

SERGIO TARWIREYI  
versus  
SAMUEL MBONELI KUNENE  
and  
FOURWAY HAULAGE S.A. (PTY) LTD

HIGH COURT OF ZIMBABWE  
HUNGWE J  
HARARE, 10 October, 2007 & 12 March, 2008

Advocate *E T Matinenga*, for the plaintiff  
Advocate *R Y Phillips*, for the 2<sup>nd</sup> defendant

HUNGWE J: Plaintiff, an *incola*, issued summons in April 2004 against first and second defendants both *peregrine*, claiming damages arising out of a motor vehicle collision that occurred in Harare on 8 February 2004. In early 2006 the defendants raised special plea to the jurisdiction of the court. That special plea was upheld. On April 2006 plaintiff made a chamber application in terms of which on 10 October 2006, this court issued an order attaching certain of second defendant's mechanical horses and trailers specified in the order. On 1 December 2006, plaintiff withdrew the proceedings in HC 4819/04 and filed the present proceedings on 30 November 2007.

Plaintiff is again met by the same plea as to the jurisdiction of this court in the first special plea and with prescription in the second special plea raised by the second respondent.

*Mr Matinenga* who appeared for the plaintiff in the matter argued that plaintiff has effectively placed the defendants within the jurisdiction by successfully securing an order to confirm jurisdiction under HC 1857/07. As to prescription, he argued that since the debtor is outside Zimbabwe plaintiff's position is saved by s 17(1) (c) of the Prescription Act [*Chapter 8:11*]. That section provides that:

- “(1) If –  
(a)- (b).....  
(c) the debtor is outside Zimbabwe:  
(d)- (e).....

and the period of prescription would, but for this subsection, be completed before or on, or within one year after the date on which the relevant impediment referred to in paragraph (a), (b) (c) (d) or (e) has ceased to exist, the period of prescription shall not be completed before the expiration of the period of one year which follows that date.”

Mr *Phillips* argued that as the plaintiff withdrew his earlier action in HC4819/04 against the defendants, it follows that prescription has run and he is barred from bringing this suit. I did not hear him to say that the effect of that withdrawal was to render the attachment to confirm jurisdiction under HC 1857/07 a nullity. Indeed it may have been imperfectly drafted but the court order makes it clear what the essence of the application was. The effect of the order is not in doubt. It confirms this court's jurisdiction as there is another jurisdictional basis upon which the claim against the defendants could be entertained. The delict was committed in Zimbabwe. The attachment therefore serves to confirm that jurisdictional ground.

As observed by BECK J in *African Distillers Ltd v Zietkiewicz* **1980 ZLR 135 @ 136F**:

“The well settled common law, for which there is no dearth of judicial authority, is that for claims that sound in money brought by an incola or a peregrinus against a peregrinus, there must be an arrest of the person of the defendant or an attachment of his property in order to found or to confirm jurisdiction in those cases where some other jurisdictional ground exists in relation to the claim – such as, for example, that it arises from a contract or delict committed within the Court's territorial limits of jurisdiction. Such arrests or attachments are necessary in order to satisfy, albeit only partially and imperfectly in some cases, the doctrine of effectiveness, for the Court will not concern itself with suits in which the resulting judgment will be no more than a brutum fulmen.”

Applying the above principles, I am satisfied that the plaintiff has succeeded in overcoming the jurisdictional hurdle in his quest to satisfy his claim.

The accident in which plaintiff was injured occurred on 8 February 2004. His claim would be extinguished by prescription unless he served summons on or before 8<sup>th</sup> February 2007.

The plaintiff, by implication, admits that prescription has run. He however relies on S 17(1) for the proposition that prescription shall not be completed before the expiration of a period of one year following that date. As the debtor is resident outside Zimbabwe, in my view, plaintiff can seek the aid of s 17 of the Prescription Act [*Chapter 8: 11*].

In the result both special pleas are dismissed with costs.