THOMAS KANJERE
versus
OLD MUTUAL LIFE ASSURANCE COMPANY LIMITED

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 9 & 22 June 2021 & 10 May 2023

Civil Trial

J Mambara, for the plaintiff
T Mpofu, for the defendant

CHITAPI J: The parties are referred to as in the heading above. The plaintiff is an adult male person of Harare. The defendant is a duly incorporated company which is in the business of offering investments and insurance services among its other portfolios of business. In 1989 the plaintiff took out an insurance policy reference No 7127755 with the defendant. The policy was described as an "Independence Maker Insurance Policy". The plaintiff pleaded the material terms relevant to the cause of action in para. 4 of the declaration as follows:

> "4. The terms of the Independence Maker Insurance Policy Number 7127785 are provided in the contract as follows:
>
> - Basic benefit of ZIM$35 521(or US$17 138.88) plus profits.
> - Normal commencing date or maturity date of 1 July 2013 (hence term of 24 years)
> - Guaranteed Minimum Annuity Rate at Normal Commencing Date: ZIM65.29 (OR us31.50) per month per ZIM 10 000 (or US$4 825.00) of Capital sum payable monthly in arrear during life assured's life with minimum of 120 instalments.
> - Single premium of ZIM9 914.24 (or US4 783.62 at issue date).
>
> In paragraph 5 of the declaration the plaintiff pleaded as follows:
>
> "5. In other words, these policy terms agreed between the plaintiff and the defendant, the defendant promised to pay ZIM$35 521.00 plus profits to the plaintiff on the 1st of July 2013, the date of maturity for this 24 year policy term; or an amount equivalent to the purchasing power of the promise at the time of the agreement (US34

856.75 at the time) when adjusted for profits (interest). The plaintiff would not have signed up if the implied benefits from the policy were hers."

The plaintiff pleaded that in 2010 the defendant offered to make payment of the sum of US$227.58 to the plaintiff as full and final settlement on the insurance police. The plaintiff pleaded that he refused the offer of the settlement since the policy was due to mature in July 2013. The plaintiff pleaded that the amount of US$227.58 did not represent the true value of the policy. He pleaded that he rejected the offer after seeking advice from the Zimbabwe Prisons and Insurance Rights Trust and got advice that he was owed much more in benefits by the defendant. The plaintiff pleaded that the amount which he ought to have received on the policy upon maturity was US$34 856.75 made up of basic benefits of US$17 138.88 and profits of US$17 717.87.

The defendant entered appearance to defend and followed up on the appearance by filing a request for further particulars which the plaintiff supplied. It is not necessary to go into detail of the contents of the further particulars because they did not relate to the question which the court is required to answer as will be done later.

The defendant filed its detailed plea to the plaintiff's claim as particularized by the further particulars supplied by the plaintiff. The plea raised a plea in bar of prescription. It also dealt with the merits of the defendant's defence. The details of the plea of prescription were stated in para. 21 of the plea as follows:

"**21. Special Plea in Bar: Prescription**

21.1 The plaintiff claims payment of amounts he alleges are due to him in contract in terms of an Independence Maker Annuity Contract issued in 1989 which was due to mature on the 1st of July 2013.

21.2 The plaintiff's cause of action therefore, arose on the 1st July 2013 in respect of the Independence Maker Annuity Contract.

21.3 Consequently, the plaintiff was obliged in terms of sections 14(1), 15(d) and 19(2) of the Prescription Act [*Chapter 8:11*] to institute and serve any claim arising from the Independence Maker Annuity Contract within three (3) years from the 1st of July 2013, that is on or before the 1st July 2016.

21.4 The plaintiff served a Summons and Declaration upon the Defendant on the 18th of July 2016, 18 days after any debt due under the Independence Maker Unity Contract was extinguished.

21.5 Defendant avers that the plaintiff's claim has prescribed and therefore extinguished by operation of law.

21.6 Accordingly the Plaintiff's claim must be dismissed with costs."

In response to the plea, the plaintiff filed a rejoinder which read as follows:

> "**PLAINTIFF'S REPLICATION**
> Plaintiff denies each and every material allegation of fact and conclusion of law in the defendant's plea and joins issue therewith."

Just to digress, the replication appears to have been drafted and filed as a matter of course and perfunctorily so without care on whether it conveyed any sense. It cannot be practical that the plaintiff was denying each and every material allegation of fact and conclusion of law in the plea. One may ask what the material allegations of fact and conclusions of law being joined issue with are. The answer is conjecture. It may well be that the plaintiff intended to join issue with factual allegations and conclusions of law as were inconsistent with the factual averments and conclusions of law pleaded in the declaration. If that be so, then the replication ought to the explicit in that regard. As the replication stands it is so vague and embarrassing as to be meaningless.

It must be appreciated that every pleading provided to be filed in an action has a purpose to serve. When the replication was filed in this action, the High Court Rules 1971 were in force. Order 19 thereof dealt with the replication in rules 125 and 126. They provided as follows:

> "**125. The replication: Reply to plea: Time for filing**
> Where a reply to the defendant's pleas is necessary, it shall be called the plaintiff's replication and shall be filed within 12 days of the service of the plea.
>
> **126. Plaintiff's replication: Confession and avoidance**
> Where the plaintiff desires to meet the allegations in the plea by confession and avoidance he must do so in a replication, and must raise by his replication all such grounds of reply to the plea as if not raised, would be likely to take the defendant by surprise or would raise issues of fact not arising out of the preceding pleadings. In the replication the plaintiff shall admit such allegations in the plea as he is willing to admit with a view to saving expense at the trial."

The replication therefore served a specific purpose as set out in the above quoted rules. The plaintiff who chooses to file a replication must follow the rule. The replication is filed where the plaintiff requires to answer the allegations made in the plea by confession and avoidance. Further, the plaintiff in the replication should raise all grounds of reply to the plea which if not raised before trial would likely take the defendant by surprise at trial. The plaintiff above all is required to admit allegations which he is willing to admit arising in the pleas to save time and expense at trial.

It should therefore be the position that unless the plaintiff is wishing to admit; confess and avoid the allegations made in the plea, a replication is unnecessary because in the absence of a replication, all factual allegations which are inconsistent with the plaintiff's allegations in the declaration are deemed as being in issue.

The plaintiff's replication was therefore uniformed, unnecessary redundant and super flous. I make note in passing that the current rules of the High Court, 2021, provide an elaborate process of dealing with replications as set out in s 40 of the rules. The procedure does not impact on the matter before me. The replication couched as it is presented a problem for the plaintiff in respect to the plea of prescription. The plea of prescription relies on facts which relate to whether or not prescription is established. Where therefore, the defendant has set out facts on which reliance is made to establish prescription, it is ill-advised on the part of the plaintiff to plead a bare denial as was done in this case. I will go into a little detail on this later because part of the arguments advanced by counsel for the defendant was that the plaintiff could not seek to raise grounds to defeat the plea of prescription in heads of arguments as they were not classified as pleadings of the parties as would constitute the substance of the claim or defence as the case might be.

Following the close of pleadings, the parties appeared for pre-trial conference before CHIGUMBA J on 3 October 2017 whereat the issues for trial were determined and stated to be the following:

> "**A. Issues**
> It was agreed that the issues for determination during trial would be as follows:
> 1. Whether or not the plaintiff's claim has prescribed
> 2. Whether or not the Defendant is indebted to the plaintiff at all
> 3. If so, indebted, in what currency and amount?"

At the commencement of trial counsel resolved that the issued of prescription should be disposed of first so that if it succeeded, the action was resolved thereby and the other issues would only need determination if the prescription plea was dismissed. The court is required to hear evidence in the determination of prescription because unlike with exceptions and motions to strike out which arise from the pleadings, prescription arises from facts not necessarily apparent on the record. That this is the position was put beyond reproach by GOWORA JA (as she then was, now is a JCC) in the case of *Brooker* v *Mudhanda & Anor* and *Pierce* v *Mudhanda & Anor* SC 5/18. In so far as the judgement relates to how a plea of prescription ought to be disposed of, the settled position is that because this plea as with other special pleas is established by facts outside the circumference of the pleadings, those facts have to be

established by evidence. I would for ease of appreciating the point made make note that since a party should not plead evidence, it follows that the evidence to establish the plea would be located outside the record or pleadings.

In order to circumvent the issue of calling oral evidence from the parties, counsel prepared a statement of agreed facts which would constitute the evidence of the parties to establish or defeat the plea of prescription. The statement of agreed facts was couched as follows and neither of the parties sought to lead evidence to add to ordilute.

> "**STATEMENT OF AGREED FACTS: DEFENDANT'S SPECIAL PLEA**
> **TAKE NOTICE THAT** for the purposes of advancing their respective contentions on the Special Plea of Prescription, the parties agree that the following facts are common cause:
> 1. That in the year 2010 and subsequently in September 2011, defendant was advised of the value of his contractual benefit after the conversions. The details of the conversions were fully explained and an offer for an early pay out was made. Plaintiff rejected the offer made.
> 2. That upon maturity of the policy in the year 2013, there was no change in the value of the policy. Defendant maintained its position on the value of the policy which position plaintiff did not agree with.
> 3. In February 2016, plaintiff issued Summons against defendant under HC 1218/16 claiming that the value assigned to the policy by defendant was less than what plaintiff considered to be the true value. When Summons was served, this was less than three years from the maturity date being 1 July 2013.
> 4. On the 15th of April 2016, the action cause instated by plaintiff under HC 1218/16 was withdrawn.
> 5. The present proceedings were field on the 15th of April 2016. The Sheriff attempted service on Kantor and Immerman on the 22nd of April 2016 which service was refused.
> 6. The summons in the present proceedings were then served on the defendant directly on the 18th of July 2016.
> 7. The parties desire to argue in favour of their respective contentions on the basis of the agreed facts as set out above."

In relation to onus of proof, the legal position was also stated in the *Brooker case* (*supra*). The learned judge stated at p 11 of the cyclostyled judgment:

> "In a plea of prescription, the onus is on the defendant to show that the claim is prescribed but if in reply to the plea, the plaintiff alleges that prescription was interrupted or waived, the onus is on the plaintiff to show that it was so interrupted or waived …"

It is common cause that the plaintiff did not in his replication plead waiver or interruption of prescription. The issue of interruption or waiver was also not specifically canvassed in the statement of agreed facts. Interruption and waiver of prescription cannot be inferred. The reason why waiver or interruption cannot be inferred is because the Prescription Act sets out specific circumstances which the court should consider and if established will constitute interruption of prescription or its waiver. Therefore, as the plaintiff in this matter

did not plead waiver or interruption of prescription or set out fact which amounted to or constituted a waiver or interruption of prescription, these defences do not arise for determination

In relation to the nature of the onus of proof which is reposed on the defendant, it is an evidentiary one. In the case of *Sunnidhew Sooka Tungwanth* v *Mobile Telephone Networks (Pty) Ltd* 2021 ZASCA 114, a judgment of *Gorven JA* in the Supreme Court of South Africa, it is stated in para. 6 as follows:

> "[6] It is settled law that a person invoking prescription bears a full onus to prove it. In *Geroke* v *Seath* (1978(1) SA 821(A) at 825H) DIEMONT JA explained [it] was the respondent, not the appellant, who raised the question of prescription. It was the respondent who challenged the appellant on the issue that the claim for damages was prescribed this he did by way of a special plea five months after the plea on the merits had been filed. The onus was clearly on the defendant to establish this defence.
>
> In *Macleod* v *Kweyiya* (2013) (6) SA 1 (SCA) para 10) this court endorsed that principle in ringing tones:
> "This court has repeatedly stated that a defendant bears the full evidentiary burden to prove a plea of prescription, including the date on which a plaintiff obtained actual or constructive knowledge of debt. The burden shifts to the plaintiff only if the defendant has established a *prima facie* case.
>
> It bears mention that the burden which shifts to the plaintiff is an evidentiary one and not burden of proof."

In casu, in the *Brooker case* the learned judge on pp 12 and 13of the cyclostyled judgment quoted with approval the case of *Yusaf* v *Barley & Ors* 1964 (4) SA 117, in determining the special plea of prescription. The following extract therefrom is relevant:

> "…. The point therefore arises whether the onus lies on the defendants to establish the special plea, *viz*, that the facts are such as to entitle them to a dismissal of the action because the claim has become prescribed or whether the onus lies on the plaintiff to establish the allegations contained in the replication to the special plea…
>
> The onus then being on the plaintiff to satisfy the court in terms of his replication to the special plea that his claim had not become prescribed before service of summons and as the only evidence on this regard is that of the plaintiff himself, consideration, as to whether that onus had been discharged cannot be divorced from an assessment of his credibility as a witness. Consequently, no decision on the special plea could, as originally suggested be given before hearing the evidence on the whole case."

The learned judge continued on p 13 and stated"

> "After being served with the special plea of prescription the respondent should have replicated. The purpose of a replication is to inform the court and the defendant of the plaintiff's rebuttal to the special plea. The failure by the respondent to file a replication to the special plea means that there are no disputes for determination on the special plea. In the absence of such replication there would be no issue for determination by the court *a quo.*

> When one speaks of the need to discharge an onus, it immediately becomes clear that there is an evidentiary burden that must be met. There is no suggestion that such burden as regard to be met. There is no suggestion that such burden as required to be was met by documents filed of record. There were no affidavits placed before the court *a quo.*
>
> Neither of the parties led evidence. Thus, there was no evidence as to when demand for transfer was made. There was no evidence as to when the cause of action actually arose and given the fact that this was dependent on whether or not the appellants were placed *in mora,* the court was left in suspense on these crucial issues. The court seems to have been active to the fact that there was a need for a factual basis to be placed before it to facilitate a determination on the crucial issue of when prescription could be said to have started running…"

It is therefore necessary for the court to understand the nature of the defences to prescription advanced by the plaintiff. The plaintiff in this case filed a bare denial which he called a replication. For all practical purposes the bare denial was as good as not filing a replication at all. It therefore follows that the allegations of prescription made by the defendant were not controverted by the plaintiff in the pleadings. In my view the plaintiff having been faced with the grounds of prescription ought to have substantively admitted, either denied with a basis given or confessed and avoided the prescription plea. The plaintiff did not do so. Following on the *dicta* in the *Brooker case*, by not informing the court in the replication on the grounds of rebuttal to the plea of prescription there was no dispute to be determined by the court because the ground of defence supporting the plea prescaution as out by the defendant remained uncontroverted.

The replication of a bare denial implied that the plaintiff had joined issue on the merits requiring the defendant to prove its defence. The problem for the plaintiff was that nothing contrary to the plaintiff's averments was pleaded. The replication was in the nature of "I deny everything you have said" without then pleading to the specific grounds of prescription advanced by the defendant.

The allegations made in the plea on which prescription was based by the plaintiff have already been quoted as per para. 21 of the plea. The defendant averred in as much as it was common cause that the insurance policy on which the plaintiff sues upon matured on 1 July, 2013. The plaintiff in para. 4 of the declaration averred that the policy was to mature on 1 July 2013 whereupon monthly payments were due to the plaintiff for 24 years payable over 120 instalments as a minimum. The plaintiff did not place in issue the fact that the insurance policy in question matured on I July, 2013 whereupon the plaintiff was to commence monthly payments to the plaintiff. The defendant had in 2010 sought to make a payment of US$227.58 to the plaintiff in full and final payments of the full maturity value of the policy. The plaintiff

refused the offer of payment as offered and stuck to the position that the policy should mature as per the policy contract followed by the making of the payments due on the policy.

The agreed facts are that the plaintiff refused the offer of a once off payment in 2010. The same offer was repeated in September 2011. The plaintiff rejected both offers. No changes were made by the defendant to the offered value of the policy. Significantly the agreed facts state that upon maturity in 2013, the parties remained polarized. The defendant maintained its offered position and the plaintiff disagreed. The plaintiff on 9 February instituted an action under case no. HC 1218/16 against the defendant described as Old Mutual Zimbabwe (Private) Limited I have considered the summons in case no. HC 1218/16. The relief sought was stated as follows:

> "The plaintiff's claim is for the following:
> 1. Payment by the defendant to the plaintiff, the sum of US$34 856.75 (Thirty-four thousand eight hundred and fifty-six dollars and seventy-mfive cents) being benefits arising from the maturation of the insurance company.
> 2. Interest on the aforesaid sum at the prescribed rate calculated from the day of summons to the date of full and final settlement.
> 3. Costs of suit at a higher scale."

The defendant entered appearance to defend on 29 February 2016. The plaintiff withdrew the action on 15 April 2016. The withdrawal followed upon a letter dated 14 March 2016 written by the defendant's legal to the plaintiff's legal practitioners wherein they advised that the correct defendant was Old Mutual Life Assurance Company of Zimbabwe Limited being the entity which contracted with the plaintiff on the insurance policy subject of that suit and still subject of the current suit. It follows that case number HC 1218/16 cannot be said to have been between the current defendant and the defendant therein because the defendant the latter was not the same defendant as the current one. Case number HC 1218/16 is inconsequential to the current proceedings because it did not interrupt prescription as it was a nullity and, in any event, withdrawn. The plaintiff did not therefore sue the current defendant under case number HC 1218/16. The current case filed on 15 April 2016 and summons therein served upon the defendant on 18 July 2016 was the first case in which the plaintiff sued the defendant therein for benefits due on the policy in issue. The court must answer the question whether when the service of summons was affected on the defendant, the claim had prescribed.

The defendant's argument was that, the cause of action rose on 1 July 2013. It is common cause that the date marked the maturity date of the policy meaning that benefits due on maturity became due upon the date of maturity of the policy. The defendant submitted that

the cause of action having arisen on 1 July 2013, the plaintiff in order to avoid prescription ought to have instituted and served its claim within three (3) years of the cause of action arising which three (3) years would expire on 1 July 2016. The defendant averred that with summons having been served on 18 July 2016, the claim had already prescribed on 1 July 2016. As already noted the plaintiff filed a replication which did not deal with the averments made. The court must determine whether on the uncontroverted averments, the same establish prescription. In other words, because prescription is a matter of law, the court, notwithstanding that the defendant may not have explicitly traversed the facts from which prescription is alleged to arise, must nonetheless be satisfied on the alleged facts on a balance of probabilities that those facts establish prescription of the nature pleaded by the defendant.

From the agreed facts, para 3 reads as follows:

> "3. In February 2016, plaintiff issued summons against defendant under HC 1218/16 claiming that the value assigned to the policy by the defendant was less than what plaintiff considered to be the time value. When summons was served, this was less than three years from the maturity date, being 1 July 2013." (own underlining)

From the above agreed fact, the parties agreed that the maturity date of the policy was significant. The date was clearly was central to the claim made by the plaintiff because whatever monetary payment had to be made became due upon the policy on the date of its maturity.

The plaintiff argued in the heads of argument that prescription can only begin to run once the cause of action is complete. It was averred on the authority of *Deloitte Haskins & Jells Consultant (Pty) Ltd* v *Bowthorpe Hellerman Deutch (Pty) Ltd* 1991 (1) SA 525 (A) that there must be an obligation to perform or to refrain from something immediately. It was further submitted that the obligation to pay was continuous because of the nature of the policy and that extinctive prescription does not arise on a debt of a continuous nature. In the matter before the court, the defendant had already as far back as the year 2010 communicated its intention to pay the sum of US$227.58 as the full value of the policy which offer was rejected by the plaintiff. No payment was made on the maturity date either contrary to the terms of the insurance policy contract. The issue is not about continuous payments non suiting the application of prescription. The issue is that even the first payment itself was not paid. The breach would therefore still be there. I agree with the defendant's submissions that the plaintiff claim for benefits arising from the maturity of the policy arose on 1 July 2013 and that three years prescription would set in on 1 July 2016.

Section 15(d) of the Prescription Act [*Chapter 8:11*] provides as follows:

> "15(d) The period of prescription of a debt shall be except where any enactment provides otherwise, three years, in the case of any other debt."

As correctly submitted in the defendant's heads of argument, in the summons, the plaintiff claimed payment of USD$34 856.75 as "benefits arising from the maturation of the insurance policy". The benefits were due on 1 July 2013. They were in breach of the obligation on the part of the defendant to pay, not paid. The plaintiff would have assumed the right to claim maturity and subsequent benefits on 1 July 2013. The defendant did not perform. It is clear that the three years for purposes of prescription began to run from 1 July 2013.

The plaintiff in this matter sat on his laurels. The law assists the vigilant and not the sluggard. Those who love Latin and want to be eccentric will express the *maxim* as *vigilantibus non dormientibus jura subvenium.* See *Chimunda* v *Zimuto & Anor* SC 76/2014; *Musuku* v *Musuku* HB 106/2016; *Justice Chengeta N.O. & Ors* v *Tymon Tabana* HH 23/2018. The right to institute court proceedings is not absolute but subject to reasonable statutory limitations. The plaintiff therefore finds himself debarred from instituting the current proceedings against the defendants because his claim had prescribed when he served summons upon the defendant. The prescription plea must succeed.

In relation to costs, the parties' legal practitioners did not address the court on them in any meaningful manner. Costs should in such a case follow the event. I therefore determine the matter as follows:

IT IS ORDERED THAT:

(i) The special plea of prescription is upheld.

(ii) The plaintiff's summons is dismissed with costs.

J Mambara & Partners, plaintiff's legal practitioners
Kantor & Immerman, defendant's legal practitioners