

METALLON GOLD ZIMBABWE (PRIVATE) LIMITED
and
METALLON CORPORATION PLC
versus
COLLEN GURA

HIGH COURT OF ZIMBABWE
CHAREWA J
HARARE, 15 March & 4 May 2016

Special Plea

Ms F Mahere, for the plaintiffs
T Mpofu, for the defendant

CHAREWA J: Between 1995 and 2011, the defendant was employed by the plaintiffs in various capacities, ranging from finance manager, finance director, chief executive officer, and executive chairman of the first plaintiff to group chief executive officer of the second plaintiff. He resigned from the last post on 30 June 2011.

A labour dispute having arisen between the parties the matter went for arbitration and is currently on appeal at the Labour Court on the very claims before this court.

The plaintiffs subsequently issued summons in this court, alleging that in breach of his contract of employment, the defendant unlawfully, unfairly and dishonestly put his personal interests above those of the plaintiffs, or alternatively, breached his duty of care or fiduciary duty to the plaintiffs by failing to act lawfully, fairly and honestly in dealing with the plaintiffs business by putting his personal interests above those of the plaintiffs. Such breach of his contract or failure to exercise duty of care caused the plaintiffs losses which they claim as follows:

1. \$279 549-00 resulting from the defendant unlawfully directing staff to refrain from deducting and remitting Pay As You Earn from his salary from April 2010 to June 2011.

2. \$25 0000-00 being allowance paid to the defendant in May 2011 for relocation to South Africa, which relocation did not happen.
3. \$2 289 270-00 which the plaintiffs was compelled to pay to ZIMRA comprising \$2 000 000-00 paid to the defendant for restraint of trade and PAYE thereon of \$289 270-00, which PAYE defendant unlawfully instructed staff not to deduct and remit to ZIMRA between April –September 2010.
4. \$312 442-00 being the purchase price of an S600 Mercedes Benz vehicle which the defendant instructed staff to buy for him in or about 1 June 2011 without board approval and contrary to the plaintiffs policies and procedures, which vehicle the defendant appropriated to himself when he resigned on 30 June 2011.
5. \$851 419-00 plus interest thereon at 22% with effect 30 June 2011, being loan which the first plaintiff took to meet a terminal package paid to the defendant upon his misrepresentation to the first plaintiff that the second plaintiff had awarded him a terminal package of \$4 200 000-00.

The defendant filed a special plea contending firstly that all five claims, having arisen at the latest by 30 June 2011, had prescribed by the time summons were issued in 2015. Secondly, and in any event, the matter, is *lis pendens*; the defendant having filed a labour complaint for unfair labour practice for non-payment of the agreed terminal package of \$4 200 000-00 or terminal benefits in terms of the contract of employment and the plaintiffs having made a counterclaim for the losses it alleged in its claims herein. More particularly, the defendant argues *lis pendens* with respect to the plaintiffs' claim 5, arguing that, in any event claims 1-4 were not validly before the arbitrator and consequently, the Labour Court.

As already stated, all these claims and counterclaims between the same parties are currently on appeal at the Labour Court.

PRESCRIPTION

It is trite that the prescription period for debts other than debts secured by notarial or mortgage bonds is three years. See s 15 (d) of the Prescription Act, [*Chapter 8:11*]. Further, it is also trite that prescription commences to run as soon as a debt becomes due. Case law has established that a debt becomes due:

- a. In contract, upon breach of the contract;

- b. In delict, when wrongful conduct accompanied by *culpa* causes injury or damage. The right of action is complete as soon as damage is caused to the plaintiff by the defendant's negligent act; and
- c. Further that the prescription period is peremptory unless delayed or interrupted in terms of the law (s 17, 18 and 19 of the Act)

In terms of s 16 (3), the creditor must be aware, or is deemed to have been aware or ought to have been aware of the identity of the debtor and the facts from which the debt arises for prescription to begin to run, from the debt of such awareness.

For the case law on these principles, see also *Peebles v Dairibord Zimbabwe (Private) Limited 1999(1) ZLR 41 (H) @ 45D-E*; *Hogson v Granger & Anor 1991 (2) ZLR 10(H)*, *HMBMP Properties (Pty) Ltd v King 1981 (1) SA 906 (N) @909 C*, *Leketi v Tladi No & Ors (2010) All SA 519 (SCA)Chiwawa v Mitzuris, HH 7/2009 @6*.

In casu, the plaintiffs, in their pleadings, assert that they base their claims in contract or delict, which makes their claims for debts subject to the three year prescription period. Further, the plaintiffs do not assert that the plaintiffs were unaware of the identity of the debtor or the facts from which the debt arose until a later period than June 2011. Therefore, simple calculation would show that by the time summons were issued in June 2015, the claims had prescribed, unless the running of prescription was lawfully delayed or interrupted.

In that regard, the plaintiffs submitted that prescription was subjected to judicial interruption in terms of s 19 of the Act, or was delayed by the arbitration process in terms of s 17.

On the contrary, the defendant argued firstly that arbitration process is not judicial process for judicial interruption of prescription in terms of s 19, as it is an alternative dispute resolution mechanism to avoid judicial process. Secondly, the defendant argued that the plaintiffs counterclaim, being for contractual/delictual damages or unjust enrichment, is a nullity in terms of the jurisdiction and powers of an arbitration tribunal or a Labour Court, and cannot therefore support an argument for interruption of prescription as it is trite that nothing can stand on nothing. Thirdly claims 1-4 were not subject of the arbitration process as they were not referred to compulsory arbitration in accordance with the terms of reference of the arbitrator.

Are arbitration processes judicial processes for purposes of s19

Section 19 of the Act refers to judicial interruption of prescription. The question that then arises is whether arbitration processes are judicial processes.

The cardinal principle of interpretation is that if something is not included in any legislative provision, then it was meant to be outside the ambit of that legislative provision. Section 19 does not speak of arbitral processes at all. Arbitration processes are provided for in s 17 of the Act.

I am of the view that if the legislature intended arbitration processes to have the same effect and status as judicial processes, then the separation between s 17 and s 19 ought to have been dispensed with. My view is bolstered by the fact that any arbitral decision requires certification by the Labour Court for its validity, and registration by the High Court as a judgment of the court for its enforcement.

Further, the definition of “court” in the Interpretation Act [*Chapter 1:01*] does not include arbitration tribunals. Neither are arbitration tribunals included on the hierarchy of courts in Zimbabwe. As rightly pointed out by the defendant, arbitration processes were developed as an alternative to judicial processes, hence they fall under alternative dispute resolution mechanisms (ADRM). They are not an extension of the court systems nor do they form part of the hierarchical structure of any court institutional architecture as defined in s 162 of the Constitution.

I am therefore not persuaded by the plaintiffs’ argument that prescription was judicially interrupted by the commencement of arbitration proceedings. More particularly, *Zimbank & Anor v Efficient Security (Pvt) Ltd & Anor 2001 (2)ZLR 55 (H)*, which has been cited by the plaintiffs does not support their argument as it deals with interruption of prescription by service of summons in the High Court, not before an arbitral tribunal.

Whether delictual/contractual or claims for unjust enrichment before a labour court or tribunal are valid for purposes of judicial interruption of prescription

Even where I am convinced that arbitration processes are valid for purposes of interrupting prescription in terms of s19, the plaintiffs would still have to successfully scale the hurdle whether or not their counterclaim, being in delict or contract or for unjust

enrichment, was within the jurisdiction of the arbitrator to permit a successful prosecution of their claims. This is so, because for interruption of prescription under s 19, either the debtor must acknowledge his liability or the creditor must successfully prosecute his claim to a final judgment of the court. In the absence of either of these prerequisites, prescription will continue to run from the beginning.

Now, I am mindful of the fact that this matter is still on appeal before the Labour Court and am loth to precipitously rule on the jurisdiction or lack thereof of the arbitrator and the Labour Court. No doubt the issues of the jurisdiction of the arbitrator to deal with the plaintiffs counterclaim will be ventilated during the appeal process at the Labour Court.

Suffice it for me to point out that the arbitration tribunal and the Labour Court are creatures of statute which jurisdiction and powers are circumscribed by s 93 as read with s 98 as well as s 89 of the Labour Act [*Chapter 28:01*]. See *National Railways of Zimbabwe v Zimbabwe Artisans Railways Union SC 08/2005* and *PTC v Zvenyika SC 108-04*.

However, I take note that the plaintiffs themselves conceded in paragraphs 20-21 of their heads of argument that the arbitrator or the Labour Court have no jurisdiction to entertain their counterclaim. If that is so, then there is obviously no interruption of prescription as the counterclaim is a nullity. See *Manning v Manning 1986(2) ZLR 1 (SC) 3-4* and *Dube v Maphepha Syndicate & Ors HB 5 2009 @3*.

In the result, the plaintiffs' claims had prescribed by the time they issued summons against defendant.

Whether s 17 could save plaintiffs' claims

The plaintiffs sought the protection of s 17, claiming that the running of prescription was delayed upon submission of the matter to arbitration.

It is clear that s 17 of the Prescription Act has the effect of delaying the running of prescription where a dispute is submitted to arbitration. However, the procedure for submission is that the matter commences with conciliation before a labour officer in terms of s 93 of the Labour Act. When conciliation fails, the labour officer then refers the dispute to compulsory arbitration in terms of s 98. In doing so, the labour officer consults the parties for the arbitrator's terms of reference to be drawn. The arbitrator, is confined to the agreed terms of reference during the arbitral process, otherwise in accordance with Article 36 (1) (a) (iii),

if the arbitrator goes beyond the terms of reference that may be a ground for objection to the registration of the arbitral award.

The terms of reference in this case are on p 82 of the record for the hearing. It is clear therefrom that the plaintiffs did not seek to include their counterclaims in the terms of reference. The upshot of this is that the counterclaim was not referred to arbitration by the labour officer. This is because at the conciliation stage the plaintiffs did not raise their counterclaims.

Consequently, the counterclaims never formed a part of the terms of reference agreed to by the parties for referral to compulsory arbitration and are not saved from prescription by s 17.

LIS PENDENS

The plaintiffs do not dispute that this same matter between the same parties and on the same issues is before the Labour Court, on appeal from arbitration. See para 4 of their heads of argument. Rather, the plaintiffs request the Court to exercise its discretion and hear the matter as:

1. *Lis pendens* is not an absolute bar to the exercise of this court's inherent jurisdiction;
2. Considerations of the balance of convenience and fairness should prevail;
3. Procedures for resolution of labour disputes are inadequate, to deal in particular with claims in delict or contract.

The defendant on the other hand requests the court to exercise its discretion by ordering that the balance of convenience and fairness should favour the resolution of the matter, particularly with regard to claim 5, by the Labour Court before which the appeal only awaits set down.

Both sides correctly state the law: that *lis pendens* is not an absolute bar, and that the court has the discretion, on a balance of convenience and fairness, to decide one way or the other. See *Mhungu v Mtindi* 1986 (2) ZLR 171 at 172E-F, *DW Hattingh & Sons (Pvt) Ltd v Cole NO* 1991 (2) ZLR 176 (SC) at 180C, *Chizura v Chiweshe* 2003 (2) ZLR 64 (H), *Herbstein and van Winsen, The Civil Practice of the Superior Courts in South Africa, 4th Ed*

(*Juta and Co. Ltd*) at 252. The only difference is that each party wishes me to exercise my discretion in its favour.

I would have been inclined to exercise my discretion in favour of the plaintiffs with respect to claims 1-4 were it not for the fact that the plaintiff chose the wrong procedure and forum with the result that these claims prescribed, as I have already found. There is therefore no valid claim before me on which to exercise my discretion in favour of the plaintiffs.

I do not find it acceptable that the plaintiffs seek to benefit from their mistake of choosing the wrong forum and committing a procedural irregularity, by claiming that that irregularity or mistake interrupted prescription and that they should now be allowed to have a second go at a remedy.

Clearly, invalid proceedings are null and void *ab initio*, and cannot found a reason for me to exercise my discretion.

Regarding claim 5, I am not inclined to exercise my discretion to deal with it as, firstly, this is an issue which has been fully vented and completed during arbitration proceedings which record is not before me. Secondly, now that an arbitral award has been made, this court is not the procedurally appropriate forum to deal with the matter which rightly ought to proceed on appeal or review of the arbitral award. The case of *Baldwin v Baldwin 1967 RLR 289 (G)*, is not, in my view, applicable in the circumstances of this case. The balance of convenience and fairness, in my view, requires that this claim should proceed on appeal at the Labour Court as scheduled.

DISPOSITION

Consequently, it is ordered that

1. The plaintiffs' claims 1-4 have prescribed and are hereby dismissed.
2. The defendant's special plea of *lis pendens* in respect of claim 5 is hereby upheld.
3. Costs be borne by the plaintiffs jointly and severally, the one paying the other to be absolved.

Scanlen & Holderness, plaintiffs' legal practitioners
Dube Manikai & Hwacha, defendant's legal practitioners