**1. REDCLIFF MUNICIPALITY** **HCA 64/18**

**Versus**

**KUDAKWASHE DAKA**

**2. REDCLIFF MUNICIPALITY** **HCA 66/18**

**Versus**

**ONIAS NCUBE**

IN THE HIGH COURT OF ZIMBABWE
MAKONESE AND TAKUVA JJ
BULAWAYO 16 MAY 2022 AND 7 SEPTEMBER 2023

**Civil Appeal**

*Advocate P. Dube,* for the appellants
No appearance for the respondents

**TAKUVA J**: The appellant appeals against the Magistrate's decision to register an arbitral award against the appellant in favour of the respondents. The Court *a quo's* ruling is on pages 8 – 10 of the record of proceedings. The grounds of appeal appear on pages 1 – 4 of the record. In those grounds appellant did not raise Prescription as one of the grounds. No argument on prescription was made before the court *a quo*. Accordingly the Magistrate did not consider it in his/her ruling.

It appears from the Supplementary Heads of Argument that this ground being a point of law is being raised for the first time on appeal. The requirements are that such procedure is proper as long as it does not prejudice the other party. *In casu* the respondents have not filed supplementary heads of argument on the point. Appellant's supplementary heads filed on 22 August 2019. The question is when were they served on respondent's legal practitioners?

The dispute relates to a contract of employment wherein respondents allege breach of a contract of employment by failing to pay wages and salaries. Matter was taken to an arbitrator who granted an award on 23rd October 2012. For some unknown reason the award was

quantified in November 2015. The matter had been heard in January 2012. Therefore, the cause of action was complete in January 2012 when the respondents were fully aware of the facts constituting their cause of action – See *Shinga* v *General Accident Insurance Co. (Zamb)* 1989 (2) ZLR 268 (HC) at 278 A-C), *Chiwawa* v *Mutzuri & 4 Ors* HH 7-2009 at p. 5.

Ordinarily the debt/claim would therefore prescribe in three years, that is by February 2015. An arbitral award is subject to prescription – section 15 (d) of the Prescription Act (Chapter 8:11) See also *John Conradie Trust* v *The Federation of Kushanda Pre-Schools Trust & Ors* SC 12-17, *Efrolou (Pvt) Ltd* v *Muringani* HH 112-2013.

It is trite that prescription can only be interrupted by judicial process as provided for in section 19 of the Prescription Act. Arbitration proceedings do not interrupt prescription as they are not judicial proceedings as is apparent from their omission from section 19 of the Prescription Act. See *Metallon Gold Zim (Pvt) Ltd and Anor* v *Collen Gure* HH 263-16.

In respect of this matter, the commencement of arbitration proceedings did not interrupt prescription. In terms of section 17 of the Prescription Act, arbitration proceedings could only have delayed prescription. The question is to what extent and for what period was the prescription period delayed before it could be completed. Section 17 of the Prescription Act reads as follows;

> "17 When completion of prescription delayed
>
> (1) if –
>
> (a) ……..; or
>
> (b) ……..; or
>
> (c) ……..; or
>
> (e) The debt is the subject matter of a dispute submitted to arbitration, or is the subject matter of a claim filed against the estate of a debtor who is deceased or against the insolvent estate of a debtor or against a company in liquidation or against an applicant under the Agricultural Assistance Scheme set out in the Third Schedule to the Agricultural Finance Corporation Act (Chapter 18:02), or
>
> (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." (emphasis added)

The meaning of the above section is patently clear, namely that, arbitration is nothing more than a delaying impediment in the running of prescription effective from the date where the cause of action arose. This impediment only delays the running of prescription by a year following the conclusion of arbitration process.

Applying this to the facts of the matter in casu and taking quite a liberal approach to the effect that the cause of action arose at the very least in January 2012 and that the arbitral process was completed by quantification of the award in November 2015, then prescription became complete a year after, that is in November 2016.

Quite clearly, respondents were therefore supposed to have registered the award or commenced judicial proceedings for registration of the award before November 2016 – See *Chiwawa* v *Mutzuris and 4 Ors supra* where the following was stated;

> "The period stipulated in the Act for the extinction of debts is peremptory. It cannot be waived. It is neither fixed in the discretion of court nor can the court extend the period for good cause shown. Like the sword of Damocles, it falls on all uncollected debts and falls on a pre-determined date."

The facts of this appeal are identical to those in *Redcliff Municipality* v *Onias Ncube* HCA 66/18. The two appeals were consolidated and argued at the same time. The issues and grounds of appeal are similar in that in both cases the issue of prescription was raised and argued in factual circumstances that apply to both respondents. Therefore the findings and conclusions of this court on the legal question of prescription apply to both respondents. The award was granted on the same date and quantified on the same date. Both respondents failed to prosecute their registration processes before November 2016.

In the result, the point *in limine* has merit.

Accordingly it is ordered that;

1. The appeal succeeds with costs.

2. The decision of the court *a quo* be and is hereby set aside and substituted with following order:-

"The application for registration of the arbitral award be and is hereby dismissed with costs."

*Wilmot and Bennet c/o Danziger & Partners*, appellant's legal practioners
*Mavhiringidze & Mashayare c/o Mashayamombe & Co. Attorneys*, respondent's legal practitioners