PETER MUSINDO
versus
ISAAC KAZAMBARA
and
MUKUMBA BROTHERS TRANSPORT (PRIVATE) LIMITED
t/a INTER AFRICA BUS SERVICES

HIGH COURT OF ZIMBABWE

DEME J
HARARE, 21 September 2023 and 31 October 2023

Special Plea for Prescription

M Ndlovu, for the plaintiff
T Magwaliba, for the defendants

DEME J: On 31 October 2023, I delivered an order upholding the special plea for prescription. I consequently dismissed the claim for damages instituted by the plaintiff against the defendants. In particular, the order is as follows:

> "1. Special plea of prescription taken by the 1st and 2nd Defendants be and is hereby upheld.
> 2. Consequently, the Plaintiff's claim be and is hereby dismissed.
> 3. The Plaintiff shall bear costs of suit on an ordinary scale."

The plaintiff approached this court with a request for reasons for the 31st October order. Hence, my task is to give the basis for the order of 31 October 2023.

The plaintiff instituted an action against the defendants for damages arising from a road traffic accident that was allegedly caused by the first defendant on 12 April 2018. The second defendant is being sued in its official capacity as the employer of the first defendant.

The plaintiff's claim is for US$234 000 which is also payable in local currency at the prevailing official rate. The breakdown of the plaintiff's claim is as follows:

1.1. Special damages in the sum of $10 000;

1.2. Shock, pain and suffering in the sum of $40 000;

1.3. Permanent disability (35%) and loss of amenities of life in the sum of $100 000;

1.4. Loss of earnings in the sum of $84 000;

2. Interest at the prescribed rate from 3 May 2021 to the date of full payment.

The plaintiff is a Zimbabwean male adult. The first defendant is a male adult who is an employee of the second defendant (a registered business entity).

The plaintiff asserted that he was employed as a driver before the accident and that the injuries he suffered as a result of the accident have negatively impacted his life hence the claim he is making.

The plaintiff in his papers stated that the first defendant admitted liability for the accident, with the second defendant accepting that they would compensate the plaintiff as they were vicariously liable for the actions of the first defendant as the accident occurred during the course of the first defendant's duty. According to the plaintiff, however, to date he has been offered US$3 000 by the second defendant. It is this refusal by the second defendant to fully settle the amount claimed by the plaintiff that has led to the institution of these court proceedings.

In defending the present application, the defendants raised a special plea of prescription. The defendants acknowledged that whilst it is common cause that the accident did occur on 12 April 2018 the plaintiff was sluggard in his approach by not timeously prosecuting the matter. According to the defendants, the failure by the plaintiff to prosecute his matter within time cannot be held against them and the present proceedings should therefore fail.

It was argued on the defendants' behalf that the plaintiff was not candid with the court as he failed to mention to the court that he had initiated initial proceedings in June 2021 under case number HC 3278/21 which proceedings were then abandoned because they were fatally defective.

The defendants prayed for an order for the upholding of the special plea of prescription and consequently for the dismissal of the plaintiff's claim. The defendants also prayed for an order of costs on an attorney and client scale.

In replication the plaintiff averred that prescription had been interrupted by the litigation process which he commenced in June 2021 when he instituted summons against the defendants in case number HC 3278/21. The plaintiff re-iterated that as a result of the accident he suffered severe and critical injuries and he was hospitalised for a period of more than 6 months. The plaintiff argued that the cause of action was completed on or around 10 March 2020. This he alleged is because he received his first medical report around July 2018, then he had follow-up check-ups and only received his second medical report on or around 10

March 2020. In the circumstances, the plaintiff maintained that the prescription only began to run from this date. The plaintiff also averred that the special plea raised by the defendants was nothing but a dilatory technique amounting to abuse of court process. He therefore prayed for the dismissal of the special plea with costs on a higher scale.

Since the hearing of the special plea requires the court to appreciate evidence and factual foundation, I invited parties to adduce their evidence by way of affidavits so that I may be able to make a proper determination based on such evidence and factual basis. At the initial hearing of this matter on 21 September 2023, only pleadings together with Heads of Argument were on record. No evidence was before me. Hence, I directed the parties to file affidavits as this is one of the available options of allowing parties to adduce their evidence before the court makes a determination of whether the claim had prescribed at the time summons was served upon the defendants. I was guided by the case of *Jennifer Nan Brooker & Anor* v *Richard Mudhanda & Anor*[1] where the Supreme Court wonderfully postulated the following remarks:

> "When one speaks of the need to discharge an onus, it immediately becomes clear that there is an evidentiary burden that must be met. There is no suggestion that such burden as required to be met was met by documents filed of record. There were no affidavits placed before the court *a quo*.
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> Neither of the parties led evidence. Thus there was no evidence as to when demand for transfer was made. There was no evidence as to when the cause of action actually arose and given the fact that this was dependent on whether or not the appellants were placed in *mora*, the court was left in suspense on these very crucial issues. The court seems to have been alive to the fact that there was a need for a factual basis to be placed before it to facilitate a determination on the crucial issue of when prescription could be said to have started running."

The defendants in their affidavits of evidence reiterated that the cause of action arose on 12 April 2018 when the plaintiff became aware of the delict, the date upon which the accident occurred. The first defendant averred that the initial proceedings, which were instituted in June 2021, were out of time and did not have the effect of interrupting prescription as these were not successfully prosecuted to finality. The plaintiff contended that he was unable to prosecute within time because of some physical condition, however according to the first defendant no evidence was adduced to support this claim.

The sole issue that this court has to determine is whether the plaintiff's claim has prescribed. The defendants raised a special plea of prescription, it was argued on their behalf that the plaintiff instituted his initial proceedings in the matter, under case number HC

[1] SC5-18.

3278/21 in June 2021 which was already well out of time as prescription had begun to run the day the cause of action arose, that is to say, 12 April 2018, the date of accident. On the contrary, the plaintiff argued that the institution of proceedings in HC 3278/21 interrupted the running of prescription.

A special plea of prescription, if successful, has the effect of disposing of the matter. The plaintiff had the onus of proving that his claim was initiated before prescription had taken its course.

In terms of s 15(d) of the Prescription Act [*Chapter 8:11*] (hereinafter called "the Prescription Act") a debt prescribes at the expiration of three years, except if otherwise provided for by any enactment. The appropriate provision provides as follows:

> "The period of prescription of a debt shall be –
> (a) ……
> (b) ……
> (c) …….
> (d) except where any enactment provides otherwise, three years, in the case of any other debt."

It is not disputed that the prescription for the accident damages is in terms of s 15(d) of the Prescription Act. The plaintiff's counsel did not advance any argument that points to the fact that the plaintiff's cause of action falls in any other category other than that contemplated in s 15(d) of the Prescription Act.

For a valid claim to be established there must be a clear cause of action from which the debt arose. The court in *Dube* v *Banana*[2] defined the cause of action as:

> "the combination of facts that are material for the plaintiff in order to succeed in his claim."

In the case of *Abrahams & Sons* v *SA Railways and Harbours*[3], the court defined the cause of action in the following way:

> "The proper meaning of the expression cause of action' is the entire set of facts which gives rise to an enforceable claim and includes every act which is material to be proved to entitle a plaintiff to succeed in his claim. It includes all that a plaintiff must set out in his declaration in order to disclose a cause of action."

Section 16 (3) of the Prescription Act provides that the running of prescription can only commence upon the creditor's becoming aware of the debtor's identity and all factors surrounding the claim. The provision is as follows:

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[2] 1998 (2) ZLR 92 (H)
[3] 1933 CPD 626

> "A debt shall not be deemed to be due until the creditor becomes aware of the identity of the debtor and of the facts from which the debt arises."

This is further solidified by our jurisprudence as was articulated by CHIWESHE JP (as he then was) in the case of *Chirinda* v *Van der Merwe & Anor*[4] wherein he superlatively remarked as follows:

> "It is therefore trite that prescription runs from the date that a debt becomes due. A debt becomes due when the creditor becomes aware of the identity of the debtor and the facts giving rise to the cause of action. The cause of action in any action or claim is the entire set of facts which give rise to an enforceable claim and includes every act which is material to be proved to entitle a plaintiff to succeed in his claim."

There is no evidence suggesting that by 12 April 2018, the date of accident, the plaintiff was not aware of the identity of the defendants. The affidavits placed before my attention do not reveal this. This leads me to formulate a presumption that the plaintiff became aware of the defendants' identity at the time of the accident. Hence, from this date, the plaintiff had sufficient information to mount the claim against the defendants, in my considered opinion.

The plaintiff argued that the running of prescription was interrupted by the institution of proceedings in HC 3278/21, a contention that was opposed by the defendants. In terms of the Prescription Act, s 19(3) (a) to be more specific, provides that judicial proceedings may only interrupt the running of prescription if the creditor has successfully prosecuted the matter, before the court, to final judgment. Section 19(3)(a) of the Prescription Act provides as follows:

> "Unless the debtor acknowledges liability, the interruption of prescription in terms of subsection (2) shall lapse and the running of prescription shall not be deemed to have been interrupted if the creditor—
> (a) Does not successfully prosecute his claim under the process in question to final judgment."

It is common cause that the plaintiff abandoned proceedings under HC 3278/21 because the application was deemed to be fatally defective. The plaintiff, in the premises, did not prosecute the matter to final judgment. If he had done so, there was no need for him to be before the court again with a similar claim. These proceedings under HC 3278/21, therefore, did not have the effect of interrupting the running of prescription.

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[4] HH 51/13

In the replication to the special plea of prescription, the plaintiff argued that the date for the cause of action was 10 March 2020 when the medical expert produced a second medical report of his condition. In the affidavit of evidence, the plaintiff alleged that he visited the medical practitioner on 15 February 2022 and was advised of his medical expenses. The plaintiff argued that, therefore, the claim cannot be said to have prescribed under such circumstances. Adv *Ndlovu* argued that the plaintiff was unable to quantify special damages by 12 April 2018 and hence the cause of action did not arise on this date. He further contended that the plaintiff is still discovering new dimensions of his disability. Additionally, he maintained that the extent of plaintiff's suffering is still to be discovered by the plaintiff. On behalf of the defendants, Adv *Magwaliba* argued that the plaintiff was now departing from his pleadings filed. According to Adv *Magwaliba*, in the replication to the special plea, the plaintiff averred that the cause of action arose on 10 March 2020 and in the affidavit of evidence, the plaintiff shifted the date for the cause of action to 15 February 2022, the date where he allegedly received the medical expenses for the proposed medical procedure. Adv *Magwaliba* contended that the plaintiff must be aware that pleadings, unless withdrawn formally in terms of the rules, are binding not only to the parties, but such pleadings are binding to the court as well. Reference is made to the case of *Zhou Haixi & Anor* v *Chen Shaoliang & Anor*, where CHIGUMBA J superbly commented the following comments:

> "It is trite that admissions made in pleadings are binding. See *Remo Investment Brokers Private Limited & Ors* v *Securities Commission Zimbabwe*.[5] It is a well-established principle that:
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> 'A formal admission made in pleadings cannot be ignored by the Court before it is made. Unless withdrawn, it prevents the leading of any further evidence to prove or disprove the admitted facts. It becomes conclusive of the issues or facts admitted. Thus where liability in full, as *in casu*, is admitted, no evidence is permissible, to prove or to disprove the defendant's admitted liability. The importance of the admission is that it is thus seen as limiting or curtailing the procedures before the court in that where it is not withdrawn, it is binding on the court and in its face, the Court cannot allow any party to lead or call for evidence to prove the facts that have been admitted.'"

[5] SC 13-13, which cited with approval the case of DD Transport Pvt Ltd v Abbott 1988 (2) ZLR 92 (SC), Gordon v Tarnow 1947 (3) SA 525 (AD),

See *Mining Industry Pension Fund* v *DAB Marketing Private Limited*[6], which quoted with approval the following cases; *Rance* v *Union Mercantile Ltd* 1922 AD 312; *Gordon* v *Tarnow* 1947 (3) Sa 525 AD; *Van Deventer* v *de Villiers* 1953 (4) SA 72.

I do agree with Adv *Magwaliba*'s submissions. The plaintiff in the replication referred to 10 March 2020 as the date upon which the cause of action arose. This date falls outside the prescriptive period. Summons was served upon the defendants on 22 March 2023 more than three years after the alleged date for the cause of action. Hence, assuming that the plaintiff is correct in this respect, it is my view the claim by the plaintiff had prescribed by the time he served summons upon the defendants. The plaintiff's attempt to generate another date of 15 February 2022 for the eruption of the cause of action in the affidavit of evidence was a desperate attempt to mislead this court. Reference is also made to the case of *Gumbochuma* v *ZETDC*, where MAFUSIRE J elegantly propounded the following remarks:

> "[10] Plainly, the plaintiff's argument on prescription is ill-conceived. His cause of action is manifestly prescribed. Both parties are agreed that the plaintiff's cause of action is a 'debt' within the meaning of s 2 of the Prescription Act, namely being a "*debt*" that may be sued for or claimed by reason of an obligation arising from statute, contract, delict or otherwise. The plaintiff's claim arises from delict. It is an ordinary debt. The period of prescription is three years.
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> [11] The plaintiff's cause of action arose when the incident happened. In terms of s 16 of the Prescription Act, prescription begins to run as soon as a debt is due. A debt is due when the plaintiff has gathered all the entire set of facts about the cause of action as are material to prove his or her claim. In this case, the plaintiff's cause of action was complete when he had gathered all the information as to, among other things, whose electricity conductors they were; allegedly that they had been in a state of neglect; allegedly that they had been lying naked on the ground whilst concealed; the sort of injuries that he had sustained; the monetary loss that he had incurred, or would incur, and so on. Those are the kind of material facts as are contemplated by cases such as *Banana* above. If three years elapsed before the plaintiff had taken action or interrupted prescription, then his cause of action would be extinguished. The lapsing of a debt by prescription is absolute, unless one can show that prescription does not apply or that the running of it was delayed or interrupted.
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> [12] Section 17 of the Act provides for situations where the completion of the period of prescription is delayed. None of them applies to the plaintiff's case. Sections 18 and 19 of the Act provide for situations where the running of prescription is interrupted. These are when the debtor acknowledges liability and when the creditor serves process on the debtor claiming the debt. The plaintiff expressly concedes that none of these applies to him either. That should mark the end of his case. But his counsel has crafted the argument that prescription should not be raised against the plaintiff because his cause of action only arose in September 2016 when the police abandoned the criminal case against him.
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> [13] That the plaintiff had been arrested by the police for the alleged theft of the conductors and or that it had taken the police seven years to clear him is not one of the factors that interrupts or delays the running of prescription. Whilst a single incident may give rise to multiple types of proceedings including criminal and civil, the outcome of one does not bind the other or others. The police and the prosecution could well have been pursuing a criminal case. The plaintiff was not precluded from pursuing his civil claim timeously after he had

[6] SC 25-12

> become satisfied that his injury and loss had arisen by reason of the defendant's negligent conduct.
> [14] The plaintiff's arguments that until the police had exonerated him of the theft allegations, it was not known whether it was him or the defendant who had been to blame for his electrocution or that without having been so exonerated he would not have been able to prove his cause of action, are thoroughly ill-informed. He himself knew and had concluded that he had been electrocuted by reason of the defendant's negligence. He did not need the police or anyone to tell him that. Furthermore, and at any rate, even after being exonerated, he would still need to prove liability on the merits as the defendant was contesting it."

The remarks of the court in the case of *Gumbochuma* v *ZETDC* apply with equal force to the present matter. No evidence was adduced by the plaintiff to support the assertion that he was unable to prosecute his matter due to illness that prevented him from acting in his best interests. The fact that the plaintiff was advised of his medical expenses on 15 February 2022 does not interrupt the running of prescription. Such medical expenses are best dealt with under the appropriate portion of future medical expenses. It is apparent that medical expenses for victims of road accident may continue to accrue for some time. A diligent and vigilant litigant would claim future medical expenses under such circumstances to avoid the prescription of the proposed claim. I was therefore left with no other conclusion except that the plaintiff was sluggard in his approach in prosecuting his matter. Public policy dictates that matters between parties should be brought to finality within the prescribed time lines failing which the litigant may lose the right to sue. In the case of *Merreta* v *Kanyongo & Anor*[7], with respect to the primary purpose of prescription, I remarked as follows:

> "The law of prescription may be described as a case management mechanism meant to ensure that there should be a definitive period within which litigation must be instituted. Litigation must never be an eternal right without regulated time frames. Failure to have such cut off time frames will result in endless suits. This law warrants that the person likely to be dragged before the courts may not limitlessly labour under perpetual fear of potential litigation. The law of prescription also makes litigation predictable. "

With respect to costs, it is my opinion that the plaintiff failed to persuade me to have a departure from an ordinary practice which dictates that costs follow the outcome. Costs on an ordinary scale are reasonably sufficient to meet the expenses incurred by the defendants in defending this matter.

In the premises, I saw it prudent to make the decision based on the reasons underscored herein.

[7] HC 1049/22

Jiti Law Chambers, plaintiff's legal practitioners
Maposa and Ndomene, defendants' legal practitioners