LEPHAT ZULU

Versus

NATIONAL RAILWAYS OF ZIMBABWE

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 21 JUNE 2019 AND 14 MAY 2020

Opposed Application

B Dube, for the plaintiff
J Mugova, for the defendant

TAKUVA J: This case seems to epitomize the extent to which an employer can go in a bid to prevent payment of what is due and owing to a hapless employee. In order to ensure capitulation the employers's entire machinery i.e. legal, financial and human resources is unleashed on the bemused employee, contrary to the supposed benign nature of human kind. Perhaps, this is what Capitalism or malignancy is all about, but is the defendant not a public entity not solely run for profit? One wonders.

THE BACKGROUND FACTS

Plaintiff issued summons against the defendant on 6 September 2018 claiming:

"1. An order declaring the defendant liable to pay the plaintiff monies due to him for injuries sustained at work as agreed by the parties.

2. An order that the defendant pays $7 374-00 due for injuries on duty as agreed.

3. An order that if defendant allegedly paid the money, that documentary proof of payment (cheque) and a bank deposit be provided.

4. An order that the defendant pays interest on $7 374-50 from date of summons to date of full payment.

5. An order that the defendant pays costs of suit on an attorney-client scale."

Plaintiff was employed by defendant until 1993. In 1983, plaintiff was injured on duty, however an assessment of the injury and the disability award in terms of section 15 SI 68 was done and concluded by the General Manager, National Social Security Authority on 12 December 2001. It was then submitted to the defendant in 2002. From that year, defendant became aware that it was indebted to the plaintiff in the sum of $7 374-50 for injuries sustained while on duty. Despite this knowledge, defendant deliberately or negligently concealed the award to the plaintiff who only got to know that there was money that he was entitled to when he had visited the defendant's offices for his regular medical checkups. This was in 2016.

Defendant entered appearance to defend on 21 September 2018. On 8 October 2018 the defendant filed its special plea in abatement as follows;

> "1. The plaintiff's claim has prescribed in view of the fact that the unfortunate incident occurred in May 1983, and payment for compensation of the injury was made in January 2002. More than three (3) years have passed since the existence of the facts forming the basis of plaintiff's claim, thereby having the effect of the claim prescribing.
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> 2. Further, and in any event, the plaintiff 's claim arose in the Zimbabwean dollar era, and not the United States dollar era. Plaintiff cannot therefore make a claim in a currency which was not supported at the time his injury arose."

Defendant prayed for the dismissal of the plaintiff's claim with costs of suit.

The sole issue for consideration is whether or not the plaintiff's claim has prescribed. The Supreme Court decision in *Zambezi Gas Zimbabwe (Pvt) Ltd v N.R Barber (Pvt) Ltd & Another* SC 3-20has rendered the second issue a non issue.

Defendant's argument is that the plaintiff's claim prescribed in terms of section 16 (1) of the Prescription Act Chapter 8:11 (The Act). According to the defendant, plaintiff's claim prescribed in May 1986 at the earliest in view of the fact that the cause of action arose in May 1983 or January 2005 at the latest as that was the date three (3) years from which payment was made should there have been any outstanding amounts.

Defendant relied on Annexure A which is a letter authored by the Director (Finance and Administration) one F Bhule. The letter is addressed to the plaintiff and reads;

"**DISABILITY CLAIM: INJURY ON DUTY**

I refer to your letter dated 10 March 2016 and your visit to the NRZ Finance Manager on 20 May 2016 on the above subject.

I would like to advise that we do not acknowledge any further liability as you were paid through cheque number 11396 for ZW$7 374-50 issued in your favour on 15 January 2002 ….."

On this basis, it was contended that plaintiff has no cause of action on which to make this claim.

The plaintiff contended that the allegation by the defendant of the prescription of the claim is unfounded in fact and in law in that while the deliberation and decision to pay the plaintiff was done and completed around 2001 to 2002, the plaintiff only got to know in 2016, when he visited the offices. Further, it was argued that the claim, by the defendant that they paid the plaintiff is denied and the defendant has failed to produce proof of such payment to the plaintiff, hence the defendant's liability has not been discharged.

The provisions of section 15 (d) as read with section 16 (1) and (2) of the Act are relevant to the issue of whether or not a claim has prescribed. Section 15 (d) states that;

"The period of prescription of a debt shall be except where any enactment provides otherwise, three years, in a case of any other debt."

Section 16(1) provides;
"Subject to subsection (2) and (3), prescription shall commence to run as soon as a debt is due." Section 16(2) states;
"If a debtor willfully prevents his creditor from becoming aware of the existence of a debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt." (my emphasis)

These provisions are crystal clear that the prescription of a debt like the one *in casu* is three years and further that such prescription runs from the date the debt became due. The debt in the present case became due in 2002 and the defendant knew this but the plaintiff did not. In the circumstances, it is unhelpful to argue that the debt prescribed in 1986 because there is a subsequent letter claimed to have been written in 2002 acknowledging the indebtedness of the defendant to the plaintiff.

If regard is had to section 16(3)(b) of the Prescription Act which says;

> "Notwithstanding subsection 5(1) and (2), an agreement made by the debtor to pay a debt after the debt has been extinguished by prescription shall be enforceable; whether or not the debtor knew at the time that he made the payment or the agreement that the debt had been extinguished by prescription.",

then a debt that might have prescribed in 1986 is subsequently revived by the letter dated 7 January 2002. However, without prejudice to this argument, what is critical is section 16(2) which provides for a debtor who willfully conceals the existence of a debt from the creditor. In such circumstances the law provides that the prescription shall run from the date at which the creditor became aware of the existence of the debt.

This is the case *in casu* where the defendant willfully concealed the award to the plaintiff and without full knowledge of the award, there was no way that the plaintiff could have been aware of the existence of the debt. He was not aware of the finalization of the assessment and resultant award and let alone seek help to assert his right. Plaintiff became aware of the debt in 2016 when he was handed over a letter by defendant's Finance Manager. He noticed that this letter was forged in 2016 and backdated to 2002. It had a forged signature and an irregular workers compensation reference number. It did not bear defendant's letter head.

As regards the alleged payment to the plaintiff by cheque, I note that defendant has not supplied any proof whatsoever in support of this allegation. Defendant's argument that it could not provide the proof because the bank no longer has the records after a period of ten years is unsatisfactory for the following reasons;

(a) If indeed a cheque was issued out to the plaintiff a record of him acknowledging receipt of it would be available at the defendant's offices.
(b) Furthermore, the cheque could not have been issued because when the plaintiff was in 2016 informed of the amount he was owed he had to approach the Finance Manager who handed him a letter that was supposedly sent to him, but he never received it. This is the letter that had many irregularities. Surely if the defendant went out of its way to conceal the debt owed to plaintiff there is no way it would have issued that cheque to him.
(c) In any event plaintiff denies ever receiving this cheque. If defendant insists that it paid the plaintiff it should adduce sufficient evidence of the cheque issued in

favour of the plaintiff, receipt of the cheque by plaintiff and if it was encashed, proof of such deduction in its reserves.

In the circumstances, I find that the pllaintiff's claim has not prescribed. Defendant has not succeeded in establishing a special plea in abatement. For these reasons the matter should proceed to trial.

Accordingly, it is ordered

1. That the special plea be and is hereby dismissed with costs.

2. The matter proceeds to trial.

Mabundu & Ndlovu Law Chambers, plaintiff's legal practitioners
Calderwood, Bryce Hendrie & Partners, defendant's legal practitioners