

POMELO MINING (PRIVATE) LIMITED
versus
TONNIE MUTUNJA

HIGH COURT OF ZIMBABWE
MANZUNZU J
HARARE, 27 October & 3 November 2021

CIVIL TRIAL - PRESCRIPTION

R Nyapadi, for the plaintiff
C Daitai, for the defendant

MANZUNZU J: Following the cancellation of an agreement between the parties, the plaintiff issued summons seeking *restitutio in intergrum* in the sum of US\$742 364.00 from the defendant. On 12 May 2014 the parties entered into a joint venture agreement wherein the defendant would avail 11 mining claims and plaintiff would avail US\$600 000.00. The parties wanted to do mining operations under a joint venture company known as Mutemwa 3. Plaintiff failed to meet its obligation of the agreement resulting in defendant serving plaintiff with a ninety day notice of intention to terminate the agreement. Despite being placed *in mora* the plaintiff failed to pay. The agreement was then cancelled on 23 March 2015, it is common cause. Summons were issued on 4 July 2018.

Mr *Daitai* for the defendant raised a point *in limine* that the plaintiff's claim has prescribed in that 3 years lapsed from 23 March 2015 before plaintiff filed summons on 4 July 2018.

Section 15 (d) of the Prescription Act Chapter 8:11(the Act) on periods of prescription of debts provides that,

“The period of prescription of a debt shall be—
(d) except where any enactment provides otherwise, three years, in the case of any other debt.”

This clear provision of the law was not disputed, neither is it disputed that the plaintiff's claim is for a debt as defined in section 2 of the Act which defines a “debt”, as “without limiting the meaning of the term, includes anything which may be sued for or claimed by reason of an obligation arising from statute, contract, delict or otherwise.”

Furthermore, it is common cause that the cause of action arose on 23 March 2015 when the agreement was cancelled. The time when prescription begins to run is made clear by section 16 (1) of the Act which states that; “(1) Subject to subsections (2) and (3), prescription shall commence to run as soon as a debt is due.” Computation of three years from that date will fall on 23 March 2017. When summons were issued on 4 July 2018 three years had already lapsed.

On the basis of these facts, Mr *Daitai* urged the court to dismiss the plaintiff’s claim with costs for the simple reason that the debt has been extinguished by operation of law.

Mr *Nyapadi* for the plaintiff expressed displeasure in the manner the point of prescription was raised. The trial was set down for the 27th and 28th October 2021. On 26 October 2021 the defendant filed with the Registrar a notice that he will raise a point *in limine* at trial that the plaintiff’s claim has prescribed. The plaintiff’s lawyers were served with the notice on 26 October 2021. Mr *Nyapadi* said the defence of prescription ought to be raised as a special plea. He did not go further to say what should happen if prescription is not raised as a special plea neither did he draw the attention of the court to any law which says prescription shall only be raised as a special plea. The case of *National Employment Council for the Construction v Zimbabwe Nantong International (Pvt) Ltd*, SC 59/15 relied upon by Mr *Nyapadi* was of little assistance.

Mr *Daitai* drew the attention of the court to s 20 (2) of the Act which says;

“(2) A party to litigation who invokes prescription shall do so in the relevant documents filed of record in the proceedings:
Provided that a court may allow prescription to be raised at any stage of the proceedings.”

He argued this was a point of law which can be raised at any point of the proceedings. see *Mwayera v Chivizhe and three others*, SC16/16. While it could have been ideal to raise prescription as a special plea. I find the manner in which it has been raised as appropriate. A formal notice was given. The plaintiff was at liberty to seek more time to prepare for it if such was its wish.

Mr *Nyapadi* said there were events which interrupted the running of prescription. The first of which he said was judicial interruption as per s 19 of the Act which provides in subsection (2) that; “The running of prescription shall, subject to subsection (3), be interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt.”

It was submitted that when the defendant cancelled the agreement on 23 March 2015, the plaintiff challenged the cancellation through case number HC 5479/15. Judgment in that case was handed down on 7 September 2016 and plaintiff lost the challenge when cancellation of the agreement was confirmed. However a challenge to the cancellation of the agreement cannot interrupt prescription. This is for the simple reason that it is not a payment for a debt as per section 19 (2) of the Act. The second leg of the argument that the plaintiff could not bring this action earlier as it was waiting for the outcome of HC 5479/15 has no bearing on interruption.

The second event alleged to have interrupted prescription was a counter-application in case number HC 1030/17. The counter-application could have succeeded to interrupt prescription had it not suffered a still birth. It was declared a nullity so there is no counter application to talk about. Mr *Nyapadi* was involved in that case and he ought to know the position of the law that you cannot put anything on nothing and expect it to stand.

The third attempt on interruption was that the two judgments in HC5479/15 and HC 1030/17 interrupted prescription. There was no demonstration as to how they did. A look at the two judgments will show that they have no effect on interruption of prescription.

The last attempt by Mr *Nyapadi* was that the defendant acknowledged his indebtedness at a pre-trial conference. Certainly such a point cannot be valid. This is because a pre trial conference is an event at the tail of issuance of summons. The relevant period is the dates between the cancellation of the agreement and the issuance of the summons. Defendant has successfully shown that the plaintiff's claim has prescribed.

Disposition

IT IS ORDERED THAT:

1. The plaintiff's claim has prescribed.
2. The plaintiff's claim be and is hereby dismissed with costs.

Muza & Nyapadi, plaintiff's legal practitioners
Magwaliba and Kwirira, defendant's legal practitioners

