JOVENNA ENERGY SERVICES (PVT) LTD
versus
PICKGLOW TRADING (PVT) LTD

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 02 June 2015 and 10 June 2015

Plea in abatement

T Tanyanyiwa, for the plaintiff
O Shava, for the defendant

MATHONSI J: The plaintiff issued summons against the defendant on 23 November 2012 for payment of a sum of $97 521.00 being the value of fuel delivered to the defendant on credit between 4 October and 17 December 2009 together with interest and costs of suit. It averred in its declaration that the parties had entered into an agreement in terms of which the plaintiff would open lines of credit for the defendant for the supply of fuel on credit.

In pursuance of that agreement the plaintiff delivered to the defendant 12 000 litres of petrol on 4 October 2009, 14 794 litres of petrol on 6 October 2009, 39 143 litres of petrol on 3 December 2009 and 9 577 litres of petrol on 17 December 2009 all of which was worth $97 521.00 which was due on or before 31 December 2009. The defendant failed to pay the debt but on 22 June 2011, the plaintiff sent its agents Precious Mujawe and Tich Zimondi to engage the defendant over payment. During the course of such engagement the defendant's managing director, one Aaron Chinhara, acknowledged indebtedness and undertook to commence making payments towards that debt in January 2012.

The defendant entered appearance to defend and filed a plea in abatement in the following;

> "The defendant pleads in abatement that:
> 1. The plaintiff's claim is based upon fuel allegedly delivered to the defendant between the 4th day of October 2009 and the 17th of December 2009.
> 2. The plaintiff admits in its further particulars that payment was due on or before the 31st December 2009. On that date plaintiff's claim fell due.
> 3. The plaintiff's summons were served on the 4th of February 2013, that is more than three years after the date upon which the claim arose.
> 4. In the premises, the plaintiff's claim has prescribed in terms of s 15 (d) the Prescription Act [*Chapter 8:11*].
>
> 4.1. The defendant's representative denies interrupting prescription by acknowledging

the debt or making an offer."

The three years during which the plaintiff was entitled to claim the money due by the defendant as provided for in the Prescription Act [*Chapter 8:11*] (the Act) expired on 31 December 2012. The issue to be decided however is whether the running of prescription was interrupted by an acknowledgement of liability and/ or an offer to pay the debt as alleged by the plaintiff. This is because while s 14 (1) as read with s 15 (d) of the Act fixes the prescriptive period for such a debt at three years, s 18 (1) of that Act provides:

> "The running of prescription shall, be interrupted by an express or tacit acknowledgement of liability by the debtor."

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.

Gubbay CJ considered the effect of s 18 (1) in *FM Zimbabwe Ltd* v *Fortress Industries Investment (Pvt) Ltd & Anor* 2000(1) ZLR 221 (S) and stated at 224 D-H; 225 A-C:

> "The learned judge appreciated that by virtue of s 18 (1) of the Act it is the debtor or the debtor's agent who must expressly or tacitly acknowledge an existing liability to the creditor's agent before the running of prescription is interrupted; acknowledgment to a third party being ineffective. See *Markham* v *South African Finance & Industrial Co Ltd* 1962 (3) SA 669 (A) at 676 F; *Pentz* v *Government of the Republic of South Africa* 1983 (3) SA 584 (A) at 594 B-C; *Oertel & Ors NNO* v *Director of Local Government & Ors* 1981 (2) SA 77 (W) 83 A……Section 18 (1) of the Act, like its counterpart s 14(1) of the South African Prescription Act 68 of 1969, does not provide examples of conduct constituting an acknowledgement of liability (compare s 6 (1) (a) of the former South African Prescription Act 1943). Acknowledgement may therefore take the form of part payment of interest therein (see *Capetown Municipality* v *Allie* 198 (2) SA 1 (C)); or, the giving of security for payment of the debt (see *Markham* v *South African Finance & Industrial Co Ltd supra* at 676E). And an acknowledgement of partial liability for the debt interrupts prescription in respect of the entire indebtedness. The use by the legislature of the word 'tacit' in s 18 (1) is important. It signifies that the debtor's words and conduct should be taken into account. See *Cape Town Municipality* v *Allie supra* at 7D. However, conduct alleged to constitute a tacit acknowledgement of liability must be seen in proper context. See *Benson & Anor* v *Walters & Ors* 1984 (1) SA 73 (A) at 87 C -88A.
> Finally, in the review of the general principles applicable to the interruption of prescription, it should not be overlooked that in the determination of whether an existing liability was acknowledged an objective assessment must be made of what the debtor's conduct conveyed in respect of whether or not it was subjectively intended to acknowledged liability. See *Agnew* v *Union and South West Africa Insurance Co Ltd* 1977 (1) SA617 (A) at 623B-C. That inquiry will always be a factual one. See *Petzer* v *Radford (Pty) Ltd* 1953 (4) SA 314 (N) at 318E"

See also *Vundhla* v *Dube & Anor* HB 47/07 (unreported).

Mr *Shava* for the defendant submitted that the statements made by Tich Zimondi and

Precious Mujawe to the effect that the defendant acknowledged the existence of liability in mid 2011 and promised to pay in January 2011 are denied. He did not elaborate as to why they are denied. Significantly, the defendant did not deny that Aaron Chinhara is its managing director or that he met the two agents of the plaintiff as alleged. In fact the defendant's contestation was a bare denial.

At best it would create a dispute of fact as cannot be resolved without the benefit of *viva voce* evidence and at worst it remains thread bare and unable to advance the defendant's case anywhere. This is firstly because the defendant knew when it filed the plea in abatement that the plaintiff was relying on the alleged acknowledgement of liability in June 2011 as having interrupted the running of prescription. For it to then proceed to file a plea in abatement based on prescription while making a bare denial of the interruption was disingenuous indeed. The existence of the dispute of fact was known to the defendant when it took to the plunge. The situation created by that is akin to a party proceeding by court application well aware of a dispute of fact as cannot be resolved on the papers. In that regard the court has a discretion to either refer the matter to trial for resolution of the dispute or dismiss the application out rightly as it should not have been made in the first place.

In that regard the remarks of Makarau J (as she then was) in *Ex-Combatants Security Co* v *Midlands State University* 2006 (1) ZLR 531 (H) 534 F-535 A are instructive:

> "The resolution of the dispute without doing an injustice to the other party appears to me to be one of the prime considerations in allowing the use of application procedure. It thus presents itself clearly to me that a claim based on an alleged oral agreement whose terms are disputed cannot be resolved on the basis of affidavits without doing an injustice to one of the parties. A disputed oral agreement by its very nature, existing as it does in the memories of the contracting parties, cannot be proved other than by comparison of the credibility of those in whose memories the agreement resides. Such an agreement can only be established by the word of those witnesses whose words the court believe. It further presents itself clearly to me that application procedure is inappropriate to allege and prove a disputed oral agreement as a resolution of the matter on the basis of affidavits will lead to an injustice as the advantage inherent in a trial will be lost to the court."

In my view, due to the existence of a dispute of facts as to whether prescription was interrupted, the plea in abatement should not have been made at all. It is therefore susceptible to dismissal.

In any event, on the basis of the papers placed before me the plaintiff has gone the extra mile in proving the interruption while the defendant has been content to merely deny it without more. Considering that the test of whether liability was acknowledged involves an objective assessment of the debtor's conduct, I tend to agree with Mr *Tanyanyiwa* for the

plaintiff that the defendant's failure to effectively challenge the claim of the interruption is conduct which is consistent with a party that did acknowledge the existence of liability, thereby interrupting prescription.

Taking a robust approach to the dispute in order to resolve it, I conclude that prescription was interrupted by an acknowledgement of liability and an undertaking to commence payment in January 2012.

In the result, it is ordered that;

1. The plea in abatements is hereby dismissed.
2. The costs of the plea in abatement shall be in the main cause.

Messrs Manase & Manase, plaintiff's legal practitioners
Mbidzo Muchadehama & Makoni, defendant's legal practitioners