

IN THE COURT OF APPEAL OF THE REPUBLIC OF BOTSWANA
HELD AT LOBATSE

COURT OF APPEAL CIVIL APPEAL NO. CACLB-045-08
(High Court Civil Case No. CC-2698-05)

In the matter between:

ESTATE CONSTRUCTION (PTY) LTD

APPELLANT

and

ZAC CONSTRUCTION (PTY) LTD

RESPONDENT

Adv. H Lever SC for the Appellant
Mr L Morapedi for the Respondent

JUDGMENT

CORAM: RAMODIBEDI J.A.
HOWIE J.A.
LORD ABERNETHY J.A.

HOWIE J.A.

1. The primary question in this appeal is whether it was open to the plaintiff in the court below to raise and advance the matter of

interruption of prescription without pleading it. The learned trial Judge (Gaongalelwe J) thought that the answer to that question had to be in the affirmative and he accordingly dismissed the defendant's special plea of prescription. The defendant appeals. For convenience I refer to the parties as they were in the Court *a quo*.

2. By way of summons served in November 2005 the plaintiff sued for payment for certain road construction work, relying on the provisions of a written contract entered into by the parties on 15 September 1997. In the summons it was alleged that the work had been completed by 28 January 1998 and that the plaintiff had unsuccessfully sought payment from the defendant, hence the suit.
3. In addition to pleading on the merits the defendant pleaded that the prescriptive period of six years (laid down by s. 4(2)(c) of the Prescriptions Act, Cap. 13:01) elapsed in June 2004 and that the action had prescribed.

4. The plaintiff did not file a replication and accordingly, having regard to Order 26 of the High Court Rules, must be taken to have done no more in response to the special plea than implicitly to deny the allegations and assertions in it and to join issue.
5. On those pleadings the parties made ready for trial. As regards pre-trial preparations the appeal record shows that the defendant made discovery of certain documents and required the plaintiff to produce certain others. None of this documentation forms part of the record.
6. What is included in the appeal record is a typed opening address to the court below by counsel for the plaintiff when eventually the matter came to trial. Referring to the prescription defence, counsel mentioned a number of other High Court cases which he said involved the same claim and showed that litigation between the parties had been “alive ever since the cause of action arose.” Counsel went on to say “Prescription did not even begin to run.” The document containing counsel’s address is dated 14 May 2008.

7. It is not apparent what course proceedings in the Court below took consequent upon plaintiff's counsel's opening address. At all events, by way of a written ruling delivered on 8 September 2008, the learned trial Judge dealt with the prescription defence and, as I have indicated, dismissed the special plea.
8. It is clear from his ruling that the trial Judge had regard to documentation relative to the other legal proceedings of which the plaintiff's counsel had made mention. Such documentation has not been included in the appeal record. It is also plain that he regarded the matter of the interruption of prescription as properly before him.
9. There having been no replication, and in view of the assertion in his opening address by the plaintiff's counsel that prescription did not even begin to run it is not apparent with any measure of clarity how the interruption aspect came to be dealt with by counsel and considered by the trial court at all. It was not raised in the pleadings and there is no indication that it was put up as a stated case, for example under Order 35.

10. In the current leading South African work on pleadings – *Amler's Precedents of Pleadings* – the subject of extinctive prescription is dealt with in the sixth edition (2003) from 293. The learned author (Justice Harms) states at page 295 that the creditor bears the onus of alleging and proving interruption of prescription. And at page 293 it is said that a court may not of its own motion take notice of prescription and that the proper way of raising the defence in action proceedings is by way of a plea or special plea. “The reason for this”, the author goes on, “is that the plaintiff may have a valid answer to the allegation of prescription, which may be raised in replication.” The same holds good for the law of Botswana: s. 16 of the Prescriptions Act says that a party to a suit who raises prescription “shall do so in the pleadings.” It follows that the party seeking to raise interruption should also do so in the pleadings.

11. What requires emphasis is that the pleadings in an action do not only serve to forewarn the pleader's opponent of the case to be met. They also define the issues which the court has to try. The evidence to be garnered and led, and the arguments to be

presented, need focus only on those issues. If it is for a defendant to plead prescription one of the reasons is to give the plaintiff the opportunity to investigate the allegation of prescription so as to seek evidence to defeat it. There is no less reason to require the plaintiff to plead interruption so that, in turn, the defendant can investigate and respond.

12. As a last ditch attempt to rely on interruption of prescription, counsel for the plaintiff contends that we should have regard to the contents of paragraph 9 of the particulars of claim. It reads as follows:

“9. As a result of the breach aforesaid the Plaintiff has instituted legal proceedings before this Honourable Court against the Defendant on or about the 25th February 1998 under case number MISCA 65/98. The Plaintiff has duly withdrawn the above application in August 2005.”

However, at best for the plaintiff those allegations signified no more than that it might rely on them were prescription ever to be pleaded; they did not assert or even refer to the interruption of

prescription and they were certainly not relied on in answer to the special plea. Cf. *Volkskas Beperk v The Master and Others* 1975(1) SA 69(T) at 72 D-E. It remains to point out that the learned Judge below remarked that had the proceedings in case MISCA 65/98 been the only previous proceedings prior to the instant case prescription would have run its course.

13. It was therefore not open to the trial Court to consider and dispose of the matter of the interruption of prescription without that matter having been made an issue by way of appropriate pleading. It follows that the appeal must succeed and it is unnecessary to examine the trial Court's reasons for holding that interruption did not occur and for consequently dismissing the special plea.

14. The further question that arises is whether, as contended by counsel for the defendant, the trial Judge's order should be replaced by an order upholding the special plea (which would terminate the action), or whether the matter should be remitted to

enable the plaintiff to file a replication raising interruption of prescription as an issue in the case.

15. It is, of course, generally speaking, not for courts to say how parties should conduct their cases. There are, nonetheless, sufficient indications in the record as it stands, firstly, that the plaintiff endeavoured to meet the prescription defence other than by way of a mere denial that the prescriptive period had expired and, secondly, that there exists some apparently relevant evidential material in this regard such as could be canvassed were the scope of the pleadings to be enlarged. The question is not whether interruption could successfully be raised. It is whether there are sufficient reasons to permit the plaintiff the opportunity to consider whether it can or should raise that matter. The guiding considerations in this regard, apart from what the record contains, are that a party must have a fair opportunity to state its case and, secondly, that prescription is there to penalize inaction, not legal ineptitude: *Mazibuko v Singer* 1979(3) SA 258(W) at 266A. On the strength of the factual statements made by the learned Judge as to the history of the litigation instituted

by the plaintiff in pursuit of payment for the work it did, it might be found in due course (if those statements are correct) that inaction is not an apt term. I therefore think that remittal is the right course.

16. The Court's order is as follows:

1. The appeal succeeds with costs.
2. The order of the Court *a quo* is set aside.

2.1 In its place there is substituted the following order:

“The matter is postponed to a date to be arranged for the resumption of the trial, it being open to the parties in the interim to consider, and to effect, such amendments to their pleadings as they deem appropriate. The costs of such postponement, as well as the costs of the proceedings to which the Court *a quo*'s Ruling dated 8 September 2008 relates, are reserved for decision at the end of the trial.”

3. The matter is remitted to the trial Court for resumption pursuant to the order in 2.1 above.

DELIVERED IN OPEN COURT AT LOBATSE THIS 27TH DAY OF JANUARY 2011.

C.T. HOWIE
JUSTICE OF APPEAL

I agree

M.M. RAMODIBEDI
JUSTICE OF APPEAL

I agree

LORD ABERNETHY
JUSTICE OF APPEAL