REPORTABLE (55)

RITA MARQUE MBATHA
v
(1) FARAI BWATIKONA ZIZHOU (2) CONFEDERATION OF ZIMBABWE INDUSTRIES

SUPREME COURT OF ZIMBABWE
MAKARAU JA, HLATSHWAYO JA & PATEL JA
HARARE, 28 MAY & 30 OCTOBER 2018

The appellant in person

R. Mabwe, for the first respondent

H. Mutasa, for the second respondent

PATEL JA: This is an appeal against the decision of the High Court upholding the respondents' special plea of prescription and consequently dismissing the appellant's claim with costs. The appellant has noted her appeal against the entire judgment and prays, as per her amended prayer, that the judgment of the court *a quo* be set aside and substituted with an order dismissing the special plea with costs.

Background

This protracted and bitterly contested matter emanates from the following factual background. The appellant was employed by the second respondent, reporting to

the first respondent, who was the Chief Executive Officer of the second respondent. On 18 June 2014, the appellant issued summons against the respondents claiming damages for shock, pain and suffering arising from alleged sexual harassment by the first respondent between September 2002 and June 2003. According to the appellant, her resistance to the first respondent's unsolicited and predatory advances culminated in her dismissal from the second respondent's employment. Her dismissal was challenged and referred to arbitration. The arbitrator found in her favour after finding that she had been sexually harassed by the first respondent. The arbitrator initially ordered both respondents to jointly compensate the appellant but, in subsequent proceedings, he referred the parties to the High Court to adjudicate the appellant's claim for damages for sexual harassment.

Before the High Court, the respondents filed a special plea that the claim had prescribed by the time that summons were issued in June 2014. The second respondent also excepted to the declaration on the basis that it did not disclose a cause of action by reason of the appellant's failure to specifically and properly allege vicarious liability on its part in respect of the first respondent's conduct.

The court *a quo* found that by the end of 2003 the appellant was aware of every fact necessary to prove her claim for damages. However, instead of approaching the High Court for damages, she pursued her claim through the labour relations mechanisms of conciliation and arbitration. The arbitrator had no jurisdiction to assess damages arising from an unfair labour practice and therefore could not award damages for sexual harassment. The claim for such damages was not part of the arbitrator's terms of reference

and was not properly before the arbitrator. In the circumstances, the court held that the setting in of prescription was not delayed, in terms of s 17(1)(d) of the Prescription Act, by the purported submission of the claim to the arbitrator. The claim for damages was raised before a competent court well after it had prescribed. In the event, the court upheld the respondents' special plea of prescription and dismissed the appellant's claim with costs.

Submissions on Appeal

The appellant's position, as appears from her grounds of appeal and voluminous heads of argument, is that the question of sexual harassment was a labour matter to be first determined and disposed of by the arbitrator before any claim for delictual damages could be lodged at the High Court. She further submits that the issues of sexual harassment and vicarious liability were part of the arbitrator's terms of reference. Moreover, the arbitrator's finding of sexual harassment was not appealed against and remained unchallenged. Thus, she contends that the question of damages, having been properly raised before the arbitrator, was not raised for the first time before a competent court well after her claim had prescribed.

Ms *Mabwe*, for the first respondent, submits that there is a fundamental distinction between a claim for compensation in a labour dispute and a claim for damages under the *lex Aquilia*. Therefore, since there was a different cause of action before the arbitrator as compared with that before the High Court, the reference to arbitration did not operate to interrupt the running of prescription on the claim for damages.

Mr *Mutasa*, for the second respondent, echoes the same position, but from a slightly different angle. He submits that the appellant's claim of sexual harassment created two distinct rights. One was an exclusively labour matter, while the other was purely for civil damages. Consequently, the appellant's claims before the arbitrator did not have the effect of suspending the running of prescription as against the appellant's claim in the High Court. However, he accepted that the rationale behind s 17(1)(d) of the Prescription Act was the need to avoid the multiplicity of litigation in respect of the same cause of action.

In casu, there are two critical factors that are not in dispute. Firstly, one of the questions referred to the arbitrator for determination was "whether or not sexual harassment was perpetrated on R. M. Mbatha by F. B. Zizhou in his capacity as Confederation of Zimbabwe Industries Chief Executive Officer". Secondly, in March 2014, the arbitrator found that the appellant had been sexually harassed and ordered the respondents to compensate her for the damages she had suffered. However, as I have already indicated, the arbitrator subsequently referred the parties to the High Court to adjudicate the appellant's claim for damages for sexual harassment, as that was a matter that fell outside his jurisdictional remit. In any event, the arbitrator's finding that the appellant had been sexually harassed remains extant. It has not been appealed against or otherwise challenged.

Whether Prescription Interrupted by Arbitration Proceedings

In light of the exchanges between the Court and the parties at the hearing of the appeal, the principal issue for determination *in casu* is the meaning to be ascribed to

s 17(1)(d) of the Prescription Act [*Chapter 8:11*]. Section 17 enumerates the various circumstances in which the completion of prescription is delayed. Section 17(1)(d), which is specifically relevant *in casu*, provides as follows:

> "(1) If—……..
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> (*d*) the debt is the subject matter of a dispute submitted to arbitration, or is the subject matter of a claim filed against the estate of a debtor who is deceased or against the insolvent estate of a debtor or against a company in liquidation or against an applicant under the Agricultural Assistance Scheme set out in the Third Schedule to the Agricultural Finance Corporation Act [*Chapter 18:02*]; or ……..
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> and the period of prescription would, but for this subsection, be completed before or on, or within one year after, the date on which the relevant impediment referred to in paragraph (*a*), (*b*), (*c*), (*d*) or (*e*) has ceased to exist, the period of prescription shall not be completed before the expiration of the period of one year which follows that date."

As a matter of interpretive principle in the context of statutory provisions, it is trite that the courts lean towards an interpretation that gives full effect to the purpose for which the provision under consideration was enacted. In my view, a broad and generous interpretation of s 17(1)(d) would give effect to the twofold purpose for which it was enacted. The foremost rationale of the provision is to avoid the situation where the same dispute is submitted for adjudication before multiple fora. The second objective is to ensure that litigants whose disputes are submitted to arbitration are not prejudiced by being precluded from instituting proceedings before the courts, should it become necessary to do so, in respect of the same matters. On this broad and purposive approach, where a matter is submitted to arbitration, the running of prescription would be arrested notwithstanding that a different remedy is later sought, provided that remedy arises from the same cause of action. To hold otherwise would, in my view, operate to erode the purpose for which s 17(1)(d) was created.

While I accept that a cause of action is conceptually distinct from the overlying debt that is claimed, the latter cannot exist *in vacuo* and must be predicated on the underlying cause of action. In the instant case, the debt, being the claim for damages for sexual harassment, cannot be severed or divorced from the cause of action, which is the sexual harassment itself. The question that was submitted to the arbitrator for determination was whether or not sexual harassment was perpetrated on the appellant. This is the same cause of action from which the appellant's claim for damages emanates. On this basis, it must be accepted that the debt claimed by the appellant, being the damages for sexual harassment, constitutes the subject matter of the dispute that was submitted to arbitration. It then follows that the running of prescription on the claim for damages was interrupted in accordance with the provisions of s 17(1)(d).

The same conclusion is arrived at if one has regard to the broad definition of the term "debt" in s 2 of the Prescription Act, *viz.* "without limiting the meaning of the term, [a debt] includes anything which may be sued for or claimed by reason of an obligation arising from statute, contract, delict or otherwise". The debt sued for in the court *a quo* arose from the delict of sexual harassment, which delictual matter was also competently before the arbitrator. The debt *in casu* comprises two separate but interrelated components, to wit, the delictual conduct perpetrated by the first respondent and the consequent claim for damages. The arbitrator dealt with and determined the first component of the debt, which consequently gave rise to the claim for damages in the court *a quo*. Thus, inasmuch as an essential component of the debt was before the arbitrator, the

debt was the subject matter of the dispute submitted to arbitration, thereby interrupting the running of prescription on the claim for damages in the court *a quo*.

Potential Plea of *Lis Alibi Pendens*

I am fortified in the foregoing conclusion from a different practical perspective. The argument that the appellant should have simultaneously or conjunctively with the arbitration proceedings pursued a separate suit for delictual damages in the High Court results in the untenable scenario where the arbitrator might possibly have made findings contradictory to those made by the High Court. Quite apart from this potentially anomalous scenario, the principles governing the special plea of *lis alibi pendens* would have operated to impede the successful institution of a claim for delictual damages. This is because the claim would be premised on the same cause of action in a dispute between the same parties already pending before an arbitral tribunal. The rationale behind the special plea of *lis alibi pendens* is akin to that underlying s 17(1)(d) of the Prescription Act, *viz.* the need to avoid potential duplication of litigation founded on the same cause of action. This point was highlighted by the Appellate Division in *Murray & Roberts Construction (Cape) (Pty) Ltd* v *Upington Municipality* 1984 (1) SA 571, at 579H-580C, in interpreting the South African equivalent of s 17(1)(d):

> "The same duality of purpose can be seen, in my view, in s 13(1)(f) of the Act which is of direct relevance to the present case. The subsection applies 'if …. the debt is the object of a dispute subjected to arbitration'. An arbitration agreement does not necessarily oust the jurisdiction of the court. Despite the existence of such an agreement, the creditor may elect to institute legal proceedings, although he might be met by an application for stay of proceedings or a special plea to the same effect. …. The court would in practice normally order a stay if requested to do so. …. An arbitration agreement is therefore in a sense an impediment to the recovery of a debt by means of legal proceedings, but it is one because it provides an alternative means of resolving disputes which carries the approval of the law. This

> applies *a fortiori* where a dispute has actually been subjected to arbitration. The creditor is protected against the running of prescription because there exists an impediment to his approaching the ordinary courts, and the impediment exists because he is taking appropriate alternative steps to recover his debt. It is against this background that s 13(1)(f) of the Act should in my view be interpreted and applied."

In casu, it would not have been practically possible for the appellant to institute proceedings for delictual damages in the High Court when another competent tribunal was already seized with an unfair labour practice arising out of the same cause of action. This is so because the respondents would undoubtedly have pleaded *lis alibi pendens* and succeeded in that plea, thereby preventing the appellant from prosecuting her claim for damages.

Disposition

It follows from all of the foregoing that the appeal must succeed on the basis that the running of prescription against the appellant's claim for damages was interrupted by the submission to arbitration of her claim of sexual harassment by the respondents. Thus, the prescriptive period would only have expired, in terms of s 17(1)(d) of the Prescription Act, one year after the date of the award rendered in her favour. Consequently, the appellant's claim for damages for sexual harassment, having been lodged in June 2014, within three months of the award rendered in March 2014, must be regarded as having been timeously lodged in the High Court.

It is accordingly ordered that:

1. The appeal be and is hereby allowed with costs.

2. The judgement of the court *a quo* be and is hereby set aside and substituted with the following:

"(i) The defendants' special plea of prescription is dismissed with costs.
(ii) The defendants shall plead to the plaintiff's claim within ten days from the date of the judgement handed down by the Supreme Court in Case No. SC 80/18 as Judgment No. SC 69/2018."

MAKARAU JA: I agree.

HLATSHWAYO JA: I agree.

Kanokanga & Partners, 1st respondent's legal practitioners

Gill Godlonton & Gerrans, 2nd respondent's legal practitioners