STEWARD BANK LIMITED
versus
CALENDFAB SERVICES
(PRIVATE) LIMITED
and
CHARITY MAGUWAH-BITI
and
BERTHA TARIRO MUZANENHAMO

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 7 February, and 2 March, 2017

Opposed Matter

M. Rujuwa, for the plaintiff
T. Biti, for the defendants

MANGOTA J: In terms of the Facility Letter which the parties signed on 15 February 2011, the plaintiff advanced the sum of $130 000.00 to the defendants. The maturity date of the loan was 15 February, 2012.

In consideration of security for the sum advanced, the second and third defendants bound themselves as sureties and co-principal debtors with the first defendant. They, as further security for the debt, registered a notarial general covering bond in favour of the plaintiff against the assets of the third defendant. The bond was registered with the Registrar of Deeds under number 1745/2011.

When the defendants failed to meet their obligations as stipulated in the facility letter, the plaintiff issued summons against them. It did so on 28 October, 2015. It claimed:

(i) payment of $130 000;
(ii) payment of interest at the rate of 5.5% per annum calculated from 15 February, 2012 to the date of full payment;
(iii) payment of a penalty charge at the rate of 10% per annum calculated from 15 February, 2011 to the date of full payment;
(iv) costs of suit on a higher scale – and
(v) payment of collection commission at the prescribed rate.

The defendants entered appearance to defend. They raised a special plea in bar. They pleaded prescription. They invoked s 15 (d) as read with s 14 of the Prescription Act [*Chapter 8:11*]. The tenor of their submission was that:

'(a) they did not acknowledge the debt, in writing or verbally, in the past three (3) consecutive years;

(b) they did not make any payment towards the debt and they did not ever promise to pay the same – and

(c) the plaintiff did not sue them for the debt within three (3) consecutive years.

They, in short, insisted that the debt was prescribed and that they were no longer liable to pay it.

The position of the defendants finds fortification in the remarks of *Stephen Russo* who, in Fin 24's Comments Policy (18 June 2013), stated as follows:

> "…. a prescribed debt is always prescribed. If you make a payment on prescribed debt, all that happens is you cannot get that payment back but it's still prescribed so you don't have to continue to make any more payments and it still cannot be legally collected from you. It's only if a debt has not prescribed that making a payment starts the 3 year period from scratch. So if you did not pay a debt for 2 years and you make a payment then the prescription period starts again from the date of your payment. After 3 years of no payment, it will prescribe …. And no payment will deem the debt to have been revived (unless a summons has been issued within that 3 year period, which puts the prescription on hold" (emphasis added).

The above cited statement clarifies the meaning and import of the defence of prescription. The statement is *in sync* with s 14 as read with s 15 of the Prescription Act [*Chapter 8:11*] ("the Act"). Section 14 of the Act makes reference to extinction of debts by prescription. It reads:

> "…… a debt shall be extinguished by prescription after the lapse of the period which in terms of the relevant enactment applies in respect of the prescription of such debt".

Section 15 of the Act refers to periods of prescription of debts. It states in a clear and unambiguous manner that the prescription period of a debt which falls outside para(s) (a) (b) and (c) of the section is three years.

The defendants' special plea in bar was anchored on s 15 (d) of the Act. They looked at s 16 of the Act which refers to the time when prescription begins to run. Prescription, according to s 16, commences to run as soon as a debt is due.

The debt, in terms of the loan facility agreement, was due on 15 February, 2012. The defendants insisted that the plaintiff should have sued them during the period which extended from 15 February, 2012 to 15 February, 2015. They submitted that the plaintiff sued them

outside the legally permitted period of time. They stated that its claim which it instituted on 28 October, 2015 should, therefore, fail.

From a *prima facie* perspective, the defendants' argument would appear to be unassailable. A claim which was instituted eight (8) months outside the prescriptive period cannot succeed. It cannot be sustained on the basis of s 15 (d) of the Act.

The plaintiff's response to the defendants' special plea in bar brought a new dimension into the equation. It submitted that s 15 (d) of the Act did not apply to the parties' case. It insisted that s 15 (c) (i) of the Act was relevant as the loan was secured by a Notarial General Covering Bond. It stated that the prescriptive period of the debt was not three (3), but six (6), years. The debt, it said, was therefore not prescribed.

Section 15 (c) (i) of the Act reads:

"The period of prescription of a debt shall be-

(a) ……
  (i) …….
  (ii) …….
  (iii) …….
  (iv) …….
(b) …….
(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) ……
(d) ……." [emphasis added]

The plaintiff referred the court to para 11 of its declaration as read together with clause 10.3 of the Facility Letter which the parties signed on 15 February, 2011. The paragraph and the clause, it averred, supported the position which it took of the matter.

The defendants did not dispute the existence of the notarial contract. All they said was that the plaintiff did not plead that part of the contract in its summons. They raised that matter at the hearing of the special plea in bar. They did not raise it in their papers.

The court found the defendants' submissions to have been difficult, if not impossible, to understand. Paragraph 11 of the plaintiff's declaration showed in clear and categorical terms that the notarial contract was specifically pleaded. It read:

> "11. The defendants opted to have this debt secured by way of a notarial general covering bond registered in favour of the plaintiff against the assets of the 3rd defendant. The bond is registered under No. 1745/2011 with the Registrar of Deeds."

With the exception of a summons which is issued under r 13 of the High Court Rules 1971, every summons is accompanied by a declaration. The declaration constitutes the plaintiff's claim. It states in clear and precise terms the relief which the plaintiff is claiming. It also states the nature, extent and grounds of the cause of action, complaint or demand.

Whilst a declaration may, in terms of r 113 of the rules of this court, be served at any time after issue of the summons, sight should not be lost of the fact that a declaration is not a stand-alone document. It is part and parcel of the plaintiff's claim as contained in the summons. It is, therefore, always read together with the summons to which the plaintiff's action relates.

The above analysed matters show in clear and unequivocal terms that the plaintiff's pleading of the notarial contract in its declaration was properly made. It gave notice to the defendants that it was relying on that contract in its claim against them.

The fact that the summons must always necessarily be read together with the declaration shows the futility of the defendants' argument. The argument was, in the court's view, an after-thought. It was raised as a way of running away from liability.

The defendants' papers as filed of record bear ample evidence of that stated fact. The papers did not ever suggest that the plaintiff's claim was defective on the basis that the notarial contract was not pleaded in the summons. The defendants' plea in bar was that the plaintiff's claim was prescribed. They said it prescribed at the lapse of three years which were calculated from the maturity date of the loan facility agreement. They relied on s 15 (d) of the Act when they raised the defence of prescription.

The plaintiff properly pleaded that the debt was covered by a notarial contract. That fact alone placed the prescriptive period of the debt under s 15 (c) (i), and not under s 15 (d), of the Act. The prescriptive period is, therefore, six (6), and not three (3), years.

The defendants' special plea in bar was totally misplaced. It was devoid of merit and it cannot succeed.

The court considered all the circumstances of this case. It is satisfied that the defendants' failed to prove their case on a balance of probabilities. The special plea is, accordingly, dismissed with costs.

Mtetwa & Nyambirai, plaintiff's legal practitioners
Tendai Biti Law HMB Chambers, defendants' legal practitioners