

MINISTER OF ENVIRONMENT, WATER & CLIMATE
versus
SOUTH AFRICAN AIRWAYS LIMITED
and
CIVIL AVIATION AUTHORITY OF ZIMBABWE

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 11, 12 June 2018, 6 March, 8 July 2019 & 8 January 2020

CIVIL TRIAL

M Tshuma, for the plaintiff
A Moyo, for the 1st defendant
H Nkomo, for the 2nd defendant

TAGU J: The plaintiff initially issued summons against the first defendant on the 20th August 2014 seeking the payment of US\$877 435.00 for arrear meteorological weather services fees, payment of further meteorological weather services fees from 1st May 2014, interest from date of service of summons to date of final payment, cost of suit and collection commission in terms of the Law Society of Zimbabwe's by-laws.

An application for the joinder of the Civil Aviation Authority of Zimbabwe as the second defendant was later made by the first defendant and was granted since the first defendant claimed in its plea that it paid all the meteorological fees to the second defendant who is the plaintiff's collecting agent. In its amended declaration the plaintiff stated that unless the second defendant opposes the plaintiff's claim and or has been indeed paid what is due to the plaintiff by the first defendant and did not remit same to plaintiff, no order or relief is sought against second defendant by the plaintiff and is not liable to pay costs of suit that the second defendant may incur in these proceedings.

The plaintiff, being the Minister of Environment, Water and Climate being represented by the Permanent Secretary who is also the Chief Accounting Officer of the Ministry Mr Prince Mupazviriho in his official capacity stated in his declaration that the plaintiff is entitled to claim

the said fees in terms of the Meteorological Services Act [*Chapter 13.21*] and the Meteorological Services (Aviation Weather Services) Regulations 2005 (Statutory Instrument 32 of 2005). In terms of Statutory Instrument 12 of 2005 the Regulations apply to all over-flights within the Zimbabwe Flight Information Region and all domestic and International flights landing and departing from those aerodromes where meteorological facilities are available. The plaintiff said the first defendant's aircraft used and continues to use the aerodrome facilities provided by the plaintiff making it liable to pay meteorological weather services departure fees, landing fees and over-flight fees as provided for by the respective schedule to the Meteorological Services (Aviation Weather Services) Weather Regulations 2005. However, in breach of its obligations to pay the said fees, the first defendant failed, neglected or refused to pay the said fees and levies to the extent that as at 31st April 2014 first defendant was indebted to the plaintiff in the sum of US\$877 435.00 and continue to incur.

In its plea the second defendant made it clear that indeed the first defendant is at law liable to pay the plaintiff in respect of the meteorological weather services departure fees, landing fees and over-flight fees that are claimable in terms of SI 32 of 2005. It further admitted that it has always been the collecting agent for the plaintiff. It therefore clarified that at all material times it invoiced the first defendant for payments due to itself and the plaintiff distinguishing that which is due to it as "aeronautical services" and that due to the plaintiff under the heading "met fees". It therefore said the first defendant is refusing to pay the "met fees" that are due to plaintiff in terms of SI 32 of 2005.

The issues to be determined in this case were captured in the joint Pre –trial conference minute filed of record. However, at the hearing of the case the parties agreed that the first defendant was the only one to defend the plaintiff's action.

The plaintiff led evidence through two witnesses, Mr Morris Vengesai Sahanga and Mrs Grace Tsitsi Mutandiro and closed his case. The plaintiff had successfully shown through his two witnesses that the first defendant was the only aircraft that had not paid for the service fees.

At the close of the plaintiff's case the first defendant made an application for absolution from the instance by raising a sole point of law that the plaintiff *in casu* had no statutory locus standi to sue the first defendant in terms of the Meteorological Services Act since there is no legal nexus between plaintiff and second defendant entitling the former to institute the current proceedings. It

submitted that the sole and exclusive statutory responsibility to supply meteorological services to the Airline Industry rests with the Civil Aviation Authority of Zimbabwe (CAAZ). In short the first defendant was saying CAAZ should be the plaintiff and not the Minister of Environment, Water and Climate since the first defendant discharged its obligations to CAAZ for payment of aeronautical services which include meteorological services (per sections 45 and 47 of the Civil Aviation Act [*Chapter 13.16*]) and for that reason the plaintiff had not established a cause of action and even if the rights created in terms of the Meteorological Services Act had been for the plaintiff's benefit, a proper interpretation of the Act would not have given the plaintiff a right of action as against the first defendant.

The second defendant submitted that it would abide by the decision of the court.

Note must be taken that the issue raised by the first defendant in its application for absolution from the instance was not one of the issues captured in the Joint Pre-Trial Minute nor was it an attack on the evidence led by the plaintiff. It was raised as a point of law which can be raised at any point that the plaintiff did not have the requisite locus standi to sue the first defendant. Having heard submissions by counsels the court dismissed the application for absolution from the instance after holding that the plaintiff had the requisite locus standi to sue the first defendant since CAAZ was merely a collecting agent of the plaintiff. The court then ordered the first defendant to give evidence in its defence.

However, the first defendant opened and closed its case without giving evidence. The first defendant then raised other points of law in its closing submissions instead of leading any evidence particularly that the first part of the plaintiff's claim is prescribed, that the plaintiff may only claim payment of fees from the period after the administration of the Meteorological Services Act was assigned to her, and that there is no cause of action that has been established by the plaintiff. The approach adopted by the first defendant is supported by authorities and this court found nothing untoward about that despite the plaintiff submitting to the contrary.

It is trite that a point of law may be raised at any stage of the court proceedings, including on appeal. In *Muchakata v Netherburn Mine* 1996 (1) ZLR 153 (S) the Supreme Court held thus at p157A:

“Provided it is one which is required by a definitive law to be specially pleaded, a point of law, which goes to the root of the matter, may be raised at any time, even for the first time on appeal, if its consideration involves no unfairness to the party against whom it is

directed: *Morobane v Bateman* 1918 AD 460, *Paddock Motors (Pty) Ltd v Igesund* 1976 (3) SA 16 (A) at 23D-G.”

Further in *Nissan Zimbabwe (Private) Limited v Hopitt (Private)* 1997 (1) ZLR 569 (S) the Supreme Court said the following at 571-572-

“Raising the point of law at this stage does not introduce any new matter into the case; the legal objection to the claim arose upon the matter which was before the court below, though this particular argument upon that matter was not there presented for consideration and, consequently, did not fall for determination.”

So a point of law can be raised at any point.

In casu, and as more fully appears above, the facts of the matter are largely common cause and the disposition of the matter largely turns on the questions of law. In the circumstances, contrary to the submissions made in the plaintiff’s Closing Submissions, nothing turns on the fact that the first defendant chose not to lead any evidence. I will straight away proceed to deal with the points of law raised by the first defendant in its defence.

1. HAS PART OF THE PLAINTIFF’S CLAIM PRESCRIBED?

The plaintiff claims payment for the alleged meteorological weather service fees. According to the summons, the plaintiff’s claim is for the period running from January 2006 to April 2014 and thereafter until the payment is made since the first defendant continues to incur the debt. The plaintiff’s summons were issued on the 20th of August 2014 and served on the first defendant on the 22nd of August 2014. The first defendant’s contention is that the plaintiff’s claim for any fees raised before 22nd August 2008 is prescribed. It relied on the provisions of section 15 (c) (ii) of the Prescription Act to the effect that a debt due to the State is extinguished by prescription after six (6) years. On the other hand the plaintiff averred that the debt is covered in terms of Section 15 (a) of the Prescription Act and not in terms of Section 15(c). the plaintiff argued therefore that the debt has not prescribed and is still claimable as the period in question has not reached 30 years per section 15 (a) of the Prescription Act.

Section 15 of the Prescription Act provides various periods of prescription for various debts. For avoidance of doubt the whole of section 15 of the Prescription Act provides as follows-

“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 a 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.”

My interpretation of the whole s 15 of the Prescription Act shows that a number of situations are applicable in this case. Sections 15 (a) (iii), (iv), section (b) and section (c) (ii) creates a bit of uncertainty in that on one hand some sections talk of debts owed to the State and on the other hand some sections talk of debts in respect of taxes imposed or levied by or under any enactments. *In casu* we are dealing with some levies that the first defendant is obligated to pay under the relevant enactments, especially the Meteorological Services Act. For that reason this is not only a debt due to the State but also levied under some enactments. It would not be correct to strictly interpret that the debt is a debt owed to the State only and disregard statutory obligations. I would therefore agree that the debt *in casu* is also covered under s 15 (a) and for that reason part of the debt is not prescribed.

CAN PLAINTIFF CLAIM FOR FEES AFTER DATE OF ASSIGNMENT OF THE ACT ONLY?

It is common cause that at the time that the Meteorological Services Act was promulgated it was administered by the Minister of Transport and Communications. The administration of the Act was assigned to the Minister of Environment, Water and Climate, the plaintiff on 7th February 2014 by virtue of Statutory Instrument 29 of 2014. The first defendant averred that the plaintiff can only properly claim payment for fees raised after 7th February 2014. I however, tend to disagree with this reasoning. My belief is that once someone has been assigned to administer any Statute, or a department, and finds that at the time of his or her takeover, that department is owed some money which debt was accrued before the takeover, there is nothing wrong for that person to take

action to recover the debt owed before his or her take over. I therefore find that the plaintiff can perfectly claim for fees due to the department she took over before her assignment.

HAS PLAINTIFF ESTABLISHED A CAUSE OF ACTION AGAINST THE FIRST DEFENDANT?

It is common cause that the first defendant is obligated to pay meteorological weather services fees and other statutory fees. The second defendant in its plea made it clear that indeed the first defendant is at law liable to pay the plaintiff in respect of the meteorological weather services departure fees, landing fees and overflight fees that are claimable in terms of Statutory Instrument 32 of 2005. A close look at the amended summons clearly show that the plaintiff is claiming from the first defendant the sum of US\$877 435.00 being the outstanding meteorological weather services fees for the period of January 2006 to 30th April 2014. The summons further shows that the plaintiff is claiming payment by the first defendant of all and further outstanding meteorological weather service fees from 1st May 2014 to date of final payment. The first defendant in its plea claimed to have paid all the fees to CAAZ, a fact disputed by CAAZ. Therefore the plaintiff has established a cause of action against the first defendant.

The court therefore found that the plaintiff has managed to prove that it had a right to sue for the payment of the said fees. It claimed what is due to it in terms of the Act and as per invoices that were sent to the first defendant through the second defendant who for all intents and purposes, was and remains its agent. The first defendant's failure, refusal or neglect to pay has no lawful justification and as it is denying the plaintiff its right to recover costs as per the statutory law and by so doing it has breached the laws of Zimbabwe. In fact the first defendant has not defended the claim before this court. Its pleadings are a relict with inconsistencies. It left the court with a duty to guess as to what is first defendant's defence to the claim as it raised one point of law and another. It chose not to lead any tangible evidence on anything. The bundle of documents being filed of record by the first defendant has not been explained to the court. Wherefore the plaintiff has proven its case on a balance of probabilities against the first defendant and is therefore entitled to judgment against first defendant with costs as prayed for in the summons.

IT IS ORDERED THAT

1. The 1st Defendant be and is hereby ordered to pay to the Plaintiff the sum of US\$877 435.00 being the outstanding meteorological weather services fees for the period of January 2006 to 30th April 2014.
2. Further, the 1st Defendant be and is hereby ordered to pay all and further outstanding meteorological weather service fees from 1st May 2014 to date of final payment.
3. 1st defendant to pay interest on the above sums at the prescribed rate of interest from date of service of summons to date of final payment.
4. Costs of suit on a legal practitioner and client scale.

Chinamasa, Mudimu & Maguranyanga, plaintiff's legal practitioners
Kantor & Immerman, 1st defendant's legal practitioners
Mhishi Nkomo legal practice, 2nd defendant's legal practitioners