

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: **00127/2021**

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|-------|---------------------------------|
| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER JUDGES: NO |
| _____ | _____ |
| DATE | SIGNATURE |

In the matter between:

SIBANYE
Applicant

STILLWATER

LIMITED

and

DOVETAIL PROPERTIES (PTY) LIMITED

Respondent

JUDGMENT

This judgment has been delivered by being uploaded to the CaseLines profile on and communicated to the parties by email.

Wepener, J

[1] The applicant is Sibanye Stillwater Limited (“Sibanye”). It is the defendant in the matter wherein the respondent (Dovetail Properties (Pty) Limited)(“Dovetail”) is seeking payment from it on various basis. This matter is dealt with in terms of and

under the rules of the Commercial Court Practice directives applicable in this Division. During a recent meeting, whilst I was case managing the matter, Sibanye indicated that it wished to separate out certain issues for hearing in terms of Rule 33(4). It filed an application and, although initially opposed by Dovetail, I eventually issued an order in the following terms:

“The following issues are separated for prior determination before the full trial:

- 1.1. The defendant’s first special plea – res judicata;
- 1.2. The defendant's second special plea – prescription;
- 1.3. The defendant’s third special plea – The ‘assent agreement’ is not cognisable in law; and
- 1.4. The question whether the letter dated 10 January 2018 from the defendant to the plaintiff constitutes a repudiation or a termination.”

[2] Subsequently to that order, the parties filed their heads of argument and the matter was heard on 5 March 2024.

First special plea - Res Judicata

[3] The issues is whether a decision of this court upholding an exception and finding that the agreement relied upon by Dovetail was unenforceable renders the matter res judicata. In a judgment dealing with the exception taken to the particulars of claim, I found that the issue was whether the agreement relied upon by Dovetail was indeed an enforceable agreement or whether it was an agreement to agree, in which latter case the parties accepted that it would be unenforceable. In that judgment I only dealt with the one paragraph of the document, in which it was said that the appointment of Dovetail “. . . will be reduced to an appropriate contract”. That was the only issue that was considered and determined and I found that the pleading, i.e., Dovetail’s reliance on an agreement to agree, is bad in law. No other terms of the alleged agreement were argued or the subject of the decision on exception. The finding was that the pleading was expiable and the particulars of claim were set aside. [4] Thereafter, as it was entitled to, Dovetail amended its particulars of claim in order to rely on various terms contained in the document wherein the impugned term appeared as well as other documents and facts in order to plead the agreement upon which its relies. The fact that the term contained in the letter of 16 May 2016 was found to be an agreement to agree and unenforceable does not detract from Dovetail’s current pleaded case which records the agreement

to be gleaned from several sources, not only the impugned document. In particular, the allegations now refer to several of the terms and conditions contained in the document of 16 May 2016, none of which were considered by this court during the exception stage. It is to be noted that there was no argument that any of the terms contained in the document were objectionable, save of course for the one dealt with during the exception stage.

[5] The nub of the objection by Sibanye is that the decision during the exception proceedings that the document contained an agreement to agree and was thus unenforceable, binds Dovetail and that it cannot further rely thereon. The pleading now also alleges that, inter alia, the impugned term had been waived. That results in the agreement, upon which Dovetail relying being en dehors the term that caused the pleading to be excipiable in the first place. Sibanye submitted that, in upholding the exception, I ruled that all the terms referred to in the letter of 16 May 2016 were part of the material that caused the exception to be upheld and that Dovetail is thus barred from relying on such terms due to the principle of res judicata. I do not agree. The judgment on the exception only dealt with the opening paragraphs which were held to be unenforceable. Dovetail now alleges a completely different agreement, inter alia, excising the impugned portion and the pleaded issues have not become res judicata between the parties. In my view, the first special plea falls to be dismissed.

Second special plea – Prescription

[6] The best way to have regard to this plea is by repeating the plea verbatim:

“8. The Plaintiff sues the Defendant for services allegedly rendered by the Plaintiff (and others on behalf of the Plaintiff) to the Defendant during the period of August to October 2016 (POC paragraph 26).

9. According to the Plaintiff, the Defendant was obliged to pay the Plaintiff 4% of the total cost of the Developments to execute the development in its entirety, alternatively, the Plaintiff would be compensated for its services at the agreed, and / or normal and / or reasonable price (POC paragraph 25.32).

10. According to the Plaintiff, it had performed all its obligations in terms of the alleged contract by December 2016 (POC paragraph 28), alternatively its obligations are deemed to be fictionally fulfilled (POC paragraph 30).

11. According to the Plaintiff, the Defendant was required to consider the outcomes of the Plaintiff’s endeavours and decide on its participation on the project

soon after the Plaintiff presented the outcome of its endeavours but failed to do so (POC paragraph 29).

12. Although the date by which the Defendant is alleged to have defaulted on its reciprocal obligations alleged in paragraph 29 of the particulars of claim is not pleaded, it is reasonable to suppose that such default allegedly took place soon after December 2016.

13. In any event, according to the Plaintiff, the Defendant repudiated the alleged agreement in January 2018 (POC paragraph 31).

14. The Plaintiff's claims are for the recovery of debts within the meaning of chapter III of the Prescription Act 68 of 1969 (the "the Prescription Act").

15. If the Defendant was liable to pay the Plaintiff's claims (which is denied), the alleged debt would have become due by December 2016 at the latest.

16. The Plaintiff was aware of the identity of the Defendant and the facts from which the alleged debts arose by December 2016 at the latest, alternatively by no later than the end of the first quarter of 2017.

17. The Plaintiff's summons and particulars of claim were issued and served on the Defendant on 7 January 2021, being more than three (3) years after the date on which the alleged debts became due.

18. In the premises, the Plaintiff's claims have prescribed in terms of section 10, read with section 11, of the Prescription Act."

[7] In the absence of a replication to the plea, it is not open to Dovetail to contend that the onset of prescription may have been delayed. Nevertheless, the onus is on Sibanye to show that the claim had become prescribed.¹ In order to substantiate its submission that the claim had become prescribed, Sibanye relied on judgments such as *Cook v Morrison and Another*,² *Minister of Public Works and Land Affairs and Another v Group Five Buildings Ltd.*³ The difficulty that one has with reliance on these cases is that these decisions were based on the facts and manner of pleading therein. In *Minister of Public Works*, unlike this matter, there was a complete set of agreed facts placed before the court from which it could make findings of fact regarding the question of prescription. In the matter before me, Sibanye wishes me to assume, if not guess, the date when prescription commenced running. It submitted that prescription ought to have commenced running shortly after December 2016 "or soon thereafter". However, if regard is had to the pleading there

¹ *Gericke vs Sack* 1978 (1) SA 821 (A).

² 2019 (5) SA 51 (SCA).

³ 1996 (4) SA 280 (SCA) at 290C-I.

is nothing (in the absence of evidence) to show when the debts became due. Indeed, the claim based on the alleged repudiation, which according to the pleadings occurred on 18 January 2018, could not have become prescribed when the summons was served within a three-year period, being 7 January 2021.

[8] On the pleadings before this court, I am unable to find that Sibanye has placed sufficient material before the court in order to conclude, in its favour, that any of the claims relied upon by Dovetail have become prescribed. In these circumstances, the plea based on prescription falls to be dismissed.

Third special plea – the claim based on quasi-mutual assent not cognisable in law

[9] In its particulars of claim Dovetail sets out certain conduct and representations by employees of Sibanye. Obviously, this Dovetail will have to prove. Sibanye's submission is that, based on *Sonap Petroleum (SA) (Pty) Ltd (formerly known as Sonarep (SA) Pty) Ltd v Pappadogianis*,⁴ Dovetail has failed to set out a sufficient case to meet the requirements to rely on a quasi-mutual assent and referred to the requirements set out in *Sonap*. For this submission it relied, inter alia, on the absence of any allegation of a misrepresentation. In *BE BOP A LULA Manufacturing and Printing CC v Kingtex Marketing (Pty) Ltd*⁵ the Supreme Court of Appeal held:

“Although, generally, a contract is founded on consensus, contractual liability can also be incurred in circumstances where there is no real agreement between the parties by one of them is reasonably entitled to assume from the words or conduct of the other that they were in agreement.”

[10] In *Van Ryn Wine and Spirit Company v Chandos Bar*⁶ it was said:

“If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus ,conducting himself would be equally bound as if he had intended to agree to the other party's terms.”

“. . . is that all the circumstances must be regarded and if as a result a reasonable man would believe that the offeree was assenting to the terms proposed by the offerer, the then rest of the rule would apply.”

[11] In my view, a contract based on quasi-mutual assent does not presuppose a mistake but rather whether the conclusion of the agreement and its terms can

⁴ 1992 (3) SA 234 (A) at 239I to 240B.

⁵ 2008 (3) SA 327 (SCA) para 10.

⁶ 1928 TPD 417 at 423.

reasonably be assumed from the other party's words or conduct. The question to be answered is whether Dovetail was actually misled and would a reasonable person have been misled in the circumstances. These issues cannot be decided only on the allegations as set out in third special plea. Evidence of the party's conduct is required. The question whether an agreement by quasi-mutual assent came into existence can therefore only be determined once the evidence is placed before the court. In such circumstances, the third special plea falls to be dismissed.

Fourth special plea – repudiation versus termination

[12] Sibanye's reliance on the fourth separated issue was abandoned. It needs no further attention.

[13] In the circumstances, in each of the three separated issues that were argued, I issue the following order:

1. Each of the three special pleas is dismissed.
2. Sibanye is to pay the costs of this application including the costs of the application for a separation (of the issues determined herein), such costs to include the costs of two counsel where so employed.

Wepener J

Heard: 5 March 2024

Delivered: 6 March 2024

For the Applicant:

Adv P. Stais SC

With Adv. R. Booysen

Instructed by Weavind & Weavind
Incorporated

For the Respondent:

Adv N. Luthuli

With Adv. N. Makhaye

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