**ARENEL SWEETS AND BISCUITS (PVT) LTD**

**Versus**

**ALEXANDER FORBES RISKS SERVICES ZIMBABWE**

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 4 & 24 MARCH 2016

**Opposed Application**

*P. Madzivire,* for the applicant (defendant
*Madya* for the respondent (the plaintiff)

**MAKONESE J:** Arenel Sweets and Biscuits (Pvt) Ltd are one of the largest manufacturers of sweets and biscuits in Zimbabwe. Their wide selection of sweets and biscuits are found in most major chain stores country wide. Established in 1946 in a small factory in Bulawayo, the plaintiff became popular with their wide range of products including "suckers", "sugar sticks" and "Apricot balls".

The defendant, Alexander Forbes Risk Services Zimbabwe, is a leading insurance broker delivering professional insurance and risk management to corporate, public and private institutions around the country. The defendant is also in the business of insurance broking. In broad terms, insurance brokers act as intermediaries between clients, who can be either individuals or commercial businesses and organisations, and insurance companies. Insurance brokers are expected to use their in-depth knowledge of risks and the insurance market to find and arrange suitable insurance policies and arrange cover. They act in the best interests of their clients and offer products from more than one insurer to ensure that their clients get the best deal.

The plaintiff instituted proceedings against the defendant for the following:-

(a) Payment of the sum of US$62 972,00 being the difference less the *ex-gratia* payment of US$15 743,00.
(b) Interest a *temporae morae*

(c) Costs on a punitive scale.

The defendant disputes the plaintiff's claims and has filed a special plea in bar and what it terms defendant's notice of exception and application to strike out. Before I deal with the merits of the application for the exception and special plea in bar I propose to set out the factual background of the claims against the defendant.

Factual background

Sometime in the year 2011, the plaintiff approached the defendant requesting defendant to effect on its behalf through insurers, an Export Insurance Policy. The defendant, being the insurance broker, engaged Credit Insurance Zimbabwe Limited, commonly known as CREDSURE to effect the insurance policy. Following discussions between the defendant (broker) and the insurer (Credsure), the final policy document was prepared, but could only become operative once a valid Credit Limit Form CU30 Forms – Application for Credit Limit), in the name of the foreign buyer had been approved by the insurer. The plaintiff through the defendant (broker) duly filled in the U – 30 Forms – Application for Credit Limit and paid the initial deposit premium of US$5 061,00 through the defendant. The plaintiff's credit insurance cover was in respect of a Zambian based company known as ZAMCON TRADING. For some reason, Credsure never approved the Credit Cover between plaintiff and ZAMCON Trading of Zambia, inspite of the fact that plaintiff was effecting payment of premiums towards the Export Credit Insurance Cover, through the defendant.

The defendant did not notify the plaintiff that the Credit Cover was not effected and on that basis the plaintiff proceeded to export and supply goods to the customer in the belief that there was an Export Credit Cover. ZAMCON subsequently defaulted in paying the sum of US$78 715,00 for goods supplied at its own instance. Plaintiff turned to the insurer through (the broker), the defendant, and was advised that the insurance cover had not been effected. By virtue of the relationship between the defendant and the insurer an *ex-gratia* payment of US$15 743,00 was paid to the plaintiff by the insurer. The plaintiff contends that through negligent conduct of the defendant an Export Credit Cover was not effected for ZAMCON

Trading on behalf of the plaintiff, despite the defendant receiving premiums for onward transmission to the insurer. The plaintiff avers that defendant misrepresented that an Export Credit Cover had been duly effected. The plaintiff claims the difference between the ex-gratia payment of US$15 743,00 and the sum of US78 715,00 for goods supplied to ZAMCON Trading.

The Exception

The defendant filed a special plea in bar in the following terms:

> "1. Plaintiff pleads that it engaged the defendant to procure Export Credit Insurance Policy with, Credit Insurance Zimbabwe Limited ("CREDSURE") in the year 2011.
> 2. Plaintiff further alleges that the defendant failed to procure the Export Credit Insurance for the plaintiff in consequence of which CREDSURE refused to pay.
> 3. The plaintiff's cause of action is based on the alleged failure by the defendant to procure Export Credit Insurance for the plaintiff in 2011 and the plaintiff was advised in any event by CREDSURE of this position on 12th April 2012 as reflected on annexure "A" hereto.
> 4. The plaintiff's summons was only served on the defendant on 17th August 2015 more than (3) years after the alleged cause of action arose.
> 5. The plaintiff's claim has accordingly prescribed in accordance with the Prescription Act (Chapter 8:11)".

On the same date the special plea in bar was filed, the defendant also filed a document headed "Defendant's Notice of Exception and Application to Strike out". The defendant makes the following averments in this document:

> "… Defendant hereby excepts to and applies to strike out the plaintiff's claim as set out in the summons and declaration on the basis that, *ex facie*, the claim does not disclose a valid cause of action against the defendant, is bad in law, argumentative and is vague and embarrassing more particularly in that:-
>
> 1. The plaintiff's claims do not disclose whether the claim is in contract or in delict.
> 2. If the claim is in contract, plaintiff has not pleaded the essential averments of the alleged contract between the parties which the defendant could have breached it.

3. If the claim is in delict, the plaintiff's claim is bad in law in that it does not contain the essential averments necessary to sustain a delict. Without derogating from the generality thereof, the plaintiff has merely averred that the defendant was negligent without seeking out the particulars of the alleged negligence on the part of the defendant. Without alleging the particulars of negligence, the plaintiff's claim is bad in law and defendant is in my event embarrassed as to what it is that is alleged against it as the basis of wrongfulness.
4. Further and in any event, the plaintiff's claim is vague and embarrassing and contradictory in that the plaintiff alleges that defendant was "negligent" in not procuring the insurance cover and in the same breath and without pleading in the alternative alleges and relies on an alleged "misrepresentation" to the plaintiff that the insurance cover had been procured.
5. Further to the aforegoing and without in any way derogating from the foregoing, paragraph 12 and 13 of the plaintiff's declaration are argumentative and express the plaintiff's "feelings" and do not amount to pleading. Defendant accordingly prays for the striking out of these paragraphs.
   Wherefore, defendant prays that the exception and application to strike out be upheld, and the plaintiff's claims against the defendant be dismissed with costs."

In response to the defendant's special plea, the plaintiff files a replication in the following terms:-

"3. …serve to say, the claim against defendant has not prescribed, in that after Credsure repudiated the claim, defendant advised plaintiff that it was engaging Credsure to try and settle and resolve the dispute, … Plaintiff was and has been of the view that defendant was trying to resolve the issue.

3.1 to the extent that defendant went as far as trying to engage a neutral party to engage in arbitration so as to try to resolve the dispute this was after the 12th April 2012, the defendant advised plaintiff that it had engaged Mr Unity Sakhe of Kantor & Immerman to try and settle the issue.

3.2 plaintiff was and or has always been of the view that defendant was engaging Credsure to try and resolve this issue. Plaintiff only became aware that defendant was not resolving anything when it received the letter dated 8th April 2015.

3.3 Hence, plaintiff became aware of its cause of action against defendant after receiving the letter dated 8th April 2015 from the defendant thus the matter has not prescribed."

In respect of the defendant's notice of exception and application to strike out the plaintiff's replies as follows:

> "1. … the Honourable Court's Rules as published in RGN 1047 of 1971 and as subsequently amended do not recognize a pleading called a notice of exception and application o strike out, thus the pleading filed by defendant is not in terms of the Rules.
> 2. In terms of Order 21 of the Honourable Court's Rules on exception and an application to strike out are separate pleadings with different essential elements, and the format for each pleading is provided for in Form 12. The mixing of the two pleadings and creating a composite pleading is not recognized by the court's Rules.
> 3. Defendant is abusing court process and delaying the proceedings as a complainant by defendant could be rectified by a complaint letter in terms of Rule 40, which is cheaper and faster.
> 4. Defendant's prayer is thus a vague and embarrassing pleading not recognized by law, which is a dismissal of plaintiff's claim in that if it is an application to strike out it does not have the effect of deciding on a matter for an applicant as outlined in defendant's pleading …"
> …(*sic*)

Whether the plaintiff's claims are prescribed

The first issue I will determine is whether the plaintiff's claims are prescribed by virtue of the provisions of the Prescription Act (Chapter 8:11). The relevant provisions of the Prescription Act state as follows:

Section 16 When prescription begins to run

> "(1) Subject to subsection (2) and (3), prescription shall commence to run as soon as a debt is due.
> (3) A debt shall not be deemed to be due until the creditor becomes aware of the identity of the debtor and of the facts from which the debt arises:-
>
> Provided that a creditor shall be deemed to have become aware of such identity and of the facts if such could have acquired knowledge thereof by exercising reasonable care."

It is common cause that Credsure refused to honour the claim by the plaintiff in a letter dated 12 April 2012. In this letter Credsure gives reasons why the claim was repudiated. The summons in the present matter was only served on the defendant on 17 August 2015 more than 3 years after the plaintiff was advised that no Export Credit Insurance cover had been put in place

in respect of ZAMCON Trading. The plaintiff's claims in my view are prescribed in accordance with the provisions of section 15 as read together with section 14 of the Prescription Act. The summons were served on the defendant more than 3 years after the cause of action arose. It is clear that the cause of action arose on 12 April 2012 when Credsure notified that the claim in respect of ZAMCON Trading had been repudiated by reason of Credsure not having agreed to cover limit. It seems logical that it is on that date that the cause of action arose against the defendant. Section 16 of the Prescription Act provides that prescription shall commence to run as soon as the debt is due. It further provides that a debt shall not be deemed to be due until the creditor becomes aware of the identity of the debtor and of the facts from which the debt arises provided that a creditor shall be deemed to have become aware of such identity and of such facts if he could have acquired knowledge thereof by exercising reasonable care.

See the cases of *Reuben Nyamusara* v *Halwick Enterprises (Pvt) Ltd, t/a Whelson Transport* HH-215-01; *Peebles* v *Dairboard Zimbabwe (Pvt) Ltd* 1999 (1) ZLR (H); *Nomsa Chikwezvero* v *Tendai Chinamora* HH-318-14 and *Eagle Insurance Co. Ltd* v *Grant* 1989 (3) ZLR 278 (SC)

The plaintiff argues that the claim is not prescribed against the defendant in that after Credsure repudiated the claim herein, the defendant engaged the plaintiff and attempted to secure a settlement with Credsure. In my view, an attempt to resolve a matter out of court, does not interrupt the running of prescription. It is usually the case that parties to a dispute will engage each other inspite of pending legal suits. In this instance the plaintiff was not prevented from instituting legal action against the defendant within the prescribed time frame. The defendant did not acknowledge liability for the debt. I am satisfied that the plaintiff's claim is time barred and that on that basis alone the special plea must be upheld and the plaintiff's claim ought to be dismissed.

I consider it unnecessary to consider the exception and application to strike out filed by the defendant. To do so, would be in my view an academic exercise.

In the circumstances, the following order is made:-

1. The defendant's special plea in bar is hereby upheld.
2. The plaintiff's claim is dismissed with costs.

*Joel Pincus, Konson & Wolhuter*, plaintiff's legal practitioners
*Wintertons c/o Mashayamombe & Company,* defendant's legal practitioners