LOVEMORE MAKUNUN'UNU
versus
WORKVILLE ENTERPRISES (PVT) LIMITED

HIGH COURT OF ZIMBABWE
CHITAKUNYE & NDEWERE JJ
HARARE, 16 March 2017 & 11 July 2018

Civil appeal

S Dzvetero, for the appellant
R Maposa, for respondent

NDEWERE J: The background of this appeal is that on 23 October, 2014, the appellant as plaintiff in the court *a quo* issued summons for the payment of US$11 000.00 being restitution of funds he paid for the purchase of an International Haulage Truck (Horse), 9670 Registration No. AA56104, interest at 10% per annum and costs of suit.

On 5 December, 2014, the respondent, as defendant in the lower court, filed a plea. It firstly raised prescription as a point *in limine* and then pleaded to the merits. On 22 April, 2015, the parties concluded a Joint Pre-trial Conference minute whose first issue was whether or not the matter had prescribed. The parties agreed that the point *in limine* of prescription be dealt with first before going to the merits. Pursuant to this agreement, the parties filed Heads of Argument.

On 10 June, 2016, the learned magistrate upheld the defendant's point *in limine* of prescription.

The appellant noted an appeal against the Magistrate's decision on 21 June, 2016. His grounds of appeal were as follows:

1. That the court *a quo* erred and misdirected itself, on a point of law, in proceeding to uphold the point *in limine* of prescription.
2. That the court *a quo* erred and misdirected itself, on a question of fact and law, by totally disregarding that the respondent had perpetually acknowledged its liability to the appellant thus interrupting the running of the debt in question.

His prayer was that the appeal succeeds with costs and that the defendant's point *in limine* of prescription be dismissed.

The appeal was argued on 16 March, 2017.

After considering the written and oral submissions by both parties, we are of the view that this appeal has no merit. We will start by responding to the second ground of appeal which combine misdirections of fact and law so as to address the facts.

The second ground of appeal said the court *a quo* erred and misdirected itself on a question of fact and law, by totally disregarding that the respondent had perpetually acknowledged its liability to the appellant thus interrupting the running of the debt in question.

Indeed, that is what appellant said throughout his case, yet he did not provide even one iota of evidence to show that the respondent had "perpetually acknowledged" its liability. There was no formal acknowledgment of debt and no letter or any other documents which confirmed the alleged acknowledgment. All there was in the record were the bald assertions but nothing to prove them. The appellant was aware from the filing of the plea that prescription was an issue. The defendant even sought further particulars which could have helped reveal some tacit acknowledgement, but plaintiff refused to furnish the requested further particulars. Discovery was done and Pre-trial discussions were held. Throughout all these, no evidence of express or tacit acknowledgement was provided. On what basis therefore would the court *a quo* have dismissed the point *in limine*? If indeed the appellant had proof of the acknowledgment of debt he referred to, he is to blame for not availing it to the court *a quo*. Consequently, we find no misdirection on a question of fact and law by the court *a quo*.

Similarly, the first ground of appeal which alleged misdirection on a point of law has no merit. The law is clear that civil debts must be acted upon within three years. The law is also very clear that issuing summons and abandoning the claim before finalisation of proceedings is not good enough. The learned magistrate correctly applied the law when she upheld the point *in limine*.

During oral submissions at the appeal hearing, the appellant argued that the court a quo relied on s 7 (3) of the Prescription Act, [*Chapter 8:11*], instead of s 19. He said consequently, he was applying to amend the relief he was seeking so that the matter is remitted to the court a quo for a hearing *de novo*.

However, a close look at s 7 of the Prescription Act, [*Chapter 8:11*] and s 19 of the same Act shows that the effect of the provisions of those two sections is the same.

Section 7 (3) (a) of the prescription Act provides as follows:

"Any interruption in terms of subsection (2) shall lapse, and the running of prescription shall not be deemed to have been interrupted, if the person claiming ownership in the thing in question, (a) does not successfully prosecute his claim under the process in question to final judgment, or (b) successfully prosecutes his claim under the process in question to final judgment, but abandons the judgment or the judgment is set aside."

Section 19 of the Prescription Act, [*Chapter 8:11*] states the following:

"Section 19
(2) 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.

(3) 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;

(b) Successfully prosecutes his claim under the process in question to final judgment but abandons the judgment or the judgment is set aside."

The respondent, in his submissions to the court *a quo*, relied on s 7 of the Prescription Act, while the appellant relied on s 19. Since both sections mean the same, the court *a quo* cannot be faulted for citing s 7 of the Prescription Act in its decision. Remitting the matter to the trial court would not change the decision since the import of the sections is the same. There is therefore no merit in the appellant's suggested relief of a remittal to the court *a quo*.

The appeal must be dismissed for lack of merit

It is therefore ordered that the appeal be and is hereby dismissed, with costs on the ordinary scale.

CHITAKUNYE J: I concur

Antonio Dzvetero legal practitioners, appellant's legal practitioners
Maposa Ndomene Maramba legal practitioners, respondent's legal practitioners