

MARY MURDOCH HOWSON
versus
JOHN ALEXANDER CAMERON

HIGH COURT OF ZIMBABWE
MATANDA-MOYO J
HARARE, 4 December 2017 and 14 March 2018

Trial

F Girach, for the plaintiff
J Wood, for the defendant

MATANDA-MOYO J: The plaintiff and the defendant are siblings. The plaintiff who is the younger of the two brought a claim against her brother the defendant for payment of the sum of \$200 000.00 being the balance due and payable in respect of shares sold to the defendant. The plaintiff also sought interest on the above amount at the prescribed rate and costs of suit on a legal practitioner-client scale.

It is the plaintiff's case that on 30 June 2008 the plaintiff and the defendant entered into an agreement of sale whereby the plaintiff agreed to sell her interest in Hamish Cameron (Pvt) Ltd to the defendant. The price was agreed at US\$240 000-00 payable in five equal instalments. Before payment of the shares by the defendant the plaintiff transferred her 10 000 shares to the defendant. The defendant as at 25 November 2010 had paid \$40 000-00 towards the shares leaving a balance of \$200 000.00 which is the subject of this claim.

In his plea the defendant denied owing \$200 000.00 nor any other sum to the plaintiff. Firstly the defendant raised the defence of prescription. It is the defendant's case that first payment was due on 1 February 2009. From then on there was no demand from the plaintiff. Secondly the plaintiff pleaded that the agreement contravened s 11 of the Exchange Control Regulations SI 109/96 and was therefore illegal and unenforceable. The agreement created an obligation to make payment in foreign currency to another Zimbabwean resident in Zimbabwe without exchange control authority. The defendant denied liability also on the basis that the initial arrangement was varied from \$240 000-00 to \$40 000-00. The defendant has therefore

paid whatever was owing to the plaintiff in full. The defendant prayed for dismissal of the plaintiff's claim with costs on a higher scale.

The plaintiff in her replication denied her claim was prescribed nor that the agreement was illegal. She also denied the existence of any varied agreement between the parties.

The issues referred for trial were as follows;

- 1) Whether the claim has prescribed
- 2) Whether the sale agreement between the parties is lawful.
- 3) Whether the sale agreement was varied
- 4) Whether the defendant made an express or tacit acknowledgement of liability and
- 5) Whether or not the defendant is indebted to the plaintiff in the sum claimed or any other amount on the agreement.

The plaintiff testified that the defendant is her blood brother. Their parents established a company called Hamish Cameron (1986) (Pvt) Ltd in the 1960s. In 1986 their father split the company between the plaintiff and the defendant equally with each holding 10 000 shares. Their father retained 100 shares and their mother 100 shares. From when she was 18 years old the plaintiff moved to work in the company. The defendant ran two farms which were owned by the company. Their father passed on in May 2000 and his shares passed on to their mother. The plaintiff continued running the company with her mother who also passed on in 2009. In 2002 the farms were acquired and the defendant moved to the company. The two worked well together until Brett, defendant's son joined the company in 2003. Trouble started between the plaintiff and defendant. The defendant would take company produce to sell from his house and fail to remit money to the company. Their relationship deteriorated resulting in plaintiff deciding to quit the company. She offered her shares to defendant. The two negotiated in the presence of Mr Andrew House whose company was responsible for Hamish Company's books. After several draft agreements the two finally agreed on the terms and signed an agreement of sale on 30 June 2008. The agreement stated that the price shall be an amount equivalent to the share portfolio held at Datvest and Tetrad in the company's name as at 31 December 2007. Such shares were to be transferred upon signing the agreement. In addition an amount equivalent of US\$240 000 was to be paid to the plaintiff in five equal instalments.

It was also agreed that should compensation be paid for the two farms acquired by government in future the plaintiff would receive 50% of such compensation.

This witness testified that she continued following up on payment through emails and through Mr House. She testified that at a meeting with the defendant, Mr House and Brett on

19 March 2015 the defendant acknowledged the debt and offered to pay \$1000 per month which offer this witness rejected. It was going to take 200 months to extinguish the debt. Thereafter defendant was explicit that he was not going to pay. The defendant claimed it was their mother's wish that he only pay \$40 000. The defendant also alleged that the exchange rate used was wrong. These accusations only came way after signing the agreement.

On being asked about an addendum allegedly originated by her, where she altered the original figure owing to \$40 000, this witness denied authoring that document. Besides she testified that it was never signed and therefore of no consequence. She denied ever varying the original agreement and maintained that the defendant owed her \$200 000-00. Under cross-examination, she said she had a good relationship with her brother. Brett, her brother's son was the one bent on instigating disharmony between the two siblings. She said she decided to sell her interest in the company due to bullying by Brett. On being asked whether she operated from the same premises as Brett, she responded in the negative.

On the price of her interest in the company she maintained that she and the defendant negotiated with the help of Mr House. It took about six months to come up with the final agreement. The defendant also inputted his contribution to the agreement.

Mr House testified on behalf of the plaintiff that indeed his company Agrilink Accounting Services did the external books for Hamish Company for almost twenty five years. Before his death Mr Cameroon who was father to the plaintiff and the defendant handed equal shares in the company to the plaintiff and the defendant. He is the one who prepared the agreement of sale of the plaintiff's shares to the defendant. In early December 2007 he was approached by the plaintiff who intended to sell her shares in the company to the defendant. That time the company was viable. The two did the valuations of the movable assets of the company. The three of them discussed and came to an understanding on the value of the company. After the agreement was drafted it was signed by both parties and witnessed by this witness and an employee of Agrilink.

As far as he is aware the defendant owed \$240 000 and only paid \$40 000 leaving a balance of \$200 000. Whilst following up on the \$200 000 he learnt from Brett and the defendant that they were not happy with the valuations done. The valuations included a property which was not supposed to be there.

This witness then held a meeting with the parties at his offices on 19 March 2015 to try and resolve the dispute. At that meeting the defendant started off not wanting to pay as he said he could not remember owing. Afterwards he offered a \$1000 per month but the plaintiff

refused the offer. The defendant said he could not afford to pay. The meeting failed to resolve the matter.

Under cross-examination he conceded he was conflicted but was quick to say his evidence was neutral and true. This witness said he was sad to witness the plaintiff and the defendant's relationship deteriorate to these levels. He insisted agreement was agreed upon by both parties. The defendant was to pay for the shares in any form, for example assets. The company was valued at \$2.2 million but the plaintiff accepted to get the lower value of \$800 00. This witness insisted the defendant owed \$200 000 as the original agreement. The purported variation agreement was never signed by the parties. Under cross examination he confirmed the defendant's house was purchased by Harnish Company. He didn't know how the plaintiff's house was purchased. He insisted he was not aware of any variations done between the parties. When the plaintiff transferred the invested shares in Tetrad and Datvest this witness could not tell whether the company was left liquid.

The defendant testified on his own behalf. It was his evidence that he loves the plaintiff who is his sister. He testified that when his father passed on in 2000 he moved to assist in the running of the business. He would then commute between the farm and business. The plaintiff was already with the company doing books' and some clerical work. The plaintiff worked closely with the external accountants Agrilink. He confirmed that when his son Brett moved to work in the company, Brett did not have a good relationship with the plaintiff. He however testified that they operated from different branches, the plaintiff was in Spurn Road whilst the plaintiff was stationed in Workington. This witness conceded that at one point in 2007 the plaintiff approached him and advised that she intended to leave the company due to friction with Brett. He admitted that him and the plaintiff had negotiations for him to buy off the plaintiff's interest in the company. Mr House of Agrilink played a pivotal role. After three or four draft agreements a final one was reached. He admitted he drew up a list of company assets and values were done internally. He admitted that he signed an agreement admitting he owed \$240 000 to the plaintiff. He however testified that upon advising their mother, she disagreed with the figures and queried why the defendant's house had been included in valuation whilst the plaintiff's house was left out.

He testified that after he realised the agreement favoured his sister he had tried to change the agreement. He approached Mr House and numerous discussions were held between them. The plaintiff in one of the meetings brought an addendum to the agreement of sale which removed the defendant's house from the valuation of company assets. In that addendum the

figure of \$240 000-00 outstanding was reduced to \$40 000-00. The plaintiff indicated that she was not going to sign the addendum as she claimed it had come about as a result of bullying their mother. This witness signed the addendum. Their mother died in 2009. This witness testified that he started paying \$40 000-00 in 2010 and finished paying in November 2010. He insisted he owed nothing to the plaintiff. It was only in 2015 that the plaintiff started bringing up the issue claiming \$200 000-00 from the defendant. It first surfaced in an email from Agrilink advising him that they had transferred some money from his mother's estate.

Under cross-examination he repeated that the current relationship between the two siblings had deteriorated as a result of this issue. The two do not even communicate. He said the main reason the plaintiff left the company was so that she and her husband could start their own company.

He insisted that their mother in 2008 decided that \$200 000-00 should be dropped from the outstanding figure. On being questioned if their mother was involved in the negotiations culminating to the agreement this witness replied that the agreement was between him and his sister and had nothing to do with their mother. He conceded agreement took 6 months to be finalised and could not explain if they kept their mother out for such a period why suddenly her wishes seemed so important.

He admitted he could not pay anything in 2008 as he had five years within which to pay. He argued that the agreement signed between the two had a provision saying any variation not signed by the parties was of no force and effect. He admitted the variation was not signed by both parties.

Brett testified on behalf of the defendant. He is the son to the defendant. He testified that he was born on the farm and after school went back to work on the farm. After the farms were acquired by government he moved into town to join the family business. The defendant had moved to the business earlier on upon the passing on of the defendant's father in 2010. He was based at Ardbenie. Around 2007/8 this witness was advised that the plaintiff was leaving the company to start her own business in catfood manufacturing. This witness then moved across to Head Office from where the plaintiff was working from in order to take over from the plaintiff's husband.

This witness denied he was the cause of the plaintiff's leaving the family business. He testified that they were not based at the same branch. This witness admitted he could question certain transactions by the plaintiff and her husband. The plaintiff and her husband were

operating a company called Solowaste and sometimes money would be moved from Hamish company into Solowaste.

He testified that he was involved in the subsequent negotiations between the plaintiff and the defendant. The assets were valued in Zimbabwean dollar. Thereafter a rate of Z\$5 000 000-00 to US\$1 was used in converting the amount to US\$. When the original agreement was signed this witness was not present. When he learnt of the agreement that is when he realised the wrong exchange rate was used.

The rate of Z\$5000 000-00 used meant there were more US\$ to share when in reality company assets were overvalued. Had they used the correct rate of Z\$5 500 000-00 that meant less US\$ to share and less US\$ to be paid to the plaintiff. He felt the agreement favoured the plaintiff. The plaintiff took all the shares that is Tetrad and Datvest. All cash made was invested in those shares. To make matters worse the plaintiff moved the shares before an agreement was reached with the defendant. From the time such shares were taken by the plaintiff the company went into red and never recovered.

When asked how the \$240 000-00 was reduced to \$40 00-00 this witness advised that the plaintiff and the defendant's mother did that. When valuing company assets for purposes of the split only the defendant's house was included as part of the assets. The plaintiff's house though bought from inheritance money was not included.

His grandmother was upset that the plaintiff was short-changing the defendant and directed that the defendant's house be removed from the company assets. She was amenable to its value being put at \$200 000-00. So the removal of the house meant the balance was reduced by that amount to \$40 000-00. That issue remained resolved until later in 2015 when Mr House sent an email saying he had been reminded by the plaintiff to follow up on the payment of the \$200 000-00. This witness admitted recording the meeting of 19 March 2015 and stated that it was a correct recovered of what transpired.

Under cross-examination this witness conceded his educational qualification were predominantly Agriculture. He was adamant the lower exchange rate used prejudiced the defendant as the defendant ended up owing more money to the plaintiff. He agreed he saw a number of drafts agreement leading to the drafting of the final agreement. He would at time advise the defendant on the drafts. This witness testified that it was Mr House who convinced the defendant to include the Dermoy house. He conceded that the purpose of a written agreement was for purposes of ironing out future disputes. He admitted agreement was binding

unless varied. He also admitted the addendum purportedly varying the agreement was not signed and therefore of no force and effect.

ANALYSIS OF EVIDENCE

From the evidence in support of the plaintiff and that in support of the defendant it is not in issue that the parties entered into an agreement of sale whereby the plaintiff sold her shares in Hamish Cameron (Pvt) Limited. The agreed price was:

- ‘1. the share portfolio held at Datvest and Tetrad in the company’s name as at the 31st December 2007. The said shares were to be transferred to the seller upon signature of this agreement; and
2. US\$240 000-00 payable to the seller in five equal instalments within a period of five years.

The two farms owned by the company namely Starthlorne, Glentana and Fairview in the District of Enterprise or Acturus acquired by government were left out. However the parties agreed that should government in future pay compensation for the farms, 50% of such compensation be given to the plaintiff.

The parties agreed that in pursuance to the above agreement the shares held at Datvest and Tetrad have since been transferred to the plaintiff. The defendant has also paid to the plaintiff the sum of \$40 000-00. The parties then differ on whether the \$40 00-00 represented full and final payment.

The plaintiff sued the defendant in terms of the agreement entered into on 30 June 2008. According to her the defendant was to pay US\$240 000-00 over and above the transfer of Tetrad and Datvest shares. On the other hand whilst accepting the original agreement entered into on 30 June 2008 the defendant testified that such agreement was varied in terms of an addendum to the agreement of sale allegedly drawn by the plaintiff on the instruction of their late mother. Such addendum reads;

“ADDENDUM TO AGREEMENT OF SALE made and entered into between

MARY HOWSON

and

JOHN CAMERON

As per the wishes of my mother, Mrs Alice Margaret Cameron, accepted that the property “10 Dermoy Lane, Borrowdale, Harare” be removed from the valuation of Hamish Cameron assets as of 1 January 2008 for purposes of this sale.

The figure of US\$240 000 (Two hundred and forty thousand dollars) stipulated in para 11 of the agreement will therefore be altered to read USD\$40 000 (Forty thousand dollars)

SIGNED:

M M HOWSON

Date

J A CAMERON

Date”

Such addendum presented to was neither signed nor dated. Defendant testified that he signed the addendum and returned same to plaintiff. The plaintiff denied ever generating the addendum. Her testimony was to the effect that she never signed that addendum. She did not recognise it. I do not believe it is crucial to find out who prepared the addendum. What is important is that it was never signed by the two parties.

The evidence show that the addendum was the parties’ mother’s input to the agreement. Even Brett testified to that effect that it was his grandmother who ordered that the Dermoy house be removed from the assets of the company. Brett also testified that it was the same grandmother who came up with the value of US\$200 000 for the Dermoy house. From the evidence it is clear the purported reduction in price was as per the desire of the parties’ mother. The parties themselves did not agree to the addendum.

The parties’ evidence also differ whether the defendant did acknowledge owing US\$200 000 at a meeting of the 19 March 2015. The plaintiff relied on page 36 of the record where defendant allegedly offered US\$1000 per month. The conversation went as follows;

“JC (defendant) you will get your money if you are owed it – I am just saying there is no ways I can pay 200 000 dollars.
A H (Andy House) ----
J C I will make you on offer if we can pay you 1000 a month.
I mean its going to stretch us
M H: No John, 1000 a month is not enough do you know how long it will take, I will be dead
J C its I was not aware i still owed you money
----”

The plaintiff took the above to mean that the defendant acknowledged the debt of \$200 000 on 19 March 2015. The defendant denied the above was an expression that he owed plaintiff \$200 000. The defendant accepted saying the words but refuted he acknowledged the debt.

At this point it is enough to simply note that the words were indeed said. Whether such words constitutes an acknowledgement of debt would be dealt with later in the judgment.

The first issue falling for determination is whether the claim is prescribed. In coming to my conclusion I have looked at the wording of the agreement on how the \$240 000 was to

be paid. In other words I shall determine when the amount was due and payable. The relevant portion of the agreement reads;

“In addition an amount equivalent to USD240 000 (Two hundred and forty thousand dollars) shall be payable to the seller in five equal instalment within a period of five years.”

Section 16 of the Prescription Act [*Chapter 8:11*] provides that prescription shall commence to run as soon as a debt is due. The present debt falls under the definition of debt as provided by s 2 of the Act. That section defines a debt as “anything which may be sued for or claimed by reason of an obligation arising from statute, contract, delict or otherwise.” See also *Syfin Holdings v Pickering* 1981 ZLR 344 (H).

The legal position relating to when prescription begins to run is provided under s 16 of the Act which speaks to the date of commencement as when a debt becomes due. Generally a debt becomes due when the cause of action arises. In the present case the debt due is the last day when payment was expected from the defendant. See *Chrinda v Konrad van der Merwe & Minister of Lands and Rural Resettlement* HH 51/13 and *ZIMASO Ltd v Son HE Mining (Pvt) Ltd* HH 654/15, *Shinga v General Accident Insurance Co (Zimb) Ltd* 1989 (20 ZLR 266 (HC)). In *Syfin Holdings Ltd v Picking (supra)* at 14 F – G the court had this to say;

“It is clear beyond argument that before prescription can begin to run against a creditor he must have been able to bring his action. Wessels, *Law of Contract* in South Africa, 2 ed, Vol 2 para 2780. It is also clear that in order to be able to institute an action for recovery of a debt, the creditor must have a complete cause of action in respect of it. *HMBMP Properties (Pty) Ltd v King*, 1981 (1) SA 906 (N) *per Thivion jut* 909.”

In the present case the agreement was signed on 30 June 2008, but was effective from 1 January 2008. The debt was to be paid in equal instalments over a period of five years. That meant the last instalment was due on 1 January 2013. Three years down the line would have been 31 December 2015. In cases involving instalments, prescription normally starts to run on the date the last instalment is due – See *Makusha Chihoho and Others SC 14/08, Alpha Media Holdings (Pvt) Ltd v Globeflower (Pvt) Ltd* HH 810/15.

Summons in the present matter were filed on 15 December 2015 but only served on the defendant on 4 January 2016. Service was done after prescription period had run. The service did therefore not interrupt the prescription in terms of s 19 of the Act.

The plaintiff then sought to rely on a purported acknowledgement of debt by the defendant in a meeting between the parties on 19 March 2015. The defendant rightly conceded that an acknowledgement of liability normally interrupts prescription if made within the three year period as provided for in s 15 of the Prescription Act. I agree with the defendant’s

submissions that the onus to prove the existence of an acknowledgment of debt lies with the plaintiff. See *Pertz v Government of the Republic of South Africa* 1983 (3) SA 584 A, *Benson and Another v Wlates and Ors* 1984 (1) SA 73 A and *First Mutual Bank of Zimbabwe v Fortress Industrial Investments (Pvt) Ltd and Anor* 2000 (1) ZLR 211 (SC).

The plaintiff submitted that the defendant, at a meeting of the 19 March 2015 acknowledged owing the debt.

The plaintiff as proof availed minutes of the meeting written by Mr Andy House. The minutes are on page 10 and 11 of plaintiff's bundle of documents. On page 11 it is noted that;

“14 Mary stated that there was still \$200 000 owing to her from the agreement.
15. John acknowledged this.”

The plaintiff relied on the above as the acknowledgment of debt.

The defendant on the other hand produced minutes of 19 March 2015. I have alluded to the relevant portion earlier on in my judgment. I have already taken the view that the issue of the \$200 000 was discussed at the meeting. What then falls for determination is whether the words spoken by defendant constitute an acknowledgement of debt.

For an acknowledgment of debt to be valid it should contain the following;

1. The acknowledgement of debt should be made by the debtor or his agent
2. The acknowledgement of debt must be made expressly or tacitly acknowledging the existence of liability.
3. The acknowledgement must be made to the creditor or his agent.

See *First Merchant Bank of Zimbabwe Ltd v Fortress Investments (Pvt) Ltd and Another* 2000 (2) ZLR 221 (S).

When considering tacit acknowledgement the conduct of the debtor also becomes relevant. See *Cape Town Municipality v Allie* 1982 (2) SA 1 (C) and *Benson and Another v Waltes & Others* 1984 (10 SA 73 (A).

The defendant accepted that he said the words ascribed to him that if he owes the money he would pay. He however denies that such words constitute acknowledgment of debt.

Considering the words and conduct of defendant I am of the view that there was no acknowledgement of the debt by the defendant. The words were not a direct acknowledgment. The defendant used the words “you will get your money if you are owed” and “ I will make you an offer if we can pay you \$1000 a month.”

There is no tacit acknowledgment to talk about. The \$1000 per month was conditional upon plaintiff accepting the offer. The offer was not taken by plaintiff. The defendant's conduct thereat and thereafter does not suggest that he acknowledged the debt.

I am satisfied that the plaintiff has failed to discharge the onus upon her of proving that the defendant acknowledged the debt on 19 March 2015. Having so failed it follows that there was no interruption of the prescription. The debt prescribed on 31 December 2015.

On that basis alone the claim fails and is dismissed.

In the result I order as follows:

1. The plaintiff's claim against the defendant is prescribed.
2. The claim is thus dismissed with costs.

Atherstone and Cook, plaintiff's legal practitioners
Venturas & Samkange, defendant's legal practitioners