ALPHA MEDIA HOLDINGS (PVT) LTD
versus
GLOBEFLOWER (PVT) LTD

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 12 October, 2015

Special Plea

T Mpofu, for the plaintiff
T Magwaliba, for the defendant

TSANGA J: This is a special plea in which plaintiff argues extinctive prescription of the defendant's counter claim whose contextual facts are these. Plaintiff, Alpha Media Holdings (Pvt) Ltd, issued summons seeking payment of the sum of $247 000-00 being the balance of purchase price owing for 20 000 shares that the plaintiff sold to the defendant, Globeflower (Pvt) Ltd. Plaintiff asserted in its declaration that in terms of a written agreement entered into on 19 November 2009, the defendant bought the shares in question being the entire issued share capital in a company called Pitrace Investments (Pvt) Ltd "(Pitrace)" for the sum of $675 000-00. This company, Pitrace, is captured in the Agreement's introduction as being in the business of investing in 25% of the issued share capital of a company called Turnatemore (Pvt) Ltd (Turnatemore), which in turn conducts the business of printing newspapers.

In terms of the share sale agreement, five payments of $100 000.00 each were to be made in specified interval instalments starting from 20 November 2009 to 13 February 2010. The last instalment of $75 000-00 was to be made on 28 February 2010. Plaintiff's claim is that the defendant paid US$ 428 000-00 of the purchase price of the shares of Pitrace as at 18 December 2009 leaving a balance of $ 247 000.00.

Whilst defendant admits an agreement of sale, its plea is that the agreement was entered into in terms of what turned out to be a misrepresentation that Pitrace owned and

controlled 25% of Turnatemore when in truth the plaintiff knew that Pitrace did not own and control 25% of that shareholding. On this basis, the defendant's position is that the agreement is voidable. It therefore raised a counterclaim for cancellation of the agreement and the return of the purchase price paid to the plaintiff.

It is this counterclaim upon which the plaintiff has raised a special plea on the basis of extinctive prescription of defendant's claim. Plaintiff also argues that dealing and disposing with the merits of the counter claim first is necessary on the grounds that it may then not be strictly necessary for it to lead evidence on its own claim which it regards as largely admitted by defendant.

The defendant's counterclaim is founded on the following averment made in para 4.2 of its claim:

> "The defendant **stopped payments** upon discovery that the plaintiff did not in fact own 25% of the shareholding in Turnatemore and that the plaintiff had not disclosed material information as set out above". (My emphasis)

To this averment, the Plaintiff sought further particulars to enable it to plead to the claim in reconvention. It framed its enquiry thus:

> "How many instalments had defendant paid when it became aware, according to it, that it could not get 25% of the shareholding of Turnatemore?"

The defendant's reply was as follows:

> "Plaintiff already has the particulars sought. **It is apparent from paragraph 4** of plaintiff's particulars of claim attached to Plaintiff's summons **how many instalments Defendant had made before it became apparent** that it would be unable to get its 5% shareholding in Turnatemore." (Again my emphasis)

The facts pointed to by plaintiff in support of the extinctive prescription argument centre on defendant's response to this request for further particulars, in which he was asked when he became aware of the fact that the plaintiff's company which it had sold, did not control or own the said shareholding of Turnatemore. Paragraph 4 of the said particulars alluded by defendant merit quoting in full since that is where the answer the plaintiff was seeking was said by the defendant to lie.

In terms of the agreement between the parties defendant was to pay the said purchase price in monthly instalments as follows:

i) Instalments of $100 000-00 each on the following dates: 20 November 2009, 4 December 2009, 18 December 2009, 13 January 2010, 31 January 2010, 13 February 2010, and

ii) A final instalment of US$ 75 000 000 on 28 February 2010.

It is not disputed that the defendant made two payments of $100 000-00 each on 20 November 2009 and 4 December 2009, and a further payment of $288 000-00 on 18 December 2009 giving a total of $488 000-00[1]. These amounts are set out in plaintiff's reply to further particulars that had been requested by the defendant to its declaration. No more payments were made thereafter even though monies would still have been due at the end of January 2010 with the last payment due on 28 February 2010. From these details, together with defendant's response, is construed by the plaintiff to emerge the details of when the cause of action of the counter-claim arose, upon which defendant became obliged to act to avert prescription.

Plaintiff put forward the argument that there are two possible dates that the court could look at in resolving when the prescription of the claim began to run, pointing out that either of the two dates proposed would still show conclusively that the defendant's claim had prescribed. The first proposal was that this court looks at the date when final payment would have been made. This would have been made on 28 February 2010. Using this date, the claim would have prescribed on 28 February 2013. Plaintiff therefore argued that based on this date, the defendant's claim in reconvention which was made on 18 September 2014, was made more than a year and half after the debt had prescribed.

Plaintiff's second proposed approach was said to be for the court to have regard to para 4 as pleaded by the defendant, in terms of which the last payment made was on 18 December 2009. Using this date, the plaintiff argued that the claim would thus have prescribed on 18 December 2012. The plaintiff reasoned that a key allegation of fact having been made in the pleadings that the last payment was made on 18 December 2009, and this having not been rebutted by the defendant, that this was date upon which prescription ought to run. The plaintiff drew on the cases of *Robinson* v *Randfontein Estates Gold Mining Co Ltd* 1921 AD 168; and *Shill* v *Milner* 1937 AD 101 at p105 to support its argument that the purpose of pleadings is to set out a party's case. Plaintiff largely leaned in favour of 18

[1] The Declaration however claims that the total amount paid was $428 000.00 leaving a balance of US$247 000.00.

December 2009, as the date of defendant's awareness on the basis that this unrebutted statement was taken to be fact.

Again based on this alternative date, it was argued that the defendant's claim is clearly outside the three year period and that the claim was in fact extinguished. Plaintiff's stance was that based on these details relating to when payment was made and when it was stopped, the defendant overran the three year mark by a considerable time span in making its own claim. It thus argued that defendant's counter- claim is unreservedly prescribed. (The cases of *Maravanyika* v *Hove* 1997 (2) ZLR at p 88 and *Taruona* v *Zvarevadza & Ors* HH 87/2012 were cited in support of this argument).

Defendant, on the other hand, argued that it could not have been aware of the facts that form the basis of its counter claim on 18 December 2009 because it would have made no sense for it to have paid if it was already aware that it would not get the shareholding in question. It was therefore argued that this could not have been the date of knowledge. It was further argued that plaintiff's quest for further particulars on this score was done in a vague manner. Furthermore, defendant insisted that the quantum of instalments paid had nothing to do with the exact date on which it became aware that it would not get a 25% shareholding in Turnatemore through its purchase of Pitrace.

What was relevant according to the defendant was the date it became aware. Its stance was that the information requested had not sought the date. Its ultimate position was therefore essentially that there was nothing in the paragraph referred to in its answer that captures the date on which it became aware. It was further argued that none of the two dates put forward by the plaintiff support an actual date of awareness or lead to a finding of fact that defendant knew of the particular facts by the given dates. Defendant further highlighted the onus in a special plea being on the party raising it. The case of *Peebles* v *Dairibord* 1999 (1) ZLR 41 at p 46 was referred to in this regard.

Defendant also resisted the prescription claim on the basis that up until 9 April 2013 when plaintiff's then lawyers wrote to defendant about the payment of the balance of the purchase price, the plaintiff had till then not demanded payment of the balance outstanding. Defendant therefore argued that its right to rescind the contract and to claim return of the purchase price did not arise until then and that it has done so within a reasonable time in view of the mutual engagement between the parties. Further, the defendant argued that since it claims restitution, rescission is a sine qua non for restitution because it cannot claim restitution as long as the contract is binding. Its argument is that the contract was binding as

of 9 April 2013 and that its election to cancel came after this date when it issued its counterclaim on 18 September 2014. It placed reliance on the case of *Bowditch* v *Peel "Magill"* 1921 AD 561 at 572-3, for its contention that a party to a contract who discovers misrepresentation must elect within a reasonable time whether to rescind the contract or proceed with it. It was argued by defendant that in view of mutual engagement on the matter, it had elected to rescind within a reasonable time given these engagement. Its argument was that it only elected to rescind as a result of the failure of mutual engagement. Defendant also argued that the plaintiff's own claim had prescribed.

Resolution of the special plea

Defendant's argument that 18 December 2009 could not have been its date of awareness has merit in that it would have made little sense to pay $288 000-00 if it already knew it had issues with the agreement. However, what is material in my view in resolving the issue of whether and when prescription began run, is the statement by the defendant in its counter claim that **it stopped payments** when certain facts came to its knowledge. This averment is particularly significant for the reason that the agreement entered into by the plaintiff and the defendant had clearly defined time frames and dates for payment. As such, if, as averred by the defendant, it **stopped payment,** this must of necessity be with reference to when its next payment would have been due or in any event its last payment, at the very latest. It seems therefore clear to me that such facts as defendant avers it became aware of would have been within its knowledge by 28 February 2010 at the very latest, using a generous interpretation. The evidence of the payments made, which are accepted by defendant, reveal that as at 13 January 2010 it had stopped payments and that by the 28 February 2010 decidedly no other payments had been made following the last payment on 18 December 2009.

When one stops payment in the face of an agreement that is clearly date specific as to when those payments are to be made, and then alleges that it stopped making payments that were still due because of certain facts it had become aware of, the reasonable inference is that those facts must have come to its knowledge within the time frame when it would have been required to make its outstanding payments. It can only be that by the time the next payment was due, it failed to pay because of its awareness of the facts in question since its own plea is that it stopped making payments when it became aware of these facts. The Agreement was clear as to when the last payment ought to have been made – 28 February 2010. Defendant's argument that in the absence of any firm date stipulated by it there should be no attempt to

ascertain this dates from the facts, exemplifies an attempt by the defendant to simply tailor an argument to wriggle out of prescription which its own statement to the plaintiff otherwise supports. Thus, even if this court accepts the defendant's argument that what is relevant is not the number of instalments but the date it became aware, the only reasonable inference would have to be that it became aware at the very latest by 28 February 2010 when it would have had to have made its last payment. The inescapable conclusion is therefore that the defendant was by 28 February 2010 aware of the facts that it alleges are central to its quest to renege on the contract.

With regard to its argument that it has the right to cancel the Agreement and seek restitution, the defendant's argument lacks merit as this is also an afterthought given that it regarded itself as fully indebted to the plaintiff as at 19 August 2013. It cannot be that one elects to rescind from a contract simply because payment of the balance of the purchase price has been claimed. As pointed out by the plaintiff in a letter to its lawyers dated 19 August 2013 from the defendant, the latter clearly acknowledged its indebtedness to the plaintiff in the following terms:

> "(f) **We agree that we owe $247 000.00 and are prepared to meet the 5% interest per year on the outstanding figure from 1 March 2010** to date but we are constrained to put in place a payment plan by the shock we are still recovering from….. ."

With a full acknowledgement that it owed the money being claimed, not much store can be placed upon defendant's argument that it has a right to renege from the contract.

Turning to defendant's argument that plaintiff's claim was equally prescribed as summons were issued in June 2014, I agree with the plaintiff's response to this assertion that s 20 (2) of the Prescription Act [*Chapter 8:11*] is clear that the issue of prescription must be specifically pleaded. Defendant did not take a point of prescription against the plaintiff in its pleadings and therefore it could not seek to raise it as a matter of argument. (The case of *Angelique Enterprises (Private Limited)* v *Albco Pvt Ltd* 1990 (1) ZLR 6 (H) was referred to by plaintiff for this position). More significantly, the plaintiff was able to point to its pleadings that its own claim could not be prescribed as it had specifically pleaded that it had made demands for payment over time which interrupted its own prescription.

Ultimately in my view, the issue which this court should not lose sight of is that the cause of action which forms the basis of defendant's counter-claim arose at the very latest on 28 February 2010 as that is the date that the defendant failed to comply with what ought to have been the last payment. I would agree with the plaintiff's argument that there is a

distinction between when a cause of action arose and when a party elects to take action. The law is clear that once the cause of action arose the defendant was obliged to act. Failure to institute proceedings within the three year period commencing 28 February 2010 to 28 February 2013 renders its claim prescribed. There is no valid counter claim against the plaintiff.

Accordingly, it is ordered as follows:

1. The special plea on the basis of prescription with regard to the defendant's counter claim is upheld with costs.

Gill Godlonton & Gerrans: plaintiff's legal practitioners
Messrs Dube, Manikai & Hwacha: Defendant's Legal Practitioners