

PETROS KUNENE

Versus

LOBELS BISCUITS (PVT) LTD

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 4 OCTOBER 2002 AND 22 MAY 2003

S Mlaudzi for the plaintiff
Ms P Dube for the defendant

Judgment

NDOU J: The plaintiff, hereinafter referred to as Mr Kunene is suing the defendant, hereinafter referred to as Lobels Biscuits for damages. Mr Kunene claims special damages in the sum of \$405 150,12, general damages in the sum of \$200 000 with interest thereon and costs of suit. The cause of action arose on 8 February 1998 when Mr Kunene was injured at his place of employment by Lobels Biscuits. It is common cause that the summons and the declaration were issued and served on Lobels Biscuits on 9 February 2001. *Prima facie*, the period of three years within which Mr Kunene had to serve on Lobels Biscuits had prescribed. Unless Mr Kunene proves that there was some interruption within the meaning of the Prescription Act [Chapter 8:11] he has lost his rights to sue Lobels Biscuits through effluxion of time. This is extinctive prescription – see *Wille's Principles of South African Law* (8ed) by D Hutchinson, B van Heerden, D P Visser and C G van der Merwe at page 499 and *Introduction to South African Law and Legal Theory* (2nd ed) by W J Hosten, A B Edwards, F Bosman and J Church at page 767.

In terms of the Prescription Act (*supra*) the type of debt under consideration in this matter is generally extinguished by prescription after the lapse of the prescribed

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period of three years. It is always important in prescription to first establish when the plaintiff's cause of action arose. This is so because in law prescription only commences to run when the plaintiff's cause of action reaches completion – see *Denton v The Director of Customs and Excise* HH-216-89, *E M Power Point (Pvt) Ltd t/a Power Point Building Contractors v City of Bulawayo* HB-5-01 and *Old Mutual Property Investment Corporation (Pvt) Limited v Grain Marketing Board* HH-216-02. Prescription cannot begin to run against a creditor before his cause of action is fully accrued i.e. before he or she is able to pursue his or her claim – see *Van Vuuren v Boschhoff* 1964(1) SA 395 at 401; *The Master v I L Back & Co Ltd and Ors* 1983 (1) SA 986 (A) and *HMBMP Properties (Pty) Ltd v King* 1981(1) SA 909 (NPD).

According to section 16(1) of the Prescription Act (*supra*) “prescription shall commence to run as soon as a debt is due.” In its ordinary meaning a debt is “due” when it is immediately claimable by the creditor by the creditor and, as its correlative, it is immediately payable by the debtor – see *Van Rensburg and Geldenhuis Deep Ltd v Superior Trading Co.* 1933 TPD 423 and *White v Municipal Council of Potchefstroom* 1906 TS 47. A debt can only be said to be claimable immediately if the creditor has the right to immediately institute an action for its recovery – see *Honey and Blanckenberg v Law* 1966(2) SA 43 (R) at page 47 and *Erins v Shield Insurance Co Ltd* 1980 (2) 814 (A) at 838.

Mr Kunene's debt only becomes due when he acquires a complete cause of action for its recovery – *McKenzie v Farmers Co-operative Meat Industries Ltd* 1922 AD 16 at 23; *Abrahamse & Sons v S A Railways and Harbour* 1933 CPD; *Coetzee v SA Railways & Harbour* 1933 CPD 565 at 570-1; *Mohammed v Nagdee* 1952(1) SA

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410(A) at 418 and *Santam Insurance Co Ltd v Vilakazi* 1967(1) SA 246(A). In the circumstances of this case when did Mr Kunene acquire a complete cause of action for damages claimed? It seems to me that 8 February 1998 is the date on which the cause of action commenced to run. It is certainly not the date on which Mr Kunene's cause of action fully accrued. On 8 February 1998 got injured, went into a coma or became unconscious and was hospitalised at the Intensive Care Unit (ICU) of United Bulawayo Hospitals. He remained in the ICU for a period in excess of two weeks. Mr Kunene is claiming both special and general damages. Some of the damages occurred well after 8 February 1998. The entire set of facts which give rise to Mr Kunene's enforceable claim against Lobels Biscuits includes every fact which it material to be proved to entitle him to succeed in his claim. It includes all that Mr Kunene must set out in his declaration in order to disclose a cause of action. His cause of action does not "arise" or "accrue" until the occurrence of the last of such facts.

Mr Kunene was unconscious from the accident for about two weeks after the accident. During this period he was hospitalised in the ICU. In my view during this period he was not aware of the "identity of the debtor and of the facts from which the debt arises" as required by the provisions of section 16(3) of the Prescription Act (*supra*). Prescription began to run only when he gained consciousness and became aware that he was injured at Lobels Biscuits factory through the negligence of the latter. This, of course, subject to the accrual of a full course of action as I described above. Mr Kunene's declaration is lacking in details of dates e.g. it is not clear when his wages were stopped. What is, however, discernable is that for about two weeks after the accident prescription did not begin to run. Taking this factor into account,

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the summons were issued well within the three year period. In light of this finding it is not necessary to determine when a complete cause of action for the recovery of Mr Kunene's damages accrued. I, however, doubt whether Mr Kunene's complete cause of action accrued by 9 February 1998 bearing in mind the nature of claims. The claims are such that they could not immediately be claimable by Mr Kunene and correlatively, immediately payable by Lobels Biscuits on 8 February 1998. The occurrence of some facts, or at the least the last of such facts was well beyond 8 February 1998. In the circumstances, even if one assumes that Mr Kunene was conscious from the date of the injuries it does not seem to me that his claim has prescribed. From the above, it is therefore evident that Mr Kunene's claims have not prescribed and Lobels Biscuits' special plea must fail on that account.

I accordingly, dismiss the defendant's special plea with costs.

Advocate S K M Sibanda and Partners, plaintiff's legal practitioners
Messrs Coghlan & Welsh defendant's legal practitioners