ONIAS MAPEPA
versus
INNSCOR APPLIANCES MANUFACTURING PRIVATE LIMITED

HIGH COURT OF ZIMBABWE
CHIGUMBA J
HARARE, 1 February 2016, 17 February 2016

Opposed Application

A. Mugandiwa, for the applicant
Ms. M. Muzembe, for the respondent

CHIGUMBA J: The defendant (INNSCOR) filed three special pleas and an exception to the plaintiff's claim, and did not set them down for hearing in terms of r 138 of the rules of this court. The parties have now agreed that the special pleas and the exception be disposed of by way of written submissions, before trial. The plaintiff's claim against the defendant is for payment of damages in the sum of USD$54 712-36 being additional compensation in terms of Statutory Instrument 68-1990 (National Social Security Authority (NSSA) Accident Prevention and Worker's Compensation Scheme Notice, 1990), as well as interest thereon and costs on a higher scale. Summons was issued against the defendant on 11 September 2014. It was averred that on 31 January 2011, along Seke road, a motor vehicle belonging to a subsidiary of the defendant was involved in a road traffic accident. The vehicle was used to ferry defendant's employees from work, and was being driven by one Amos Kamupira. The plaintiff, an employee of the defendant was sitting in the front passenger seat and sustained a fractured femur during the accident. He became confined to a wheelchair.

It was averred further, that the accident was caused by the negligence of Amos Kamupira who drove without due care and attention, failed to keep a proper lookout, and failed to apply brakes or take evasive action when an accident seemed imminent. The defendant was blamed for being negligent in employing Amos Kamupira who had no class 2 drivers licence authorizing him to drive a Mazda T35 truck,, he had no re-test certificate, he had no defensive driver's licence and no medical report. The plaintiff's claim is for damages which he occasioned as a result of the defendant's negligence, and which damages are particularized and broken down into loss of earnings, pain and suffering, permanent disability and future loss of earnings. The plaintiff admits to having been receiving compensation from the time of the accident, from the National Social security Authority (NSSA). The defendant's liability is averred to emanate from s 9(1) of SI 68-90 as the accident was caused by its negligence.

The defendant entered appearance to defend on 16 September 2014 and filed its plea on 21 October 2014. It was denied that Amos Kamupira had been negligent as alleged or in any manner at all. The defendant denied having any knowledge of the injuries sustained by the plaintiff and denied being liable for the damages claimed. It was denied that plaintiff's salary had been reviewed upwards to USD$340-00 a month. It was denied that plaintiff had been unable to pursue his occupation after the accident. Finally, defendant denied that there had been any finding of its negligence by the Zimbabwe Republic Police. The defendant filed a special plea on 21 October 2014 in which it averred that the plaintiff's claim is not properly before the court because plaintiff had instituted similar proceedings based on the same facts and the same cause of action on 27 May 2011 under HC4962/11. It was averred that this matter had been removed from the roll on 9 June 2014 at the plaintiff's instance.

The background giving rise to these proceedings is that plaintiff issued summons as against the defendant, and Amos Kamupira, under case number HC4962/11 on 27 May 2011 claiming the sum of USD$74 624-00 being damages for bodily injury sustained in a road traffic accident, as well interest at the prescribed rate and costs. The cause of action was the second defendant Amos Kamupira's negligence in that he drove without due care and attention, failed to keep a proper lookout and failed to apply brakes or take evasive action when an accident seemed

imminent. It is common cause that the plaintiff was employed as a refrigerator mechanic by Innscor. The defendants' plea was filed on 15 July 2011 and it was a denial of the second defendant's negligence as alleged or at all. The defendants filed a special plea on 15 July 2011 in which they averred that compensation for damages in terms of the common law could not be sought against an employer in terms of s 2 of SI 68-90, but only under s 8. The plaintiff had not alleged any negligence against Innscor, the first defendant. The matter went all the way up to pre trial conference stage.

It was set down for hearing before me. At the hearing of the matter on 9 June 2014, the matter was removed from the roll by the consent of the parties to enable the plaintiff to file an interim application. On 22 March 2013, the plaintiff filed a court application under HC 4552-14, for amendment of pleadings in terms of Order 20 r 152 of the rules of this court, in which an amendment of the summons and declaration was sought. The application was opposed by Innscor, the defendant on 19 June 2014. No answering affidavit was filed. Instead, on 11 September 2014, the plaintiff instituted fresh proceedings under HC 8034-14. Amos Kamupira was not cited as a party to these proceedings which we are now seized with. On 2 February 2014, both HC 4962-11(original claim) and HC 4552-14 (court application for amendment of pleadings) were withdrawn by the plaintiff and costs tendered. We must now determine the special pleas and exception filed by the defendant, on the papers as agreed by the parties.

Order 21 r137 provides that:

"ORDER 21

SPECIAL PLEAS, EXCEPTIONS, APPLICATIONS TOSTRIKE OUT AND APPLICATIONS FOR PARTICULARS

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;

(*b*) except to the pleading or to single paragraphs thereof if they embody separate causes of action or defence as the case may be;

(*c*)…;

(*d*) …

(2) …

It is trite that the purpose of a special plea is to;-

> "…permit a defendant to achieve prompt resolution of a factual issue which founds a legal argument that disposes of the plaintiff's claim. Special pleas are three in kind. The plea in bar, by which a party may interpose a purely formal objection to the jurisdiction of the court. The plea is available as a plea to the jurisdiction or as a plea for the recusal of a judge and in no other cases. Other special pleas are available to disclose some ground either for quashing or abating a declaration or for delaying proceedings. Both are usually termed pleas in abatement, although that expression is properly used to describe the declinatory, rather than the merely dilatory, plea. The plea in abatement, strictly so called, avers some good ground, not disclosed in the declaration, which otherwise is admitted, for denying the plaintiff relief. The dilatory plea advances some fact, not disclosed in the declaration, which is otherwise admitted, and which entitles the defendant to a stay of proceedings." See Doelcam (Pvt) Ltd v Pichanik & Ors[1]

The first special plea that the defendant sought to rely on was based on the provisions of para 10 of *Practise Direction 3 of 2013* which stipulates that where a matter is postponed *sine die* or removed from the roll without any directive giving time frames within which to cause the postponement or removal from the roll to be addressed, the matter is deemed abandoned and lapsed if nothing further is done within a period of three months from the date on which the matter was postponed or removed from the roll. Based on the stipulation in the Practise Direction, the matter ought to have been re-enrolled by the 11th of September 2014. It was averred that the plaintiff's recourse was to apply for reinstatement of the matter. I find the submissions made by the defendant to be a correct interpretation of para 10 of *Practise Direction 3 of 2013.* The special plea would have been upheld but for the fact that its raising is moot. The plaintiff filed a notice of withdrawal of HC 4962-11 on the 2nd of February 2016.

The defendant's second special plea raised is that the plaintiff has failed to comply with the procedural requirements of Statutory Instrument 68-90. The defendant averred that it is clear from the provisions of s 9 of SI 68-90 that, proceedings for additional compensation may only be instituted against the employer and the general manager of NSSA jointly. Section 9 says:

> "Notwithstanding anything to the contrary 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

[1] 1999(1) ZLR 39 (H) (9) 396 B-D

(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 other person referred to in paragraph (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 an action in a court of law against his employer, where the employer concerned 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". (my emphasis)

The defendant avers that the claim should be instituted against it or against it and the manager within 3 years of the accident, and the accident occurred on 31 January 2011 and that a claim for damages could not be pursued after 30 January 2014. Defendant submitted that the import of s 9 is that where compensation in addition to the compensation ordinarily payable under the Accident Prevention and Worker's Scheme is claimed, both the employer and the general manger of NSSA ought to be sued. It was submitted further that these proceedings are fatally flawed because the general manager has not been cited as a co-defendants and therefore the proceedings ought to be dismissed for want of compliance with the provisions of s 9 of SI 68-90. I do not find this argument persuasive, or an accurate interpretation of s 9 which in my view merely sets out the two alternatives of suing an employer individually, or <u>otherwise</u> the employer and the general manager.

I accept however, that when s 9 is read with s 10 (2) of SI 68-90, the intention of the legislature becomes crystal clear. Section 10 (2) provides as follows:

"A worker shall, before instituting proceedings under subsection (1), in writing notify the general manger or the employer individually liable, as the case may be, of his intention to do so and shall likewise notify the general manger or the employer if he decides to abandon such proceedings or to relinquish or settle his claim for damages, and shall, in connection with any such notification furnish such particulars as the general manger may require. **No proceedings in a court of law to recover damages against any person referred to in subsection (1) may be taken by a worker until he is has so notified the general manager of his intention to take such proceedings and unless he has lodged a claim for compensation".** (my emphasis)

It is common cause that the plaintiff did not give notice to the general manager of NSSA of his intention to take such proceedings before he filed the same.

We find that the plaintiff is in violation of s 10 (2) of SI 68-90. The letter of 18 August 2014 which purported to give notice to the general manager cannot be relied on by the plaintiff because by that date, three years had elapsed from the date of the accident and the plaintiff's claim could not be brought in terms of s 9 of SI 8-90. The letter was also invalid because it not give the date of the accident, it failed to disclose the circumstances of the accident, it did not acknowledge that additional compensation was being sought or inform the general manager of the quantum of the compensation that NSSA was paying, it did not attach a medical report justifying the quantum of additional compensation sought.

The third special plea is based on the provisions of s 15 of the *Prescription Act* [*Chapter 8;11*] which provides that;-

"15 Periods of prescription of debts
The period of prescription of a debt shall be—
(*a*) thirty years, in the case of—
  (i) a debt secured by mortgage bond;
  (ii) a judgment debt;
  (iii) a debt in respect of taxation imposed or levied by or under any enactment;
  (iv) a debt owed to the State in respect of any tax, royalty, tribute, share of the profits or other similar charge or consideration payable in connection with the exploitation of or the right to win minerals or other substances;
(b) fifteen years, in the case of a debt owed to the State and arising out of an advance or loan of money or a sale or lease of land by the State to the debtor unless a longer period applies in respect of the debt concerned in terms of paragraph (*a*);
(*c*) six years in the case of—
  (i) a debt arising from a bill of exchange or other negotiable instrument or from a notarial contract;
  (ii) a debt owed to the State;
  unless a longer period applies in respect of the debt concerned in terms of paragraph (*a*) or (*b*);
(d) except where any enactment provides otherwise, three years, in the case of any other debt".

Section 16 of the Prescription Act then provides that prescription commences to run as soon as a debt is due. The section provides further, 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. A creditor is deemed to have become aware of such identity and of such facts if he could have acquired knowledge thereof exercising reasonable care. The plaintiff avers that on 31 January he was an employee of the defendant and a passenger in a vehicle owned by the

defendant which was involved in an accident along Seke Road caused by the negligence of the defendant's driver. As a result of the injuries sustained in the accident the plaintiff is now confined to a wheelchair. It is common cause that on 11 September 2014, when summons was issued, a period of three years had elapsed. The plaintiff has averred that he only became aware of the defendant's negligence in respect of the accident in April 2011. That is the date on which he became aware that Amos Kamupira had no class 2 driver's licence, re-test certificate, defensive driver's licence and a medical report (see annexure 'A' to the summons).

That is the basis of the plaintiff's claim for negligence. The plaintiff averred that he spent the rest of 2011 confined to a wheelchair and could not have obtained the details set out in Annexure "A" to the summons from the Central Vehicle Registry (CVR). The plaintiff submits that prescription cannot be said to have commenced to run while he was incapacitated physically. The plaintiff acknowledges that NSSA issued a worker's compensation disability award in his favour on 28 April 2011. Compensation payable in terms of SI 68-90 was determined by that date. The defendant submits that in terms of the provisions of the Prescription Act, the cause of action for additional compensation arose on that date. I find this argument persuasive, because additional compensation is the difference between compensation payable in terms of SI 68-90 and an award of damages that would have been payable to a claimant at common law. Section 9(2) of SI 68-90 provides that '…if the court is satisfied that the accident was due to any such negligence or defect as is referred to in subs (1), it shall award the applicant such additional compensation as it would deem equitable to award as damages in an action at common law'. I find that the period of prescription began to run from 28 April 2011 when the compensation payable in terms of SI 68-90 was determined.

The plaintiff's summons was issued four and a half months after the date on which any claim for additional compensation had prescribed. In my view the particulars of the negligence of Amos Kamupira were immaterial to the cause of action for additional compensation. In the summons which the plaintiff issued on 27 May 2011 under HC 4962-11, para 7 of the declaration, the plaintiff averred that the accident occurred as a result of the second defendant (Kamupira's) negligence in that he drove without due care and attention; failed to keep a proper

lookout; and failed to apply brakes or take evasive action when an accident seemed imminent. The plaintiff could have obtained any information he required from the police when they compiled their report on 16 May 2011. The plaintiff's injuries were placed before NSSA on 28 April 2011 when it assessed his compensation. The plaintiff's claim is in delict, and it is trite that the debt arises as soon as damage is caused to the plaintiff by reason of the defendant's negligence or deliberate act. See *Oslo Land Co Ltd* v *Union Government.*[2]

The term 'cause of action' has been defined as follows;-

> "I prefer to use the term 'right of action' to cause of action' because, I think, the former is strictly and technically more legally correct…'cause of action is ordinarily used to describe the factual basis, the set of material facts, that begets the plaintiff's legal right of action and, complementarily, the defendant's 'debt', the word used in the Prescription Act. The term 'cause of action' is commonly used in relation to pleadings or in statutes relating to jurisdiction or requiring prior written notification of a claim before action thereon is commenced".

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'. 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*[3], 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*[4] or "immediately claimable", see *Deloitte Haskins & Sells Consultants (Pty) Ltd* v *Bowthorpe Hellerman Deutsch*

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[2] 1938 AD 584 @ 590

[3] 1998 (2) ZLR 334 (H) at 336,

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

(Pty) Ltd [5] or "immediately exigible at the will of the creditor", see *Benson & Anor* v *Walters & Ors*[6].

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? That is the issue for determination in determining whether this special plea has any merit. Generally, a debt becomes due when the cause of action arises. See *Mukahlera* v *Clerk of Parliament & Ors*[7], where the court relied on the case of *Dube* v *Banana*[8], 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*[9].

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[5] 1991 (1) SA 525 (A) at 532H)

[6] 1984 (1) SA 73 (A) at 82H)

[7] 2005 (2) ZLR 365 (SC)

[8] 1998 (2) ZLR 92(H)

[9] 1999 (1) ZLR 41 (H) at 45

It is my view that the same particulars of negligence were averred in HC 4962-11 and in this matter therefore the entire set of facts which gave rise to the plaintiff's claim, and every act material to be proved to entitle the plaintiff to succeed in his claim, was present when that 2011 summons was issued. When NSSA assessed the compensation payable to the plaintiff on 28 April 2011 every fact which was necessary for plaintiff to prove in order to get judgment in his favour was present. The cause of action for additional compensation was established on that date. By 28 April 2011, plaintiff was in possession of all the facts from which the debt arose. I find that the plaintiff's present claim was instituted after the three year prescription period. The special plea that the plaintiff's claim has prescribed is accordingly upheld.

The defendant took an exception on the ground that the plaintiff's claim is bad in law and embarrassing in that it does not disclose a cause of action. The purpose of an exception was discussed in the case of *Levitan* v *Newhaven Holiday Enterprises CC* **[10]**. The court in this case found that, an excipient must satisfy the court that he will be substantially embarrassed, i.e. prejudiced, if the offending pleading is allowed to stand, and relied on Herbstein and Van Winsen *Civil Practice of the Superior Courts in South Africa* 3rd ed at 339; Joubert (ed) Law of South Africa vol 3 para 199.) as authority for this proposition. In the case of *Metallon Corporation Ltd* v *Stanmaker Mining (Pvt)* [11], it was held that the true purpose of an exception

[10] 1991 (2) SA 297 (C) @ 2981-299D. The court found that an exception that a pleading is vague or embarrassing ought not to be allowed unless the excipient would be seriously prejudiced if the offending allegations were not expunged. The court found that: "A plaintiff's particulars of claim or declaration must be framed in such a way that an admission by the defendant of the crucial allegations in it contributes to the success of the plaintiff's claim, not to its failure. So, even though it might be possible to draft an unobjectionable plea to an objectionable declaration, this might lead nowhere because the pleadings, read together, must contain the outlines of a triable case. It is the resolution of the parties' dispute that matters. If the effect of the plea is that no intelligible dispute remains there is nothing on which a court can sensibly adjudicate. If a defendant pleads to a plaintiff's particulars of claim in such a way that the remaining disputed facts no longer sustain the plaintiff's claim, there is something seriously wrong with the particulars of claim. This creates embarrassment for a defendant who is now obliged to proceed to trial on a claim which he knows to be bad in law, but to which he cannot except as disclosing no cause of action.

[11] 2007 (1) ZLR 296 (H) @ 299G where it was held that a defendant must comprehend the case against him in order to formulate and put forward his defence.

is not to embarrass your opponent, but to either settle the case or part of it in a cheap and easy fashion, or to protect oneself against an embarrassment which is so serious as to merit the costs of an exception. See *Khan* v *Stuart* 1942 CPD 386 @ 391[12].

The issue that the court must determine is whether, the plaintiff's summons and declaration fails to allege and prove a wrongful act or omission; negligence on the part of the defendant, a causal connection between the negligent act relied on and the damages suffered, and the extent of the damaged suffered. I find myself unable to agree with the defendant that the plaintiff has failed to allege or establish a causal connection between the alleged negligence and the damages suffered. Nor am I persuaded that the summons and declaration is vague and embarrassing to the extent of being prejudicial to the defendant. The defendant has pleaded on the merits to the plaintiff's claim. This is evidence that defendant was not embarrassed by the summons and declaration. The plaintiff's claim is clearly for additional compensation in terms of SI 68-90. In the declaration, the plaintiff avers that the motor vehicle in question belonged to the defendant and that the driver of the vehicle was employed by the defendant at the material time. Clause 9 of the declaration contains an averment that the defendant was negligent in employing Amos Kamupira as a driver when he did not have the requisite documentation for driving the type of vehicle. The exception has no merit and is dismissed.

We uphold the two special pleas filed on behalf of the defendant. At the time that summons in HC 8034-14 was filed, the plaintiff's claim had prescribed because the cause of action for additional compensation arose on 28 April 2011 when NSSA paid a worker's Compensation Ability award to the plaintiff. The plaintiff became aware of the defendant's negligence on that date, because all the facts required for him to successfully sue the defendant for additional compensation were present or readily ascertainable on the date. The plaintiff has

[12] "… the court should not look at a pleading with a magnifying glass of too high power. If it does it will almost always find flaws in most pleadings…it is so very easy, especially for busy counsel, to make mistakes here or there, to say too much or too little, or to express something imperfectly…it is the duty of the court, when an exception is taken to a pleading, first to see if there is a point of law to be decided which will dispose of the case in whole or in part. If there is not, then it must see if there is any embarrassment, which is real such as cannot be met by the asking of particulars…and unless the excipient can satisfy the court that there is such a point of law or such real embarrassment, then the exception should be dismissed".

failed to comply with the procedural requirements of SI 68-90 in that, he failed to add the general manager of NSSA as a party to the proceedings, and to give notice to the general manger of NSSA that he intended to file a claim for additional compensation before the claim was filed. The plaintiff is in violation of s 9, s 10 (1) and s 10 (2) of SI 68-90.

The defendant's special plea that the plaintiff fell foul of practice direction 3-13 was upheld even though the special plea was overtaken by events when the plaintiff withdrew HC 4962-11, on 2 February 2016. The plaintiff's claim is dismissed, because it has prescribed and for failure to follow the procedure set out in SI 68-90. The court has seen fit to exercise its discretion in favour of the plaintiff and dismiss the matter on the basis that each party will bear its own costs. Costs being at the discretion of the court, it is my considered view that the plaintiff missed the boat inadvertently by not receiving proper legal advice when he instituted his first claim for additional compensation in 2011.

In the result, the plaintiff's claim is dismissed on the basis that each party bears its own costs.

Mungeni & Muzvondiwa, applicant's legal practitioners
Wintertons, respondent's legal practitioners