

CHRISTOPHER GWIRIRI
versus
STAR AFRICA CORPORATION LIMITED
and
THE GENERAL MANAGER OF THE
NATIONAL SOCIAL SECURITY AUTHORITY

HIGH COURT OF ZIMBABWE
DUBE J
HARARE, 23 June 2015 and 5 August 2015

Civil Trial

T Mapuranga, for the plaintiff
Ms N Moyo, for the defendant

DUBE J: The plaintiff claims for additional compensation in terms of s 9 of the National Social Security Authority (Accident Prevention and Workers Compensation Scheme) Notice 1990 (hereinafter referred to as the notice). The plaintiff is a former employee of the first defendant. The second defendant is the General Manager of the National Social Security Authority, (NSSA). He is cited in his official capacity in terms of s 9 of the notice.

The analogy of events leading to this claim is as follows. The plaintiff was employed by the first defendant from 1990 to February 2006 as a Cibra Machine Operator and as an assistant operator of a Tapeline machine. On 20 April 2006 the plaintiff was involved in a workplace accident resulting in his right hand getting trapped between the rollers of the Tapeline machine which had developed a fault. The plaintiff's hand was crushed resulting in him suffering 65 per cent permanent disability. The plaintiff permanently lost the use of his right hand and he received compensation from NSSA under the Workers Compensation Insurance Fund in 2007 and receives a monthly pension. The plaintiff claims that the accident was caused by the negligence of the employer.

In January 2008 the plaintiff instituted a claim against the first defendant under HC 421/08. The claim was based on the averment that the defendant caused the accident through its negligence and defendant claimed damages for loss of income, pain and suffering,

permanent disfigurement, loss of future earnings and future medical expenses. At the end of the hearing, the trial judge entered judgment in favour of the defendant. The court found that the claim before him was one for additional compensation and awarded the plaintiff damages. The first defendant appealed the decision on the basis of two main grounds. The first ground was that the court *a quo* erred at law in finding that the claim by respondent was one for additional compensation in terms of the notice. Secondly that the court *a quo* erred in its approach to quantification of damages. The Supreme Court set aside the decision of the High Court on September 20 2011. No reasons were given for the order.

In November 2011, a fresh set of summons was issued by the plaintiff against the first and second defendants. The plaintiff brought yet a similar claim in terms of s 9 of the National Social Security Authority (Accident Prevention and Worker's Compensation Scheme) Notice (1990). The 2nd defendant emerged joined to the claim. In this claim, the second defendant is cited in his official capacity as General Manager of NSSA. The plaintiff claims additional compensation on the basis that the compensation from NSSA is inadequate. He claims compensation under the same categories as in the first claim. He gives particulars of negligence which I will not summarise as they are not relevant to this judgment. The plaintiff justified the claim on the second basis that a new party, thus the General Manager for NSSA has been added to the claim.

At the hearing of this matter counsel for the defendants Ms Moyo raised two points *in limine* which she requested the court to deal with before going into the merits of the matter. Counsel submitted that the claim has prescribed and further that the matter is *res judicata*. The defendants submitted that the plaintiff's claim has already been determined by the High Court and it cannot be instituted again. Mr *Mapuranga* representing the plaintiff opposed the application. He submitted in response that the plaintiff prosecuted his claim to final judgment and that the previous claim was interrupted in terms of s 19 (3) of the Prescription Act [*Chapter 8:11*], the Act. On the point related to the plea of *res judicata*, the plaintiff submitted that because the previous claim was not dealt with on the merits by the Supreme Court, the current proceedings are not barred by the plea of *res judicata*. Counsel for the plaintiff contended that the Supreme Court set aside the judgment of the High Court on a technicality and therefore that the plaintiff is entitled to bring the claim again.

Prescription begins to run when the debt or other cause of action arises. Prescription is interrupted by the service of process on the debtor thus commencement of a suit. In *Du Bruyn*

v *Joubert* 1982 (4) SA 69, the court laid down the requirements of interruption as follows, (1) there must be process, (2) the process must be served on the debtor and (3) by that process the creditor must claim payment of the debt. For process to interrupt prescription, the claimant is required to prosecute the claim to final judgment and not abandon the matter. In the same case, the court held that if the judgment is set aside for whatever reason, interruption will not take place.

The first issue that this court is being asked to resolve is whether this claim has prescribed.

Section 19 of the Prescription Act deals with interruption of prescription. It reads in part as follows,

“19 JUDICIAL INTERRUPTION OF PRESCRIPTION

- (1)
- (2) The running of prescription shall, subject to subsection 3, be interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt.
- (3) Unless the debtor acknowledges liability, the interruption of prescription in terms of subsection (2) shall lapse and the running of prescription shall not be deemed to have been interrupted, if the creditor –
 - (a) does not successfully prosecute his claim under the process in question to final judgment, or
 - (b) successfully prosecutes his claim under the process in question to final judgment but abandons the judgment or the judgment is set aside.”

This section deals with judicial interruption of prescription. This court had occasion to consider the issue of judicial interruption of prescription in *Chiwawa v Mutzuris* 2009 (1) ZLR 72. The facts of this case are as follows. The parties entered into a verbal agreement for sale of a property in November 2002. This was followed in July 2003 by a signed written agreement over the same property and transfer was not effected. In June 2004 the plaintiff filed an application for transfer of the property and the court dismissed the application in May 2005 on the basis that there were disputes of fact that could not be resolved on the papers and that the matter should have come by way of trial. In November 2006 the plaintiff issued summons to compel transfer of the property. The defendant raised the defence of prescription and the court upheld the defence.

The plaintiff appealed to the Supreme Court under SC 4/11. The plaintiff contended that prescription had been interrupted by the issue of process in 2004 and insisted that the claim had not prescribed. GARWE JA considered the use of the word “successfully” in the

phrase “does not successfully prosecute his claim under the process to final judgment.” in subs 3 (a) in s19. To aid it in its interpretation the court followed the interpretation given to Section 15 (2) of the Prescription Act 68 of 1969 of South Africa in the case of, *Van Der Merwe v Protea Insurance Co Ltd* 1982 (1) SA 770 (E). That section is similar to our s 19. At p 773 C-D SMALBERGER J remarked as follows,

“It seems to me that the whole purpose of s 15(2) is that, if a creditor fails to prosecute successfully his claim under the process which interrupts prescription, either in the court in which such process commences legal proceedings, or on appeal to a higher tribunal, or, having been successful in the initial prosecution of his claim, abandons the judgment in his favour, or it is set aside on appeal at the instance of the debtor, the running of prescription is deemed not to have been interrupted. (*Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 827G-828A; *Titus’ case supra* at 704C [*Titus v Union & SWA Insurance Co Ltd* 1980 (2) SA 701 (Tk)]....”

The court at p 793A-C went further and remarked as follows,

“The “process in question” is clearly that by which prescription was originally interrupted. It is that process which must be successfully prosecuted to final judgment by the creditor, and not any other. The reference to “final judgment”, in the context, contemplates judgment in the court in which process is instituted or, if the creditor is unsuccessful in such court, any higher tribunal in which the creditor is ultimately successful on appeal in relation to the “process in question.” When a creditor is successful in the court in which the process in question commences legal proceedings prescription stands interrupted until the judgment is abandoned or set aside on appeal.”

After analysing this case and others, the court in the *Chiwawa* case held that

“The creditor is required to successfully prosecute his claim to final judgment before prescription shall be deemed to have been interrupted. He is not simply required to prosecute his claim to final judgment” and that ‘there must be a successful prosecution to final judgment in the sense that the creditor must obtain a judgment in its favour.’”

The court in the *Chiwawa* case held further as follows,

“Paragraph (b) of subs 3 of s 19 has without doubt put the matter beyond argument. It has provided that if the creditor successfully prosecutes his claim under the process in question to final judgment but abandons the judgment or the judgment is set aside then prescription shall not be deemed to have been interrupted. As the respondents’ have correctly pointed out in their heads of argument, one can only abandon a judgment given in one’s favour. Similarly, in the context of subs 3(b), only a judgment in one’s favour can be set aside on appeal or review.

I am satisfied that on a correct reading of the section and regard being had to the cases cited above, the correct interpretation is that there must be a successful prosecution to final judgment in the sense that the creditor must obtain a judgment in its favour. The suggestion

by the appellant that the section simply means that the creditor must pursue the matter to final judgment ignores the use of the word “successfully” and renders the word superfluous.”

The effect of s 19 is succinctly explained in these cases. I agree with the position adopted in these cases. Put simply, the effect of s 19 (2) is that process issued in respect of a debt and served on a debtor within three years of the cause of action has the effect of interrupting prescription. The running of prescription shall not be deemed to have been interrupted, in terms of s 19 (3) if the creditor,) does not prosecute the proceedings under that process to finality or b) successfully prosecutes the claim under the process in question to final judgment but he abandons the judgment or the judgment is set aside. The mischief behind the section is that the creditor must successfully prosecute the matter to final judgment and must get a judgment in his favour. If he does not, he is entitled to pursue the matter until he gets final judgment in his favour. He is only entitled to successfully prosecute to final judgment the proceedings under the process in question that is, the process by which prescription was originally interrupted and not any other.

The defendant was injured in 2006. That is the date when the plaintiff’s cause of action arose. The prescriptive period began to run from the date the plaintiff sustained the injury. The plaintiff was required to bring proceedings within 3 years of the occurrence in terms of s15 of the Act. The first claim against the first defendant was brought in 2008. The first suit against the 1st defendant was brought within the prescription period. It was timely brought. The effect of the service of summons commencing action in the High Court action had the effect of interrupting prescription. The plaintiff was entitled to successfully prosecute this claim to final judgment. The judgment of the High Court was set aside on appeal. It does not matter whether it was set aside on the basis of the merits or on technicalities. Prescription stood interrupted as the plaintiff had not successfully prosecuted his claim to final judgment. The plaintiff was entitled to pursue his claim under the process in question until he obtained final judgment in his favour. The plaintiff did not prosecute the first claim to finality. Those proceedings stand interrupted. The plaintiff can still pursue these proceedings.

This matter is on all fours with the Chiwawa case. In both cases the plaintiffs did not prosecute the initial proceedings to finality. They then sought to bring fresh proceedings.

The plaintiff claims for additional compensation in terms of s 9 of the notice.

Section 9 of the notice states as follows:

“Notwithstanding anything to the contrary contained in this scheme if a worker meets with an accident which is due:-

- (a) to the negligence
 - (i) of his employer; or
 - (ii) of a person entrusted by his employer with the management or in charge of such employer’s trade or business or any branch or department thereof; or
 - (iii) of a person having the right to engage or discharge workers on behalf of his employer; or
- (b) to a patent defect in the condition of the premises, works, plant or machinery used in such trade or business, which defect his employer or any person referred to in para (a) has knowingly or negligently failed to remedy or caused

.....
.....

the worker or, in the case of his death as a result of such accident, his representative, may, within three years of such accident, proceed by action in a court of law against his employer, where the employer is an employer individually liable, or otherwise against his employer and the general manager, jointly, for further compensation in addition to the compensation ordinarily payable under this scheme. Provided that in the case of an action in which the employer and the general manager are joined, nothing in this section shall be construed to mean that any compensation awarded under this section is payable by the employer”.

Liability in a claim for additional compensation is based on proof of negligence on the part of the employer. A party bringing a claim for additional compensation is required to cite both the employer and NSSA. He has to cite the employer in order that he may be able to establish the negligence element of the claim and the NSSA because it is the authority responsible for payment of compensation. The claim cannot be successful in the absence of either of the two defendants and hence the decision to join the second defendant. Although the reasons why the judgment of the High Court was set aside were not given, it appears that the first defendant’s ground of appeal that the court erred in finding that the claim before it was for additional compensation was upheld. Realising that a claim for additional compensation would not succeed without adding or joining the second defendant to the claim, the plaintiff issued summons against both defendants. A second set of summons was issued in November 2011. To this claim is now introduced the second defendant who was not previously cited. These are fresh proceedings.

In order for additional compensation proceedings to succeed they ought to be brought within three years of the accident. When one has regard to the requirements of interruption of prescription, it is clear that none of the requirements were met. There was no process served on the second defendant within the three year prescriptive period. The second defendant was

not served with any summons until the plaintiff lost in the Supreme Court and more than 5 years after the occurrence of the accident. By this time, the prescriptive period had run out and the cause of action against the second defendant lapsed. The plaintiff failed to bring the claim against the second defendant within the prescription period as required in terms of the law. The second defendant was not part of the interrupted proceedings. Because the plaintiff failed to bring the second defendant to the fore within the required time, he cannot do that now. Where a suit has been timely filed against one defendant, the filing of that suit does not interrupt prescription as against other defendants not served with the process. Prescription is not interrupted where a party is subsequently added to the same suit in circumstances where the party sought to be joined was not timely served with process. The proceedings by which prescription was originally interrupted are the proceedings which must be prosecuted to finality under the process. A litigant cannot bring a fresh set of summons and hope that those too will fall under cover of previous process that interrupted process in the first claim. The second defendant was not part of the initial proceedings, the claim against him has prescribed.

The second set of summons was brought out of time for both defendants. The preliminary point disposes of the case. It will not be necessary for me to determine the second point related to *res judicata*. The defendants' special plea is upheld

In the result it is ordered as follows,

1. The defendants are absolved from the instance
2. The plaintiff shall bear the costs of this application.

Chihambakwe Mutizwa & Partners, plaintiff's legal practitioners
Coglan Welsh & Guest, defendant's legal practitioners