ZIMASCO PRIVATE LIMITED
versus
SAN HE MINING PRIVATE LIMITED

HIGH COURT OF ZIMBABWE
CHIGUMBA J
HARARE, 10 July 2015, 29 July 2015

Opposed Application

T. Nleya, for applicant
S. Omar, respondent

CHIGUMBA J: This is a case in which the defendant raised a plea in bar that the plaintiff's claim had prescribed by the effluxion of time and was invalid.

It is trite that, for purposes of calculating the relevant time when prescription begins to run in respect of a debt, regard must be had to the date when the cause of action 'arises'. The meaning of 'cause of action', while clearly formulated in legal terms, at times gives rise to difficulty in its application to particular circumstances where the facts that are material for the plaintiff to prove its claim, do not converge or come together during the same period of time. The question that arises as a consequence of this legal dilemma is whether the period of prescription begins to run as soon as one factor needed to prove the plaintiff's claim takes place, or the period of prescription begins to run only when all the factors that the plaintiff needs to prove its case are present, at the same time. The answer is simple. It depends on all the surrounding circumstances, and the onus rests on the plaintiff to show that, prescription began to run on a particular date, according to the nature of the cause of action on which the plaintiff's claim is premised. The authorities are clear that the cause of action arises when the last of the facts required to prove the claim and win it, become known to plaintiff. In my view the authorities are equally clear that, the running of prescription shall be interrupted by the service of process on the other party, not by the mere issue of process.

The background to this matter is that the plaintiff issued summons against the defendant on the 14th of October 2014 claiming payment of the sum of USD$12 038-00 together with interest at the prescribed rate and costs of suit. The plaintiff and defendant are both companies which are duly registered in accordance with the laws of Zimbabwe. In the declaration to the summons plaintiff averred that it is the lawful holder of a registered mining claim known as Boots 2 17562BM in the North and Middle Dyke. On or about the 14th of October 2011 the defendant illegally encroached into plaintiff's claim without the plaintiff's consent and mined 126.20 metric tonnes of chromite ore, from which 48.35 metric tonnes of saleable alloy was realized, with a net price of USD$0.91 per pound, giving a total loss of income to the plaintiff in the sum claimed in the summons.

The defendant entered appearance to defend on the 5th of December 2014. The defendant served a plea in bar in terms of r 137 of the rules of this court, which was filed of record on 9 December 2014, on the plaintiffs, and confirmed this in a letter to the plaintiff dated 10 December 2014. Defendant averred that, the allegation by plaintiff in para 4 of its declaration that the date of the alleged encroachment was 14 October 2011, taken together with service of the summons after 14 October 2014, brought the plaintiffs claim squarely within s 15(d) of the ***Prescription Act [Chapter 8:11]***. The plaintiff's claim, being one for a debt, ought to have been brought within three years of the date when the cause of action arose. At the hearing of the matter, the plaintiff made an oral application for leave to file supplementary heads of argument in its defence against the special plea. Although the application for leave was vigorously opposed by counsel for the defendant, *Ms. Omar* ,the court was of the view that it would be in the interests of justice that leave be granted, in order to increase the chances of being better able to determine the merits of the special plea, seeing as the nature of the special plea was that if allowed, it would bar the plaintiff from proceeding further with its claim. For that reason leave to file the supplementary affidavit was allowed.

The defendant filed heads of argument in support of its plea in bar, on 16 December 2014. It was submitted on behalf of the defendant that r 137 of the rules of this court provides that a special plea in bar may be taken when the matter is one of substance which would not involve delving into the merits of the case. Prescription goes to the root of the claim and for that reason the special plea should be upheld. Order 20 r 137 of the ***High Court Rules 1971*** provides that;

> ***"137. Alternatives to pleading to merits: forms***
> (1) A party may—
> (*a*) take a plea in bar or in abatement where the matter is one of substance which does not involve going into the merits of the case and which, if allowed, will dispose of the case".

It was submitted further, that in terms of the definition section of the Prescription Act, s 2, a 'debt' is defined as 'anything which may be sued for or claimed by reason of any obligation arising from statute, contract, and delict or otherwise'. It was submitted further, that the plaintiff's claim as formulated in the summons constitutes a claim for a debt, as it is based on an infringement of mining rights. In terms of s 16(1) of the Prescription Act, prescription begins to run as soon as a debt is due, and in terms of s 15(d) of the same act, the period of prescription for a debt is three years.

When is a debt 'due', for purposes of the calculation of the time when prescription begins to run? Section 16(3) of the Prescription Act, stipulates that a debt is not deemed to be due "until the creditor becomes aware of the identity of the debtor and of the facts from which the debt arises". However, a creditor is "deemed to have become aware of such identity and of such facts if he could have acquired knowledge thereof by exercising reasonable care". See **N*dlovu* v *Posts & Telecommunications Corporation*[1]**for illustration of the circumstances when a debt becomes due. It has also been said that a debt is due when it is "owing and already payable" See ***Escom* v *Stewarts & Lloyds SA (Pty) Ltd***[2] or "immediately claimable", see ***Deloitte Haskins & Sells Consultants (Pty) Ltd* v *Bowthorpe Hellerman Deutsch (Pty) Ltd*** [3] or "immediately exigible at the will of the creditor", see ***Benson & Anor* v *Walters & Ors***[4].

On what date can it then be said that the plaintiff in this matter, exercising reasonable care, became aware of the identity of the defendant and of the facts from which the debt arises? When if at all, did the debt in this matter become owing and immediately payable at plaintiffs will? In our view this is the crux of the matter for determination before the court. Generally, a

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[1] 1998 (2) ZLR 334 (H) at 336,

[2] 1979 (4) SA 905 (W) at 908E)

[3] 1991 (1) SA 525 (A) at 532H)

[4] 1984 (1) SA 73 (A) at 82H)

debt becomes due when the cause of action arises. See ***Mukahlera* v *Clerk of Parliament & Ors*[5]*, where the court relied on the case of Dube* v *Banana*[6]*,*** in which it was held that;

> "….the cause of action means the combination of facts that are material for the plaintiff to prove in order to succeed…"

It was also held in ***Mukahlera supra,*** at p 4, that:

> "The "cause of action" in relation to a claim is "the entire set of facts which gives rise to an enforceable claim and includes every act which is material to be proved to entitle a plaintiff to succeed in his claim" (*per* WATERMEYER J in *Abrahamse & Sons v SA Railways and Harbours* 1933 CPD 626 at 637). Similarly, in *Patel v Controller of Customs & Excise* 1982 (2) ZLR 82 (H) at 85, GUBBAY J (citing *Controller of Customs v Guiffre* 1971 (2) SA 81 (R) at 84A, and *Read v Brown* (l888) 22 QBD 131) defined the cause of action as being "every fact which it would be necessary for the plaintiff to prove if traversed, in order to support his right to the judgement of the court".

So, in order for there to be a 'cause of action', every fact which gives rise to a successful claim must be present. Every act which is relevant to the plaintiff's claim, if the plaintiff is to succeed in its claim, must be present before it can be said that there is a 'cause of action'. See ***Peebles* v *Dairiboard Zimbabwe (Pvt) Ltd*[7].**

The defendant submitted that the cause of action in this matter, the encroachment of the plaintiff's registered claim, arose prior to 14 October 2011, the date on which the plaintiff became aware of the facts necessary to create the need to approach this court for relief. The defendant cited the case of ***Hodgson* v *Granger & Anor*[8]**, as authority for this proposition. In this case the court said the following;

> "In ***Syfin Holdings Ltd* v *Pickering 1982 (1) ZLR 10 (SC)*** at 19 FIELDSEND CJ equated the word "debt", in the Act, with "cause of action"…see ***Patel* v *Controller of Customs and Excise 1982 (2) ZLR (HC)*** 82 at 86…in ***Controller of Customs v Guiffre 1971 (2) SA 81 (R) at 84A***, BECK J, (as he then was) discussed the meaning of the phrase 'the cause of the action' and adopted the definition of LORD ESHER MR, in ***Read v Brown (1888) 22 QBD 131***, as being; 'every fact which it would be necessary for plaintiff to prove if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every act which is necessary to be proved.'" … In ***Abrahamse & Sons v SA Railways and Harbours 1933 CPD 626 at 637*** WATERMEYER J stated:

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[5] 2005 (2) ZLR 365 (SC)

[6] 1998 (2) ZLR 92(H)

[7] 1999 (1) ZLR 41 (H) at 45

[8] 1991 (2) ZLR 10(H)

> "The proper legal meaning of the expression 'cause of action' is the entire set of facts which gives rise to an enforceable claim and includes every act which is material to be proved to entitle a plaintiff to succeed in his claim. It includes all that a plaintiff must set out in his declaration in order to disclose a cause of action. Such cause of action does not 'arise' or 'accrue' until the occurrence of the last of such facts and consequently the last of such facts is sometimes loosely spoken of as the cause of action. (See Halsbury, vol 1, sec 3, and the cases there cited.)"

The cause of action arises at the date on which the plaintiff becomes aware of every fact that is needed to be prove in order to win the claim against the defendant. The cause of action does not 'arise' until the occurrence of the last of such facts, so loosely speaking, the cause of action arises when the last of the facts that plaintiff requires to prove its case and win it, becomes known to plaintiff.

It was submitted on behalf of the defendant that the service of the summons interrupts the running of prescription, not the issue of the summons. Defendant cited the case of ***Masenga* v *Minister of Home Affairs***[9], as authority for this proposition, as read with sections 19(2) and (3) of the Prescription Act. In **Masenga supra,** it was held that:

> "on a correct interpretation of s 70 of Police Act [Chapter 11:10], as read with ss 6(4) and 9 of State Liabilities Act [Chapter 8:14], the running of the prescription period is only interrupted when there has been service of the summons. To hold otherwise would be to defeat the intention of the legislature. The purpose of the legislation is to ensure that the defendant is forewarned of the cause of the action so that he is able to collect any relevant evidence and decide whether or not to defend the claim. This purpose would be frustrated if the period of prescription could be interrupted by the unilateral act of issuing summons without the debtor being aware that this has been done"

Section 19 of the Prescription Act provides as follows:

> "(2) The running of prescription shall, subject to subsection (3), be interrupted by <u>the service on the debtor of any process</u> whereby the creditor claims payment of the debt. (my emphasis)
> According to the definition section of section 19, which provides for the judicial interruption of prescription, 'process' includes—' (*f*) any document whereby <u>legal proceedings are commenced.</u>" (my emphasis)

We can safely conclude that the proposition that the running of prescription may be interrupted by the service of process, as opposed to the issue of process, is correct. Section 7 of the Prescription Act, which was cited as authority for a contrary view, only applies to matters where process is served on the possessor of the thing in question where any person claims ownership in that thing. Such is not the case here. Section 19 applies to these circumstances under consideration. Consequently, plaintiff's contention that its claim had not prescribed at the

[9] 1998 (2) ZLR 183(H)

date when summons was issued, does not advance its cause, in light of the above conclusion of law.

It is my considered view that the cause of action in this matter did not arise on the date when the defendant allegedly encroached on the plaintiff's mining claim, but on the date on which the Mining Commissioner confirmed that there had been overpegging onto plaintiff's claims. That date is common cause, it is on the 28th of November 2012 when the Mining Commissioner undertook to cancel the wrongful pegging of the defendant's mining claims. Prior to that date, it cannot be said that the plaintiff had all the facts which it needed in order to bring a claim against the defendant and succeed, The last fact which plaintiff needed to successfully make a claim against the defendant occurred on 28 November 2012. Before that date, both plaintiff and defendant had mining claims which had been pegged by the relevant ministry. The mining Commissioner launched his investigation on 13 December 2011 where the parties agreed that an independent survey be done to verify the boundaries. The plaintiff would not have been aware of all the facts necessary to succeed in a claim against the defendant until the date when the boundaries were verified, a fact which was crucial for the plaintiff to show whether indeed the defendant encroached onto its claim.

In the result, we find that the plaintiff's claim has not prescribed and dismiss the special plea in bar with costs.

Gill, Godlonton & Gerrans, applicant's legal practitioners
Hussein Ranchod & Company, respondent's legal practitioners