

MAKETH ENTERPRISES (PRIVATE) LIMITED

Versus

Z B FINANCIAL HOLDINGS

IN THE HIGH COURT OF ZIMBABWE
KAMOCHA J
BULAWAYO 27 MARCH AND 12 JUNE 2008

C P Moyo for plaintiff

J J Moyo for defendant

Deendant's plea in bar

KAMOCHA J: The defendant filed its plea in bar in terms of rule 137(1)(a) of the rules of this court but by the time the matter came up for argument the parties had not complied with the provisions of rule 138. They, however, requested the court to condone that so that the special plea could be argued on its merits. I acceded to the request in terms of rule 4C.

The facts giving rise to this matter were these. On 2 September 2003 plaintiff approached Syfrets Bank – a division of defendant and opened a current account. Thereafter plaintiff made a number of deposits into that account in foreign currency such that by 10 October 2003 the account held the sum of US\$95 167,70.

On 26 September 2003 plaintiff instructed defendant to pay the sum of US\$20 000,00 to C M Hartshorne & Co Ltd. The plaintiff's account, at that time held sufficient funds to pay in terms of the instructions.

Similarly on 21 October 2003 defendant was instructed by plaintiff to pay the same company the sum of US\$52 000,00.

Plaintiff alleged that, defendant, without reasonable cause, failed, refused or neglected to pay timeously to the said company as instructed by it. The defendant only made payment to the said company on 9 January 2004 which was 3 months after the written instructions had been given by plaintiff.

Due to defendant's failure to pay timeously when payment was eventually made by defendant the price of the goods that plaintiff was purchasing had risen from US\$72 000,00 to US\$84 314,00. It is the excess US\$12 314,00 which the plaintiff claims as damages arising from defendant's failure to act as is expected of a bank.

The defendant's plea in bar was that by section 15(d) of the Prescription Act [Chapter 8:11] the claim against defendant had become prescribed after three years. Judicial interruption of prescription was required at the latest by 20 October 2006.

Yet summons was only served on the defendant on 5 June 2007 some seven months too late to interrupt prescription.

In answer to the defendant's plea in bar plaintiff pointed out that its claim was based on a bill of exchange as defined in section 3 of the Bills of Exchange Act [chapter 14:02] section 3(1) of the Act provides:

“(1) A bill of exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, addressed to pay on demand, or at a fixed or determined future time, a sum certain in money to, or to the order of, a specified person, or to bearer.”

A look at the two documents wherein the defendant was instructed to pay to C M Hartshorne & Co Ltd the sums US\$20 000,00 and US\$52 000,00 reveals that the instructions were given in writing and signed by the plaintiff. The instructions were unconditional which explains why the defendant made the payments albeit late. I therefore agree with the plaintiff's view that its claim is based on a bill of exchange.

The Prescription Act provides as follows in section 15:

“15. Periods of Prescription of debts
The period of prescription of a debt shall be –
(a) ...

...

six year in the case of –

(i) a debt arising from a bill of exchange or other negotiable instrument or from a notarial contract.

...

except where any enactment provides otherwise, three years, in the case of any other debt.”

Since the plaintiff's claim arises from a bill of exchange the claim can only be affected by prescription after a period of six years in terms of section 15(c) (i) and not in terms of section 15(d) of the said Act as suggested by the defendant.

In the result I would dismiss the defendant's plea in abatement with costs.

Messrs Majoko & Majoko, plaintiff's legal practitioners
Gill, Godlonton & Gerrans, defendant's legal practitioners