MEGALINK INVESTMENTS (PVT) LTD
versus
OZIAS BVUTE

HIGH COURT OF ZIMBABWE
MUNANGATI-MANONGWA J
HARARE, 5 June 2019 and 9 December 2019

Opposed Matter

O. Kadare, for the plaintiff
T. Tanyanyiwa, for the defendant

MUNANGATI-MANONGWA J: On 25 January 2019 the plaintiff issued summons against the defendant claiming payment of US$227 000.00 balance due for the supply of vehicles and equipment. The declaration states the total cost as having been US$853 000.00. An invoice marked annexure A dated 13 March 2015 reflecting $149 500.00 was attached to the declaration together with Annexure B a document headed "Adjusted" which shows cost associated with a bus and costs for three vehicles (Day Trucks), two front end loaders and a fuss tipper. Annexure B is not dated.

The defendant entered appearance to defend and raised a special plea. The defendant pleaded prescription, averring that the invoice supplied by plaintiff is dated 13 March 2015, the debt therefore prescribed on the 13th March 2018. In that regard the summons issued on the 21st January 2019 was issued outside the prescription period given the 3 years provided by the Prescription Act [*Chapter 8:11*]. The plaintiff pleaded that prescription had been interrupted and referred to correspondence between parties through emails. The plaintiff also indicated that there was tacit acknowledgment of the debt.

It is now settled that where a special plea of prescription is raised it is necessary to hear evidence to dispose of the matter. As GOWORA JA aptly put it in *Jennifer Nan Brooker* v *Richard Mudhanda and the Registrar of Deeds* SC 5/15 at p 16 of the cyclostyled judgment the rationale

behind this is that where a party raises a special plea as a defence, new facts arise. Due to the introduction of fresh facts which did not appear in the declaration, there is need for a court to hear the evidence of the parties where facts are disputed before making a ruling on the plea.

In *casu* plaintiff pleaded interruption hence it is necessary for evidence to be led as the onus shifts to the plaintiff to prove same.

The plaintiff gave evidence, through Mr Peter Owen Murumbi its director. He stated that in March 2015 the parties entered into a verbal agreement wherein equipment and vehicles were sold to defendant. Certain payments were made leaving a balance of $207 000.00. The last payment in the sum of $20 000.00 was made on 9 June 2016. A ledger card from Metbank being a statement of account was produced (same being exh 5) which reflected payments of $80 000.00 and $57 000 on 8 June 2016 and $20 000 on 9 June 2016. The initial two payments were made through Wealthgoal Investments (Pvt) Ltd a company owned by the debtor. Mr Murumbi stated that he always communicated with the debtor who never disputed liability but would refer him to Mr Chawoneka the debtor's agent.

The witness stated that on 15 May 2016 he sent an email to Mr Chawoneka stating the items which had been delivered to Mr Bvute indicating the balance due as USD$247 750.00

The email referred to was produced as exh 2 and the last sentence thereto reads

"Total buses figures plus above figures less loans set off gives the balance due to plaintiff."

The plaintiff further gave evidence that he received a reconciliation from Mr Chawoneka which appears as exh 3, wherein Mr Chawoneka indicates funds owed to Megalink as $137 000.00. He indicated that plaintiff was coming up with his own figures hence the purpose of exchanging reconciliations with Mr Chawoneka was to check the "missing link." It was the witnesses' evidence that Mr Chawoneka was the debtor's agent and Mr Bvute never disputed that money was owing but would refer witness to Mr Chawoneka. The issue between the two was the timing of settlement.

The witness insisted that Mr Chawoneka believed that $137 000.00 was outstanding, that was the debtor's understanding. This explains why the debtor made 2 payments $80 000.00 and $57 000.00. however in essence the balance was much more. Mr Murumbi gave his evidence well and was not shaken under cross examination. He struck the court as a credible witness.

Mr Ozias Bvute the defendant gave evidence in person and indicated that he only instructed Mr Chawoneka to deal with Mr Murumbi for the plaintiff only 3 months ago to enquire what the issue was about when he received summons. He however admitted that it was Mr Chawoneka who took him to Megalink. He indicated that he admitted liability when the invoices were presented to him in the years 2014 to 2015. He added that apart from the equipment on the invoice (Annexure A to the summons) there was secondary equipment which they had bought. He stated that he was not aware of email exchanges between Mr Chawoneka and Mr Murumbi and never saw the reconciliations done by the plaintiff's representative nor Mr Chawoneka on his behalf. He confirmed he never communicated with the plaintiff from the time of transaction to the time of receiving the summons. He stated that the payments made to plaintiff where through Mr Nyamadzawo his employee. He stated that when payment was made (in June 2016) he was not aware of the background submissions.

On being asked by the court why the plaintiff would make a demand through Mr Chawoneka, the witness indicated that he was at a loss. Equally he did not know when settlement was made by Nyamadzawo on his behalf except that it was made in full. His evidence raised doubt in the court's mind as regards its truthfulness.

In dealing with the issue of prescription, MATHONSI J (as he then was) succinctly stated in *Joven Energy Services (Pvt) Ltd* v *Pickglow Trading (Pvt) Ltd* HH504/15 that;

> "There can be no doubt therefore that if a debtor expressly or tacitly acknowledges the debt the running of prescription will be interrupted and the debt will not be extinguished at the expiration of three years from due date. Prescription will commence to run once again from the date of interruption."

The plaintiff maintained that that there was an acknowledgement of debt and part-payment by the defendant which would constitute interruption of the running of prescription.

It is common cause that the invoice of 15 March 2015 did not have all the purchased items on it, a fact confirmed by the debtor himself. It is also established that payments of $80 000, $37 000 and $20 000 went into plaintiff's accounts in June 2016, two of them from Wealthgoal defendant's company. Mr Bvute sought to say Wealthgoal was a trading company used with regards to cricket Zimbabwe. I find that it is no coincidence that the amount Mr Chawoneka acknowledge as owing to Megalink for the equipment being $137 000.00 is what exactly is paid

into Megalink's account on 8 June 2016. That figure came out during a reconciliation process by plaintiff and Mr Chawoneka although plaintiff had its own figure.

The emails between Mr Murumbi and Mr Chawoneka dating from 7 September 2015 Exh 1 (a) up till July 2017 Exh 4 point towards communication to do with Mr Bvute's debt. Exhibit 3 a reconciliation by Chawoneka is a clear acknowledgement of liability by defendant to Megalink to the tune of $137 000.00 which the plaintiff did not agree to. This documents can safely be placed around 19 May 2016 given the sequence of the emails. It explains why then a payment was made on behalf of the defendant on 8 June 2016.

Further, the court does not accept the evidence of Ozias Bvute. He certainly instructed Chawoneka to act on his behalf from the onset and not after the issuance of summons. The way Chawoneka responded to plaintiff's representative when discussing the debt, the way he did all the reconciliations and sent the bank statement to plaintiff points to the fact that he was defendant's agent. He acknowledged owing a certain amount of money being $137000.00 (see exh 3). In exhibit 4 Mr Chawaneka remarks

> "For good order lets separate the zc (Zimbabwe Cricket) issues from your equipment issues with OB (Ozias Bvute) I do have all reconciliations and I would rather we meet and quickly resolve issues. I am sending you a picture of the old reconciliation done together with your bank statement for guidance. In essence ZC are paid up and do not need be affected by your issues with ob."

He then sent "exh 3" which shows defendant's purchases. I thus find that Mr Chawoneka was the defendant's agent and he acknowledged on behalf of the defendant owing $137000.00 The defendant paid that amounts on 8 June 2016 and a further $20 000-00 on 9th June 2016. The effect of the acknowledgement and part payment constituted interruption of the running of the prescription.

The other dimension to this case is when the cause of action arose. The agreement between the parties was a verbal one. The invoice of 13 March 2013 did not contain all the purchases, it only had 3 items with a total value of $149 500.00. The defendant conceded there were other items purchased which appear in exh 3 a reconciliation by Mr Chawaneka. It is also not in dispute that no date for payment was agreed to between the parties.

The question thus arises when the debt became due. It has to be decided when the cause of action arose. It is now settled law that what constitutes a 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. See *Ahraham & Sons* v *S.A. Railway Harbours* 1933 CPD 626 at 637. The cause of action *in casu* is the entitlement of plaintiff to payment of the balance of the purchase price of vehicles and equipment sold to defendant. Suffice that no payment date had been agreed to. In that regard demand was necessary to put the debtor in *mora*.

The initial demand of the 15th May 2016 which reads;

> "Find attached court orders for equipment taken by Bvute. I will be left with no option except to ask for redress through the courts"

and the one of September 2015 being exh 1 (b) which reads;

> "Please find my attachments from the Sheriff. Either I get the money or I need to deliver this to the Sheriff."

This correspondence does not suffice as demands. No amount is stated neither do the demands stipulate the period of performance. Further the exchange of reconciliations shows that the parties were still working on the figures hence the full facts which give rise to an enforceable claim had not been established. The proper demand came in October 2018 when the legal practitioners demanded the claimed amount. This is when the debtor was placed *in mora*.

The cumulative effect of the above is that demand having been made in October 2018 that is when the cause of action arose. That is when prescription began to run. The issuance of summons on the 25th January 2019 therefore was proper as the debt had not prescribed, the cause of action having arose in 2018. In that regard the plea of prescription cannot succeed.

The totality of the facts and evidence at hand shows that the debt is not prescribed given both the time the debt became due and alternatively interruption by way of the acknowledgement of debt or by the part payments made. Accordingly the special plea is dismissed with costs and the defendant shall plead over to the merits within 10 days of handing down of this judgment.

Kadare Legal Practitioners, plaintiff's legal practitioners
Messrs Pfigu Tanyanyiwa, defendant's legal practitioners