

OLD MUTUAL ASSURANCE COMPANY OF ZIMBABWE
versus
MARICK TRADING (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
MAWADZE J
HARARE, 20 March & 29 July 2015

Opposed application

D Twadar, for plaintiff
Ms S Njerere, for defendant

MAWADZE J: The plaintiff issued summons out of this court on 23 September 2014 claiming payment of the sum of US\$83 965.43 together with interest at the rate of 14% per annum from 1 January 2009 to date of full payment being an amount for arrear operating costs for the period 1 January 2009 to 1 June 2010. The plaintiff also claims payment of interest on arrear rentals amounting to the sum of US\$117 000 at the rate of 14% per annum from 1 January 2009 to the date of repayment in full and costs on legal practitioner client scale.

The defendant has taken two special pleas in bar. The defendant protests that both claims are prescribed and that the claim for interest on arrear rentals is *res judicata*.

The background facts of this matter are as follows;

Both the plaintiff and the defendant are duly registered companies in accordance with the laws of Zimbabwe and in August 2008 they entered into a lease agreement in terms of which the plaintiff leased to defendant a portion of its property known as stand no. 4491 Salisbury Township Harare. In terms of the lease agreement the defendant was obliged to;

- i) pay rentals monthly and in advance on or before the 1st day of each month
- ii) in the event that the defendant failed to pay any amounts due on the due date to pay the interest on all outstanding amounts at the equivalent of the overdraft rate charged on unauthorised overdraft by the plaintiff's commercial banks.
- iii) pay operating costs including electricity and rates bills for the premises and

- iv) that in the event that the plaintiff had to institute any proceedings as a result of the defendant's breach of the terms and conditions of the Lease Agreement the defendant undertook to pay the plaintiff's costs of suit on the legal practitioner and client scale and to reimburse the plaintiff for all commissions paid by its legal practitioners.

The plaintiff alleges that in breach of the terms and conditions of the Lease Agreement the defendant has failed or refused to pay interest on the outstanding rentals which were awarded to the plaintiff at the arbitration amounting to US\$117 000. The plaintiff alleges that the defendant has failed or refused to pay operating costs in the sum of US\$83 965.43.

The defendant entered a notice of appearance to defend on 2 October 2014 and filed a special plea on 5 November 2014 raising the issues of prescription and *res judicata* in respect of the claim on interest.

It is common cause that the Lease Agreement was terminated on 31 March 2010. It is the defendant's contention that the plaintiff's claim in respect of both the operating costs and the interest on arrears rentals has prescribed. The defendant also contends that the issue of interest on arrear rentals is *resjudicata*.

In respect of the special plea on prescription the defendant submitted that both the operating costs and the interest on arrear rentals are for the period of the duration of the Lease Agreement which is 1 January 2009 to 31 March 2010. It is not issue that the defendant was to pay the operating costs monthly directly to the service providers and that if that was not possible to pay to the plaintiff within 7 days of receipt of the account of consumption. It is the defendant's contention therefore that since the Lease Agreement was terminated on 31 March 2010 the claim in respect of operating costs interest prescribed within 3 years on 30 June 2013. The same would apply in respect of the interest on arrear rentals which should have prescribed within 3 years after the termination of the lease agreement.

It is not in issue that the summons were issued out on 23 September 2014 and served on 30 September 2014 on the defendant in respect of both the operating costs and interest on arrear rentals.

I now turn to deal with the special plea of prescription in respect of both the operating costs and on arrear rentals. The operating costs which were to be paid monthly were never in dispute. The amount due in respect of both the operating costs and the interest on arrear rentals are regarded as a debt as defined in s 2 of the Prescription Act [*Chapter*

8:11]. In terms of s 15 (d) of the same Act, the period of prescription would be 3 years. This would mean that in terms of s 16 (1) of the said Act prescription commenced to run as soon as the debt was due. The plaintiff was therefore aware of the facts from which indebtedness arises from the time it was due as is required by s 16 (3) of the Prescription Act [*Chapter 8:11*].

The question which arises is when did the plaintiff's cause of action arise in respect of both the operating costs and interest on arrear rentals. In respect of operating costs it is clear to my mind that the cause of action arose at the end of each month or after the defendant has been served with the bill of consumption. Since the Lease Agreement was terminated on 31 March 2010 the 3 years would at most lapse on 31 March 2013 in respect of operating costs.

As regards the interest on arrear rentals both parties are agreed that there was a dispute as to what was fair rentals for the period in issue and that this dispute was referred to arbitration. It is not issue that the rental due was only determined by the arbitrator on 8 December 2011 as being the sum of US\$7 800 per month from 1 January 2009 to 31 March 2010. This would mean that the plaintiff would only have been aware of the interest due on arrear rentals after the determination by the arbitrator on 8 December 2011. My calculations would show that the three years from 8 December 2011 would only lapse on 8 December 2014. I am therefore unable to appreciate the defendant's argument as regards the plea of prescription in respect of interest on arrear rentals as summons were issued on 23 September 2014 and served on 30 September 2014 was within the three years. My finding therefore is that the defence of prescription is not available to the defendant in respect of interest on arrear rentals.

The plaintiff contends that the defendant acknowledged liability for operating costs on 28 May 2014 hence interrupting with the running of prescription in terms of s 18 (1) of the prescription Act [*Chapter 8:11*]. In terms of s 18 (1) of the Prescription Act [*Chapter 8:11*] the running of prescription is interrupted by an express or tacit acknowledgement of liability by the debtor. See *Pocock v Agricultural Finance Corporation* 1995 (2) ZLR 365 (S).

It is settled in our law that for the acknowledgement of liability to be valid the following requirements should be met;

- a) the acknowledgement of the debt should be made by the debtor or his agent.
- b) the acknowledgement of debt must be made expressly or tacitly acknowledging the existence of liability.

c) the acknowledgement must be made to the creditor or his agent.

See *Ndlovu v Posts and Telecommunications Corporation* 1998 (2) ZLR 334 (H); *First Merchant Bank of Zimbabwe Limited v Fotress Industrial Investments (Private) Limited and Another* 200 (2) ZLR 221 (S).

I am not persuaded by the plaintiff's argument in this regard. According to the plaintiff the acknowledgement of liability was made by the defendant to the plaintiff's legal practitioners in respect of the operating costs on 28 May 2014. The plaintiff submitted that further payments in respect of operating costs were made by the defendant between February and July 2014 thus interrupting with the running of prescription. There is no evidence at all submitted by the plaintiff to support this contention. Further, the 3 years had long lapsed on 31 March 2013 when the defendant allegedly acknowledged liability in 2014. It therefore cannot be true that the running of prescription in respect of operating costs had been interrupted by the defendant's acknowledgement of liability. I am satisfied that the plaintiff's claim in respect of operating costs has prescribed. The defence of prescription is available to the defendant in respect of the operating costs in the sum of US\$83 965.43.

I now turn to the issue of *res judicata* in respect of interest on arrear rentals in the sum of US\$117 000.00.

The rationale of the plea of *res judicata* is principally based upon the public interest that there must be an end to litigation and also that the authority vested in judicial decisions must be given effect even if they may be erroneous. See *Wolfenden v Jackson* 1985 (2) ZLR 313 (S).

The requirements for a plea of *res judicata* to succeed are now settled in our law. See *Tobacco Sales (Pvt) Ltd v Eternity Star Investments* 2006 (2) ZLR 293 (H) at 300 B-G, *Flowerdale Investments (Pvt) Ltd and Another v Bernard Construction (Pvt) Ltd and Others* 2009 (1) ZLR 110 (S).

The requirements can be summarised as follows,

- i) the action in respect of which judgment has been given must concern the same party or parties
- ii) the action or judgment must involve the same subject matter and
- iii) the action in which judgment is given must be founded on the same cause of action or complaint.

I have already alluded to the facts that after the parties failed to agree on what is fair rentals for the period 1 January 2009 to 31 March 2010 the dispute was referred to

arbitration. The arbitrator on 8 December 2011 decided that the fair rental was US\$ 7 800.00 per month for the period in issue. This award was registered as an order of this court on 4 November 2013. The defendant's argument is that the arbitral award and the subsequent order of this court were between the same parties and concerning the same subject matter being arrear rentals. According to the defendant the dispute has already been disposed of by tribunal of competent jurisdiction hence the claim is *res judicata*. The defendant further argued that the issue of interests cannot be divorced from the principal debt of fair rental which was adjudicated upon by the arbitrator.

I am not impressed by the defendant's argument in this regard. The issue which was referred for resolution by the arbitrator related to what was fair rentals and not what interest should be charged. The issue of interest to be charged was never in dispute and therefore was not canvassed by the arbitrator. It is therefore disingenuous for the defendant to submit that the issue of interest is *res judicata*. Further, it is not correct that the plaintiff cannot found a claim on interest on arrear rentals. The plaintiff's claim of interest on arrear rentals is the sum of US\$117 000.00 is well founded at law.

As regards costs I am of the view that the costs should follow the results. Each party has partially succeeded in this matter and it is only fair that each party should bear its own costs.

In the result it is ordered that;

1. The defendant's special plea of prescription in respect of operating costs in the sum of US\$83 965.43 be and is hereby upheld.
2. The defendant's special plea of prescription in respect of interest on arrear rentals in the sum of US\$117 000.000 be and is hereby dismissed.
3. The defendant's special plea of *res judicata* in respect of interest on arrear rentals in the sum of US\$117 000.00 be and is hereby dismissed.
4. Each party is to bear its own costs.

Messrs Gill, Godlton & Gerrans, plaintiff's legal practitioners
Honey & Blanckenberg, defendant's legal practitioners