaintiff, payment was due within 90 days from date of delivery. However, the plaintiff does not indicate when the goods were delivered. Neither does the first defendant inform the court of the date when it received the goods, despite the fact that it is the one claiming prescription. The court is therefore left to its own devices as to the actual date when prescription started to run.

Making the generous assumption, in favour of the plaintiff, that the invoice was raised on 31 December 2012 and delivery was 90 days from the invoice date, it would seem that the claim arose by 1 July 2013. Prescription is thus expected to have run its course by 30 June 2016. Therefore, as at 14 April 2016, when the purported acknowledgement of debt was made, prescription was still running and was consequently interrupted.

Conversely, in the absence of sufficient detail by the parties, the generosity of the court could be extended to the defendant: by assuming that the invoice was raised as early as 1 January 2012, and thus concluding that the claim had prescribed long before any acknowledgment of debt was signed on 14 June 2016.

However, and in any event, in the face of defendant's assertion that this acknowledged amount was paid, I am unable to find that any purported interruption of prescription serves any purpose.

Further, the acknowledgment of debt by the first defendant dated 14 April 2016, at page 20 of the bundle of pleadings, is very specific, relating as it does only to the debt for \$25 775 owed by the first defendant. Consequently it does not affect any other amounts due from the 3rd defendant.

It goes without saying, as properly conceded by Mr *Hungwe* that, had the debt prescribed at the time the acknowledgement of debt was entered into, the debt would have remained extinguished, unless the acknowledgement was a new and specific undertaking to pay.

Ultimately, whether the claim had prescribed or not, and whether the alleged acknowledgment of debt is invalid or a forgery are matters I cannot decide on the evidence before, but are best dealt with by adducing evidence at the trial. I therefore cannot uphold the special plea with respect to the claim against the first defendant.

The claim against the third defendant

With regard to the third defendant, the plaintiff alleges that goods were delivered under invoice number DO/AD/165/13 in the amount of \$69 630. Like the invoice against first defendant, the dates of issuance thereof are not disclosed, nor are the dates of delivery of the goods supplied thereunder.

Thus, the date when prescription began to run remains shrouded in mystery. Therefore, the court having also been left totally in the dark as to when delivery was made, the same assumptions pertaining to first defendant would mean that the debt possibly arose at the earliest, on 1 January 2013, or at the latest, on 30 December 2013. Prescription would therefore have run its course either by 31 December 2016 or 31 December 2017. Summons having been issued on 4 September 2017, the special plea of prescription could be upheld or dismissed.

In any case the purported acknowledgment of debt dated 16 January 2015, at p 19 of the bundle of pleadings, is in fact a denial of liability for \$90 000 by third defendant.

In this instance too, I have difficulty in upholding the special plea.

Conclusion

With regard to the entire claim therefore, assuming that the plaintiff can show, by evidence at trial and as alleged in the pleadings, that defendants were making regular and scheduled payments up until February 2016, any finding of prescription is difficult.

The long and the short of it is that, due to the paucity of information supplied by the parties, the issue of prescription must be left for determination at the trial.

Disposition

Consequently, it be and is hereby ordered that the special plea of prescription shall be dealt with at the trial. Costs will be in the cause.

Mushonga Mutsvairo & Associates, plaintiff's legal practitioners
Mvingi & Mugadza, 1st and 3rd defendants' legal practitioners