

AUGUSTINE TANAYE DUBE

Versus

**BARCLAYS BANK OF ZIMBABWE LTD
STAFF PENSION FUND**

And

**FIRST CAPITAL BANK
(FORMER BARCLAYS BANK OF ZIMBABWE LTD)**

IN THE HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 26 JANUARY 2023 AND 7 DECEMBER 2023

Special Plea

M. E. P. Moyo, for the plaintiff
Mrs S. Ngwenya, for the 1st defendant
Ms V Chagonda, for the 2nd defendant

MOYO J: Plaintiff issued summons claiming the following:-

- (1) The payment of the sum of ZWL\$3000,0001-00, being damages for pain and suffering arising from a slip and fall accident which occurred on 13 March 2019.
- (2) The payment of US2000-00 on the bank rate equivalent in ZWL, being damages for future medical expenses arising from a slip and fall accident which occurred on 13 March 2019.
- (3) Interest at the prescribed rate from the date of summons.
- (4) Costs of suit.

Per the plaintiff's declaration paragraph 4 the cause of action arose on the 13th of March 2019 where plaintiff had a slip and fall accident in a building owned by the defendants.

The 2nd defendant has raised a special plea in bar to the effect that:-

That plaintiff's cause of action against the 2nd defendant arises from injuries allegedly caused by a slip and fall accident that occurred on 13 March 2019.

That plaintiff issued summons on 16 September 2022 and that therefore section 15 (d) of the Prescription Act (Chapter 8:11) applies and that therefore plaintiff's action against 2nd defendant has since prescribed.

It is common cause that a period of 3 years elapsed from 13 March 2019 to 13 March 2022, before plaintiff issued summons against the 2nd defendant.

The plaintiff argues that it was not aware of the identity of the 2nd defendant as it did not know that 2nd defendant is the one who owned the property or not until April 2022. Plaintiff therefore argues that prescription could not have run before plaintiff became aware of the identity of the 2nd defendant.

However, annexed to the 2nd defendant's special plea, is a letter of demand by the plaintiff, dated 15 March 2019 and issued through the small claims court. It is addressed to The Manager Barclays Bank and is stamped "received" by First Capital Bank on 18 March 2019. It is therefore the 2nd defendant's argument that plaintiff knew the identity of second defendant from that date.

Second defendant is currently sued as First Capital Bank (former Barclays Bank of Zimbabwe Ltd) a situation that plaintiff got to know on 18 March 2019 after writing a letter of demand to Barclays and serving it on First Capital Bank.

2nd defendant quotes the case of *Peebles vs Dairiboard Zim Pvt Ltd* 1999 (1) ZLR 41 (HC) wherein it was stated that prescription runs from the date a plaintiff is aware of the cause of action and of all the facts giving rise to his cause of action. In this case plaintiff knew that he fell at a building owned by Barclays Bank, did a letter of demand, went to serve it and realised that it was now called First Capital Bank, that was sufficient knowledge of the facts building his cause of action together with the responsible person for that loss. He in fact did a letter of demand and served it in that respect.

Plaintiff's counsel submitted that the special plea cannot be resolved without evidence being led and cited the case of *Nan Brook v Mudanda & Ors* SC 5-18. However, in that case there was an obvious dispute of fact unlike in this case where the attached letter of demand

filed through the small claims court, proves that plaintiff was aware of both the cause of action and Barclays Bank being the owner of the building (which he discovered was then First Capital when he served the letter).

It is for these reasons that I hold that the plaintiff was clearly aware of the facts giving rise to the cause of action together with Barclays Bank (later called First Capital Bank) as the owners of the building.

I hold the view that the issue of the title deed does not take the matter anywhere for the simple reason that plaintiff was already aware of 2nd defendant's involvement per his own letter of demand and nothing stopped plaintiff from establishing from both 1st and 2nd defendants who between them was the owner of the building or if they both owned it. In fact the title deed attached shows the transferee is Barclays Bank.

It is for these reasons that I hold that plaintiff failed in his quest to lodge his suit, to sue the 2nd defendant whom plaintiff was already aware of as a defendant per the letter of demand.

I accordingly uphold the special plea.

The special plea by the 2nd defendant accordingly succeeds with costs.

Mathonsi Ncube Law Chambers, plaintiff's legal practitioners
Messrs Coghlan & Guest, 1st defendant's legal practitioners
Atherstone & Cook c/o Calderwood, Bryce Hendrie & Partners, 2nd defendant's legal practitioners