



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Reportable

CASE NO: 386/2002

In the matter between :

F W A LUTZKIE NO

First Appellant

S C LUTZKIE NO

Second Appellant

and

ZENITH CONCESSIONS LIMITED

Respondent

Before: MPATI, NUGENT JJA & VAN HEERDEN AJA

Heard: 16 SEPTEMBER 2003

Delivered: 26 SEPTEMBER 2003

Summary: Cheque – period of prescription

J U D G M E N T

NUGENT JA

NUGENT JA:

[1] Section 11(c) of the Prescription Act 68 of 1969 ('the Act') provides that the period of prescription in respect of a 'debt arising from a bill of exchange' (except in certain cases that are not relevant to this appeal) is six years. In this case an action founded upon a cheque, commenced within that period, was dismissed by the High Court at Pretoria on the grounds that the debt had prescribed when the underlying debt prescribed (the prescription period of the underlying debt was three years in terms of s 11(d) of the Act). The unsuccessful plaintiff now appeals against that order with leave granted by this Court.

[2] The cheque was drawn by the respondent in favour of the appellant in payment of part of the purchase price of the shares in a company that were sold by the appellant to the respondent on 25 September 1997. The purchase price of R7 450 000 was payable in tranches. The first tranche of R4 029 666.49 was payable upon signature of the agreement and the remaining tranches (in varying amounts) were payable upon the occurrence of certain future events.

[3] The respondent paid the sum of R1 029 666.49 to the appellant on 21 October 1997. On 26 November 1997 the cheque that is now in issue, for R2 million, was issued by the respondent in reduction of the balance of the first tranche that was then outstanding. The cheque was presented for payment, and dishonoured, two days later.

[4] The appellant sued the respondent for provisional sentence on the cheque. The summons was served on the respondent on 20 March 2001 (more than three years after the underlying debt became due). The respondent raised various defences to the claim. It alleged that the cheque was handed over on condition that it would not be banked until the respondent had given ‘the go-ahead’ to do so, that the person who purported to act for the respondent in concluding the agreement of sale had not been authorised to do so, that the agreement was void from the outset for failure of an underlying assumption or for mistake, and that the respondent was induced to conclude the agreement by various misrepresentations. It also alleged that because the underlying debt had prescribed so too had the debt arising from the cheque.

[5] The court *a quo* was asked by the parties to deal with the defence of prescription at the outset because it was potentially decisive of the claim. On that issue the learned judge reasoned that, because the underlying debt (the debt that arose from the agreement of sale) had prescribed, the debt arising from the cheque had also prescribed. To hold otherwise, said the learned judge –

‘... druis in teen die erkende beginsel van onderliggende skuldoorsaak soos neergelê in *Froman v Robertson* en die tjek is nie die rede waarom die eiser hof toe kom om die geld te vorder nie. Die eiser kom hof toe om die verdere of die gedeeltelike betaling van die koopprys te vorder ...’

[6] A cheque that has been properly drawn and issued constitutes a contract in writing (with the special characteristic of negotiability) and as such it must be founded upon *justa causa debendi*, or reasonable cause, in order to be valid and enforceable (*Froman v Robertson* 1971 (1) SA 115 (A) at 120F-G). Conversely a claim by the payee for enforcement of that contract will be defeated if it is shown that the requisite *justa causa* was lacking or has failed (*Froman v Robertson, supra*, at 121G-122C), for example, where the underlying contract was voidable, or illegal, or there has been a failure to perform (*Malan on Bills of Exchange, Cheques and Promissory Notes in South African Law* 4th ed para 65).

[3] To that extent the obligation that arises on a cheque is dependent upon the validity of the underlying obligation but it does not follow that they are extinguished simultaneously by the operation of prescription. Debts are extinguished by prescription through the operation of the Act and the terms of the Act will determine the extent to which it has had that effect. Clearly the legislature intended that a debt arising from a cheque would not prescribe when the underlying debt prescribed for it provided expressly for a different period of prescription to apply in relation to that debt (cf *Malan, supra*, paras 14 and 185). In the case of the underlying debt in this case the prescription period was three years, but in the case of a ‘debt arising from a bill of exchange’ (by which is meant a debt which has its source or origin in a bill of exchange: *Pentz v Government of the*

Republic of South Africa 1983 (3) SA 584 (A) at 593B) which is what was sued upon in this case, the prescription period is six years. That period had not elapsed at the time the provisional sentence summons was served and the defence of prescription should have failed.

[9] 1. The appeal is upheld with costs including the costs occasioned by the employment of two counsel.

2. The order of the court *a quo* is set aside and the following order is substituted:

“The defence of prescription is dismissed with costs.”

3. The action is remitted to the court *a quo* for the remaining issues to be determined.

NUGENT JA

MPATI DP)

VAN HEERDEN AJA)

CONCUR