MANYARA MAVI DHLIWAYO
versus
DICKSON MAKUMBE
and
EAGLELINER BUS SERVICE

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 23 November 2015 & 16 December 2015

Opposed Application

J Mudimu, for the plaintiff
E Mangezi, for the defendant

TSANGA J: The plaintiff issued summons for a claim of $311 776.00 as damages for injuries, pain and suffering and loss of earnings resulting from a motor vehicle accident involving the first defendant, an employee of the second defendant. She lost several front teeth, her jaw was disfigured and she sustained injuries to her left eye. The accident occurred on 23 December 2009. Summons were issued in the matter on 18 August 2010. However, they were only served on 14 July 2015, almost five years later.

As such, the defendants took the position that the matter had prescribed by the time the summons were eventually served. The plaintiff's replication to the special plea was simply to deny prescription, and to state that the summons were issued before the prescriptive period. No further particulars were provided besides the denial by plaintiff of every allegation of fact and conclusion of law in defendants' plea.

However, the plaintiff for the first time, purported to provide the detailed factual explanation and reasons for the delay in the service of summons in her 'Heads of Argument'. The explanation proffered was that the second defendant, Eagleliner Bus Service, being a *peregrinus,* a chamber application to attach and found jurisdiction had been made. Such order to attach and found jurisdiction was issued by the court on 28 January 2010. Following the granting of the order, a new firm of practitioners, Kanyenze Legal Practitioners, had been engaged by the plaintiff. On 6 August 2010, they had applied through another chamber

application, to correct the order from essentially attaching one bus belonging to the second defendant, to attaching 10 buses. This order too was granted. However, the firm of practitioners in question had subsequently been de-registered. It was the plaintiff's explanation that as a result she had experienced difficulties retrieving her file.

Another firm of practitioners, Tavenhave Machingauta, were engaged. They made an effort to have the order to found jurisdiction executed. However, these efforts were in vain as the orders were said to have disappeared from the file and the plaintiff was not in possession of the original order.

The file was then moved to yet another firm of practitioners Zuze Law Chambers who applied for a certified true copy some time in December 2013. The order was only certified on 16 April 2014. The attachment was done on 30 June 2015.

Counsel for the defendants Mr *Mangezi* argued at the hearing of the opposed matter that the second defendant had been firmly brought into this court's jurisdiction by virtue of the order of this court granted in January 2010. He vehemently objected to the raising of these explanations in the heads of argument. His stance was that following the obtainment of the order, as there was no service of the summons on the defendants, there was never any interruption of prescription and therefore the matter was effectively prescribed by 2013. He emphasised that since an order to attach in order to found jurisdiction had been issued, the second defendant could have been served and that the plaintiff could not rely on s 17 (c) of the Prescription Act [*Chapter: 8:11*] that the debtor was outside Zimbabwe in order to delay prescription until the service of the order.

The plaintiff's counsel Mr *Mudimu,* argued that it was only in June 2015 that the plaintiff had successfully overcome the jurisdictional hurdle by attaching the second defendant's bus. As such, it was his argument that drawing on the provisions of s 17 (c) of the Prescription Act, the plaintiff had the benefit of an additional year from the time the jurisdictional hurdle stemming from the second defendant being a *peregrinus,* had been overcome. The gist of his argument therefore on behalf of his client was that although summons had been issued in 2010, they were not served because the plaintiff was yet to found and confirm jurisdiction. The impediment referred to in s 17 (c) of the Prescription Act only ceased exist according to the plaintiff, on 30 June 2015 when the attachment was effected to confirm jurisdiction.

In terms of s 17 (c) if:

> "a)……..
> b)…….
> c) the debtor is outside |Zimbabwe; or
> d)……
> e)……..
>
> and the period of prescription would, but of this subsection, be completed before or on, or within one year after, the date on which the relevant impediment referred to paragraph (a), (b), (c), (d) or (e) has ceased to exist, the period of prescription shall not be completed before the expiration of the period of one year which follows that date."

The accident in this matter happened in December 2009. In light of the nature of the debt, the claim would ordinarily have been prescribed within three years from the time that the debt became due. This would have been 2012. The defendants' counsel is correct in its observations that the plaintiff's explanation for the delay in service of the summons could not have been made in the heads of argument. As stated in *Mutasa* v *Telecel* HH 331 /14, where allegations are contained only in the heads of argument and not in evidence submitted on behalf of a party, in the form of affidavits deposed to by the witnesses, the court may simply ignore such allegations. Mathonsi J could not have expressed his displeasure with this tactical ambush more strongly when he opined as follows:

> "The bulk of what the applicant relies upon in making out a case for the relief that she seeks is contained in Heads of Argument filed by her counsel. It is not only improper but also wrong, utterly absurd and completely unacceptable to purposely avoid presenting evidence in affidavits which would put the other party on guard and enable that party to respond to such evidence in its opposing affidavit, in the forlorn hope of influencing the court by placing it in arguments. It is an undesirable ambush."

The plaintiff's factual explanation as to why it could not serve the summons, however sorrowful it may be, should not have been made in the heads of argument for the first time. Whilst it might be argued that the resultant injustice to the plaintiff should soften the courts stance towards procedural irregularities, of significance is that Mr *Mangezi* also argued that whatever the allegations that the plaintiff now sought to make did not fall within the confines of the grounds upon which prescription may be delayed. Furthermore, he also stressed that the plaintiff had not addressed the failure to serve the first defendant who has been in Zimbabwe at all times, and, as such, there was no point in the inaction and failure to attach.

The one year delay permitted by s 17 (c) of the Prescription Act is permitted where the impediment of the debtor being outside the country has been overcome. The critical issue is therefore whether the plaintiff is statute barred because it had in its possession an order to attach and found jurisdiction as way back as 2010 or whether prescription was delayed until actual service of that order confirming and founding jurisdiction. The reasons for prescriptive

periods should not be lost. Apart from bringing matters to rest, among them is also certainty in the law as well as encouragement of diligence in prosecuting a claim. The need for litigation to be based on fresh evidence is also material. In my view it cannot be said that a party who has already obtained an order to found jurisdiction cannot rely on the date of his actual ability to attach to stem the running of the one year extended prescription period. This would encourage a sluggard approach in the prosecution of claims. There is nothing in s 17 (c) that gives the court discretion to depart from the reasons for delay as articulated on the mere grounds of injustice to the other side. In terms of s 17 (c) the one year extension is founded on removal of the impediment of the debtor being out of the country.

In this case the impediment that the plaintiff faced was that the second defendant was a peregrinus. To remove this impediment what was required was a court order which permitted the plaintiff to go ahead to execute to found jurisdiction. This was granted as was the amended one. The provision is clearly not about the factual reasons for the delay being sufficiently compelling to place a case outside the permissible reasons for delayed prescription. Materially, the case of *African Distillers Limited* v *Zierkiewicz & Ors* 1980 ZLR 135, which plaintiff's counsel relied on for the assertion that there must be an actual attachment to found jurisdiction, what had been clearly absent in that case to bring the defendants within this court's jurisdiction by way of attachment was an order of the court. It was in that context that the common law principle was articulated. It is thus the obtainment of the court order that is the material to the attachment, for without it no attachment can proceed. Surely it cannot be that a party can simply sit on a court order to found jurisdiction and argue that the impediment is only removed when they have managed to attach.

What the plaintiff is seeking this court to do is to look at the particular circumstances of her case in order to assess whether the second defendant could be said to be have been in the court's jurisdiction at the time that the order was obtained, given the factual details of her case. This court is being asked to find that up until the actual attachment, it could not be said that the impediment was removed.

The danger of individualising each case to the circumstances of the case is that it would simply increase litigation in cases where there may have been delay for one reason or another. Effectively, if the yardstick is factual, there would then be no fixed prescriptive principle for when the extended one year would begin to run under s 17 (c) as this would now be determined by the facts of each particular case. This was certainly not the intention of the

legislature given that one of the underlying reason for prescriptive periods is certainty in the law.

In this case the matter was not yet prescribed in 2010 when the order(s) were obtained. If the ordinary course of prescription was interrupted by the obtainment of the order which was the basis for bringing the second defendant within the court's jurisdiction by way of attachment, then the matter prescribed in 2013. The extended one year period would not have kicked in under the circumstances since the matter would not have prescribed within the year that the impediment ceased to exist. In reality therefore, the matter prescribed in 2013. But even if this interpretation is wrong and the extended one year period kicked in, at the latest the matter prescribed in 2014.

Accordingly, the special plea on the grounds of prescription, is upheld with costs.

Mudimu Law Chambers, plaintiff's legal practitioners
J Mambara & Partners, 1st and 2nd defendant's legal practitioners