RIMAYI JULIET
versus
NATIONAL OIL COMPANY OF ZIMBABWE
and
MR MUNYARADZI-NOCZIM BOARD CHAIRMAN
and
HAROLD MHLANGA

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 20 February 2019 and 13 March, 2019

Opposed Matter

M. Mazani, for the plaintiff
Z.T. Zvobgo, for the 1st and 2nd defendants
No appearance for the 3rd defendant

MANGOTA J: On the afternoon of 15 January 2011, the third defendant who was working for the first defendant and was about the latter's business was driving a Scania motor vehicle with registration number ABG 0506 along the Harare-Mutare road. When he approached the 90 kilometre peg, the motor vehicle knocked down the plaintiff, her two children namely Annatoria and Takudzwa Jimu as well as one other woman who was in their company. The plaintiff, her two children and their companion one Angeline Kanyimo were walking off the road when the accident occurred. The accident claimed the life of Takudzwa. It caused the plaintiff, her daughter Annatoria and Angeline Kanyimo to sustain injuries which the plaintiff described as having been very serious.

On 17 July, 2018 the plaintiff sued the defendants. She claimed from them, jointly and severally, the one paying the others to be absolved:

(a) special damages of $35 000
(b) general damages of $40 000
(c) interest at the prescribed rate calculated from the date of the summons to the date of full payment – and
(d) costs of suit.

The defendants entered appearance to defend. They raised a special plea in bar to the

plaintiff's claim. They stated that the claim had prescribed. They alleged that the plaintiff's claim was instituted some seven (7) years after the cause of action had arisen. The claim, they insisted, prescribed on 15 January, 2014. They averred that prescription was never arrested. They stated that their payment of the plaintiff's medical bills did not translate into an admission of liability by them. They insisted that they did not admit that:

(i) the debt exists;

(ii) they are liable for the debt and/or

(iii) they accepted responsibility for the settlement of liability.

They moved the court to dismiss the plaintiff's claim with costs.

The defendants' defence, it is evident, falls under paragraph (d) of s 15 of the Prescription Act [*Chapter 8:11*] ("the Act"). The paragraph allows a plaintiff who intends to sue another outside paragraphs (a), (b) or (c) of s 15 of the Act to do so within three (3) years which are, by and large, calculated from the date of the occurrence of the event. Any suit which the plaintiff mounts against another person in terms of paragraph (d) of s 15 of the Act outside the three - year period is considered by the law of prescription as a non-event.

It is on s 15 (d) of the Act, therefore, that the defendants anchor their defence. The defence is, from a *prima facie* perspective, not without merit. That is so given that the event which forms the subject matter of the plaintiff's complaint occurred on 15 January, 2011 and that she filed her suit against the defendants on 17 July, 2018. Simple mathematical calculation shows that she sued the defendants seven (7) years after the accident which constitutes her cause of action had occurred. Her claim would, therefore, appear to have prescribed as the defendants content.

The statement which the plaintiff made in her replication portrays a completely different set of circumstances from those of the defendants. It, in effect, refutes the defendants' special plea in bar.

The plaintiff avers that she suffered very serious injuries from the accident. She alleges that she was admitted at Parirenyatwa Hospital in an unconscious state. She states that she remained at the hospital from the date of her admission to 2012. She avers that, although she was discharged from hospital in 2012, she had not yet recovered. She states that she continued to receive treatment from the hospital during the period which extends from 2013 to 2015. She alleges that, prior to January 2015, she was still pre-occupied with the idea of saving her life which was then in danger.

The long and short of the plaintiff's narration of events is that, up to January 2015 prescription had not yet started to run. She insists that it only commenced to run in January 2015 when she was fully recovered. Her statement which is to the effect that the injuries which she sustained crippled her movement for the four years which intervened the date of the accident and her recovery in January, 2015 brings out the point which she is making in a clear and lucid manner.

The medical reports which the plaintiff attached to her replication support her allegations in a substantial way. They show that, although she was discharged from the hospital on 24 February 2011, she continued to receive treatment from the same institution as an out-patient. One of the reports describes the injuries which she suffered as a result of the accident. It confirms the pain which she continued to endure after her discharge from the hospital as well as the fact that she had to undergo a second operation for removal of what the doctor described as rings.

The plaintiff also attached to her replication correspondence which the first defendant's chief executive officer addressed to the Permanent Secretary of his parent Ministry. The correspondence deals with the plaintiff's case, in particular the issue of payment of compensation to Angelina Kanyimo, the plaintiff and her two children who were/are victims of the accident.

The circumstances under which the correspondence came into the hands of the plaintiff remains unclear. The defendants do not dispute the authenticity of the correspondence. Nor do they challenge the admissibility of the same. All what they state on that matter is that the correspondence was between the defendants.

The correspondence comprises three letters. These are dated 15 March 2015, 20 March 2015 and 17 June, 2017. They appear at pages 7, 8 and 9 of the plaintiff's replication respectively.

The letter, Annexure C, which the first defendant's chief executive officer addressed to the Permanent Secretary of his parent Ministry on 15 March, 2015 is relevant to the case of the plaintiff. Paragraph 2 of the same reads:

> "The accident claimed her son (Takudzwa Jimu), Anna Jimu and Anna's mother (name not known) were seriously injured in the same accident and are said to be <u>in a poor state of health as well</u>" <u>(emphasis added).</u>

It is clear that the chief executive officer's letter of 15 March 2015 deals with the case of Angeline Kanyimo only. He acknowledged, based on information which he had received, that, as at 15 March 2015, the plaintiff was still in a poor state of health.

The plaintiff, it is evident, anchors her case on s 16 of the Act to rebut the special plea which the defendants mounted. She insists that she could only have sued the defendants as soon as the debt was due and not before that event.

The Act defines the phrase '*as soon as the debt is due'* with some prescission. It stresses that a debt is due when the creditor, *in casu* the plaintiff, becomes aware of the existence of the debt and the identity of the debtor, *in casu* the defendants, as well as the facts from which the debt arises.

It is the statement of the plaintiff that she identified the debt, the debtor and the circumstances from which the debt arose in January 2015. The stated month, she insists, constitutes the time when prescription commenced to run. It did not, according to her, start to run before January 2015.

Given the contents of the medical report as read with those of the letter, Annexure C, the plaintiff's claim cannot be said to be without merit. A *fortiori* when the annexure acknowledges that, as at 15 March 2015, she was said to be still in a poor state of health. The mentioned probabilities weigh in the plaintiff favour.

The above-observed matter notwithstanding, however, the defendants' defence remains available to them. It does so because prescription which started to run in January 2015 ran its full course in January 2018.

The plaintiff, it is observed and mentioned, filed its claim on 17 July 2018. She served the summons and declaration on the defendants on 31 July 2018. She served the process on them six (6) months outside the three - year period which is stipulated in s 15 (d) of the Act.

The plaintiff persists with her claim. She says it has not prescribed. She places reliance on s 18 (1) of the Act in the mentioned regard. She states that the letters which the first defendant's chief executive officer addressed to the Permanent Secretary of his parent Ministry in March 2015 and June 2017 arrested the running of prescription. The letters, she avers, show that the first defendant admitted the existence of the debt, its liability for the same as well as its intention to settle the debt.

The defendants' statement on the same is to the contrary. They, in the mentioned regard, place reliance on the words of MALABA J (as he then was) who in *Ndlovu* v *Posts & Telecommunications Corporation* 1998 (2) ZLR 334 (H) at 337 remarked that:

> "For the entry to constitute an acknowledgment of liability with the legal effect of interrupting the running of prescription, it must contain an admission by the debtor of the fact that the debt exists and that he is liable for its payment. The admission of the fact of the existence of the debt and liability therefore must be made to the creditor or his agent." (emphasis added).

The letters upon which the plaintiff places reliance are, in my view, in consonant with s 18 (1) of the Act. The first one, Annexure C, is more *in sync* with the position of the plaintiff than the other two letters. Its last sentence which reads "*A form of compensation to all the road traffic accident victims would bring finality to the whole issue*" cannot be interpreted in any way other than reading into it the defendants' admission of liability not only to the plaintiff but also to her two children as well as to Angeline Kanyimo. The defendants, through the letter, admitted the existence of the debt and the need on their part to pay compensation to the plaintiff and to other victims of the accident.

Section 18 of the Act deals with circumstances which arrest prescription. Subsection (1) of s 18 is relevant to the case of the plaintiff. It reads:

> "(1) The running of prescription is interrupted by an express or tacit acknowledge of liability by the debtor."

The words which MALABA J (as he then was) was pleased to make in *Ndlovu* v *Posts & Telecommunication (supra)* should not, with respect, be read into the Act. The section does not state, as MALABA J did, that the admission of the fact of the existence of the debt and liability "*must be made to the creditor or his agent*." The section simply states that the debtor's express or tacit acknowledgment of debt interrupts the running of prescription.

It is accepted that the admission of the debt was not made to the plaintiff. However, the fact that the defendants availed to her the correspondence which they made between them evinces the communication of acceptance of liability by them. No reasonable explanation exists for the defendants to have furnished such vital information to the plaintiff. To the stated extent, therefore, the conduct of the defendants is *in sync* with what MALABA J stated in *Ndhlovu* v *Posts & Telecommunication Corporation (supra).*

That the defendants expressly acknowledged the debt and their liability to pay the same to the plaintiff and others requires little if any, debate. The contents of Annexure C are self-evident on the stated matter. They acknowledged their liability. They also expressed an intention to settle their indebtedness to all the victims of the accident, the plaintiff included.

The defendants' acknowledgment of debt as well as their acceptance of liability interrupted the running of prescription. Their defence is not with merit. It is, accordingly, dismissed with costs.

Mazani and Associates, plaintiff's legal practitioners
Dube, Manika & Hwacha, 1st & 2nd defendant's legal practitioners