LANSDOWNE ESTATES (PVT) LTD
versus
FARM A-RAMA (PVT) LTD

HIGH COURT OF ZIMBABWE
CHAREWA J
HARARE, 13, 15 February & 29 March 2017

Civil Trial

Mr S Hashiti, for the plaintiff
Ms S Njerere, for the defendant

CHAREWA J: The plaintiff's claim is for the replacement and return of 383 x 50kg bags of urea fertiliser, or alternatively, their market value calculated at the date of judgment together with interest at the prescribed rate and costs.

Facts

The undisputed facts are that between 11 and 17 April 2002, and without prior arrangement with the defendant, the plaintiff delivered 623 x 50kg bags of urea at the defendant's premises for safe keeping. The defendant did store the plaintiff's fertiliser. Such agreement was a purely gratuitous act by the defendant which it accorded all farmers affected by the land reform programme. The plaintiff later removed 240 bags and disposed of them leaving a balance of 383.

On 21 October 2002, the defendant wrote to the plaintiff, as it did to all other farmers in a similar situation, to remove the remaining bags of urea failing which the defendant would be obliged to sell them at a price decided by the plaintiff. This was because the defendant was being accused of hoarding an essential product and was under pressure to dispose of it.

It was not in dispute that unlike other farmers in the same situation, plaintiff did not remove its fertiliser, nor was it willing to have it sold. However, the plaintiff subsequently met with Mr Bromley, the defendant's employee and advised that the fertiliser could be disposed of at $500 000/t. The fertiliser was eventually disposed of to Mashco at the price

stipulated by plaintiff. Nor is it disputed that plaintiff refused a tender of the proceeds of the sale.

Parties' submissions

Plaintiff

The plaintiff's submissions are summarised as follows: agreement was reached for storage of the plaintiff's urea fertiliser bags with the defendant. Once it became necessary, the plaintiff authorised that the fertiliser should be sold for a specified amount. It did become necessary and the fertiliser was sold for $500 000/t according to the plaintiff's stipulation. None of the proceeds were or have since been paid to the plaintiff, nor has any of the fertiliser been returned to it. Therefore, the defendant is liable to the plaintiff for the return of the fertiliser or its value.

The plaintiff, in its pleadings, made no attempt to reply to the defendant's plea of prescription.

Defendant

For its part, the defendant submits that the plaintiff simply drove up and left its goods at the plaintiff's premises as other farmers were also storing their stuff there. There was no prior agreement or discussion as to the terms of such storage. In any event, there is no basis for the claim against it because the plaintiff's fertiliser was sold in terms of the plaintiff's authorisation, the proceeds of the sale were tendered and refused. In any case, the plaintiff's claim is prescribed as summons was issued in October 2006, when at the latest, the debt became due in June 2003.

Dispute

The dispute arises as to whether the defendant tendered to the plaintiff the purchase price received from Mashco at $500 000/t. The plaintiff alleges that the defendant, at an undetermined date which could have been in early 2003, tendered an unsigned cheque calculated at $175 000/t which it refused to accept, while the defendant alleges a proper tender of $500 000/t.

The further material dispute on the facts is whether, at a meeting held between the parties not later than early 2003, the defendant agreed to buy back the unsold urea from Mashco, (in the event that Mashco was not amenable to reversing the sale), and make up the

balance. While the plaintiff alleges this was so, the defendant flatly denied making any such undertaking, save the offer to approach Mashco to see if the sale could be reversed, which Mashco refused to do.

Issues

The matter was referred to trial on six issues:

1. The nature of the agreement between the parties;
2. Whether or not the defendant sold the fertiliser at the price stipulated by the plaintiff;
3. Whether or not the defendant tendered to the plaintiff payment in respect of the urea;
4. Whether or not the defendant undertook to replace the urea but failed to do so;
5. Whether or not the claim is prescribed; and
6. Whether or not the plaintiff is entitled to the relief sought.

It is evident from the facts traversed above, the submissions of the parties and the identified areas of dispute that the first two issues are no longer germane. Issue 3 and 4 are matters of fact which I will summarily dispose of.

Whether or not the defendant tendered to the plaintiff payment in respect of the urea;

It is evident from the testimony and submissions by both parties that a tender for the proceeds of the sale of the fertiliser was indeed made.

According to the plaintiff, the tender was for $175 000/t, substantially less than the price it had stipulated. To add insult to injury, the tender was through an unsigned cheque.

I find it established that the tender was on an unsigned cheque, as the defendant's witness did not, and could not rebut this assertion as he never dealt with the cheque, whereas the plaintiff's witness was the very person to whom the cheque was handed.

According to the defendant, the tender was for $500 000/t. However, the defendant's witness did not make the tender, did not see the cheque nor produce it. Nor was the witness able to tell the court the amount on the cheque.

While the defendant's stock cards were not explained or entered into the record as exhibits, they were discovered by the plaintiff and they do not show that plaintiff's fertiliser was disposed of to Mashco at the end of 2002 for $9,575,000.00 which, simple arithmetic shows, would have been the price of 383 bags of urea (19.15t at $500 000/t). In fact, a

complementary slip on Mashco letterhead seems to suggest that the fertiliser was dispose of for $3,360,000.00 at $175 000/t.

In the premises, I am constrained to agree with the plaintiff that any tender by the defendant was not in accordance with the plaintiff's authority.

Whether or not the defendant undertook to replace the urea but failed to do so

The plaintiff faced a more difficult challenge to prove that the defendant undertook to replace the fertiliser and failed to do so. Save for a letter, entered into the record as Exhibit II, written by an ex-employee of the defendant, more than a year after the event, alleging that defendant undertook to purchase the unsold stock from Mashco on failure of which defendant would order the fertiliser from Windmill, plaintiff adduced no other evidence to corroborate this letter. The best evidence would have been the minutes of the meeting where this undertaking was made. Further, the letter from the ex-employee of defendant is made even more doubtful by the fact that its author was not called to testify and be cross-examined on it. Neither could the author be cross-examined on his recollection of the conclusions of the meeting in the face of one of the participants to the meeting stating a contrary view in court.

I am therefore not able to put much stock in the corroborative weight of this letter. Consequently, the court is left to consider the issue on the credibility of the two witnesses, one for each of the parties, who appeared in court and a general assessment of the circumstances of the case to determine which witness was likely to be stating the truth.

In view of the fact that the defendant was storing the plaintiff's fertiliser gratuitously, and did not stand to benefit from such act, I cannot comprehend how the defendant would take on the extra burden of offering to purchase and return the fertiliser to the plaintiff. After all, the defendant did not wilfully sell the fertiliser. It was forced to do so by pressure from the authorities in circumstances were the plaintiff had unreasonably refused to collect its fertiliser, and was reluctant to sell it. I can understand the defendant's willingness to follow up with Mashco to return any unsold stock, but I find it difficult to believe that the defendant would offer to incur the cost of purchasing and returning the fertiliser to plaintiff. Such an undertaking would obviously require the authority of Mr Orphanides, the defendant's witness, who flatly denied any such undertaking.

The plaintiff has therefore not persuaded me that its version, that the defendant undertook to replace the fertiliser and failed to do so, is the correct position.

Prescription

The defendant raised the more serious point of law of prescription. It is not in dispute that the plaintiff's fertiliser was sold to Mashco at the end of 2002. The plaintiff alleges that it discovered in early 2003 that its fertiliser had been sold to Mashco when its witness came to check on its stock and found the fertiliser gone. In my view, it was at this stage that defendant became indebted to the plaintiff for the proceeds of the sale.

Alternatively, if the defendant made an undertaking in early 2003, to return the fertiliser (which I have already stated that I am not inclined to believe), then the debt became due then.

While he correctly quoted the law[1], I cannot agree with Mr Hashiti's analysis and application thereof to the facts: that the plaintiff's *causa* only became complete when attempts to remedy the situation failed. Attempts to remedy a situation do not create a cause of action. Rather, the situation itself grounds the cause.

In this case, the situation was that the plaintiff's fertiliser was sold by the defendant and the plaintiff did not receive the proceeds of such sale. These facts were enough to complete the plaintiff's *causa* and entitle it to relief because all it needed to prove to succeed was that the defendant sold its fertiliser and did not pay the proceeds to it. Therefore as soon as the plaintiff became aware of this situation, its cause of action arose and prescription began to run.

The law is quite clear. Prescription begins to run as soon as a debt becomes due as long as the creditor is deemed to be aware of the identity of the debtor and the facts from which the debt arises.[2]

In my view, it is not relevant that a meeting was subsequently held to try and reverse the sale or even to purchase the fertiliser and return it to the plaintiff. Prescription started to run from when the plaintiff became aware that its fertiliser had been sold by the defendant. Such running of prescription could only have been interrupted, as rightly stated by the plaintiff, upon an express or tacit acknowledgement of liability by the debtor.[3]

Even assuming that, at the meeting in early January 2003, which both parties acknowledge, the defendant acknowledged its liability to the plaintiff, the issuance of summons in October 2006 would have still been beyond the prescriptive period.

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[1] Peebles v Dairibord Zimbabwe (Pvt) Ltd 1999 (1) ZLR 41
[2] Prescription Act [Cap 8:11], s16
[3] Prescription Act(supra) s18(1)

However, the defendant denies acknowledging any liability towards the plaintiff. The summary of facts, parties' submissions, the points in dispute and my findings on issue 1 and 2 at pages 1-4 above are pertinent. At no stage has it been proved that the defendant acknowledged liability to plaintiff.

The plaintiff further falls into difficulty in alleging that subsequent meetings were held with the defendant's managers after early 2003 at which such further acknowledgments of liability were made, thus interrupting prescription. The record clearly shows, and the plaintiff's witness testified as much, that after the meeting in early 2003 (alluded to in Exb II), no other meetings were held.

In fact, the plaintiff's witness stated that he only approached a former employee of the defendant's in January 2004. Certainly, whatever admissions or acknowledgments the former employee made then, cannot be attributed to the defendant as such former employee had no mandate to make any acknowledgments on behalf of the defendant.

The plaintiff further argued that since it did not place the defendant *in mora,* then prescription did not begin to run. I find this argument interesting, but totally without merit. Firstly, that point is predicated on a contractual agreement. It has not been alleged in the summons that the plaintiff's claim is based on a contractual relationship. Nor has it been established during the trial that there was any contract between the parties for the storage of plaintiff's fertiliser, and the terms thereof. In fact, the facts show that the plaintiff simply drove up to the defendant's premises and offloaded its fertiliser for safekeeping without any prior discussion or agreement. Gratuitously, the defendant, allowed the plaintiff's fertiliser to remain on its premises until forced by pressure from the authorities to require that the plaintiff should remove his fertiliser or allow the defendant to sell it.

In any event, Mr Hashiti's submission would result in an absurdity, where a plaintiff would place a defendant in an invidious position, and then do nothing about it for years to later claim that it had not put the defendant *in mora* and therefore prescription did not commence to run.

In any case, in the instant matter, I am of the view that the plaintiff did put the defendant *in mora* when it claimed from the defendant, the payment of the purchase price received from Mashco or the reversal of the sale.

Consequently I find that the running of prescription from early 2003 was not interrupted up until summons was issued in October 2006. Plaintiff's claim is therefore prescribed.

Having found that the defendant has proved prescription, it follows that the plaintiff is not entitled to the relief claimed in the summons, and its claim must therefore be dismissed.

The defendant argued that should it succeed, then costs should be awarded against the plaintiff on the higher scale. I am unable to agree with the defendant. Firstly, costs are entirely in the discretion of the court. Higher costs being punitive, such discretion may not be exercised unreasonably and unnecessarily unless it is clear to a judge that a party, well knowing that its claim is absolutely without basis, persisted therewith.

In the instant case, it is apparent that the plaintiff stored its fertiliser with the defendant. The defendant sold that fertiliser and the plaintiff did not receive the proceeds thereof, or the return of its fertiliser. In different circumstances, the plaintiff would have had an unassailable case. The issue of stabbing its benefactor in the back does not arise: the benefactor's kindness did not entitle it to enrich itself at the plaintiff's expense.

In my view, the plaintiff's only problem was that it ran afoul of the prescriptive requirements. Even then, the time lapse between the issuance of summons and the running out of prescription was not so great as to warrant higher costs. According to the defendant's own assumption, prescription ran out in or about June 2006 and summons was issued in October 2006.

As for the dilatoriness of the plaintiff in litigating its claim to finality, it was uncontroverted that the plaintiff's witness is now based in South Africa and had challenges, both financially and health wise, in pursuing the matter.

In the premises, the plaintiff's claim is dismissed with cost on the ordinary scale.

Donsa-Nkomo Mutangi, plaintiff's legal practitioners
Honey and Blankenberg, defendant's legal practitioners