DAVID CECIL KAPLIN
[Represented herein by his wife, Charity Kaplin, in terms of a power of attorney dated the 15th of January 2014]
versus
ZIMBABWE ELECTRICITY TRANSMISSION & DISTRIBUTION COMPANY

HIGH COURT OF ZIMBABWE
DUBE-BANDA J
HARARE; 14 November 2024 & 11 February 2025

Special plea

G.R.J. Sithole for the plaintiff
Ms. B. Mahuni for the defendant

DUBE-BANDA J:

[1] This is a special plea. The facts giving rise to this special plea may be briefly summarized as follows, the plaintiff issued summons against the defendant on 10 September 2024 seeking an order for payment of US23 943.85 being the replacement value of the damaged electric motor and the variable speed drive (VSD) control box; payment of US136 400.00 being the value of the loss of potential income which was anticipated from the expected wheat yield allegedly caused by the defendant's electrical fault on the electricity distribution transformer which caused damage on plaintiff's electric motor and the variable speed drive (VSD) control box; interest; costs of suit on a higher scale and collection commission. The allegations are that the electrical fault which damaged the plaintiff's electrical motor and the variable speed drive control box was solely caused by some persistent, unresolved and intermittent fault to the defendant's electricity distribution transformer. The defendant filed a notice of intention to defend and a special plea. Plaintiff filed a replication and both parties filed heads of argument.

[2] The defendant raised six special pleas against the plaintiff's summons. In the first plea, the defendant alleges that the plaintiff's claim has prescribed. It being contended that the claim should have been instituted within three years, given that the electrical fault occurred in August 2021, the present proceedings should have been filed by August

2024, however the summons was filed on 10 September 2024. It was further contended that prescription was not interrupted by summons filed on 30 July 2024 in case number HCH 3292/24 as that matter was not prosecuted to final judgment. It was contended that the matter was withdrawn.

[3] The second special plea raised was the alleged plaintiff's non-payment of wasted costs in HCH 3835/24 a matter withdrawn on 9 September 2024. It was contended that in the notice of withdrawal the plaintiff tendered wasted costs but did not pay such costs. It was contended further that this matter cannot proceed before the plaintiff pays wasted costs in HCH 3835/24. This special plea was abandoned in oral argument, and no further reference shall be made to it.

[4] The third plea raised was the alleged plaintiff's lack of *locus standi*. It being contended that the power of attorney relied upon, and not attached to the summons has conflicting dates i.e., 15 January 2014 as *per* summons and 15 January 2024 as *per* the declaration. This discrepancy is alleged to cast doubt on the authenticity and validity of the power of attorney. It was contended that the power of attorney must be disregarded, and without the power of attorney there is no plaintiff before court.

[5] The fourth plea raised was the alleged non-joinder of Cell Insurance (Private) Limited to these proceedings. It being contended that Cell Insurance has a real and substantial interest in the outcome of these proceedings. The fifth plea raised is the alleged mis-citation of the defendant. It being alleged that the defendant is known as Zimbabwe Electricity Transmission Company (Private) Limited, not Zimbabwe Electricity Transmission and Distribution Company as cited in these proceedings. It was contended further that citing a non-existent party renders the entire proceedings fatally defective. The sixth plea raised was the alleged incompetence of the relief sought in the summons. It being contended that the relief sought is in exclusive foreign currency, which is incompetent because Zimbabwe has its own currency. It was further contended that the plaintiff cannot claim damages in solely foreign currency unless the damages sought can be qualified as a foreign obligation. The defendant contended that claiming damages solely in foreign currency is unlawful and has the effect of undermining the currency of Zimbabwe.

THE LAW AND THE FACTS

[6] A Special Plea can be defined as a legal objection to some aspect of the plaintiff's claim. It attempts to eliminate the plaintiff's case before the merits of the plaintiff's case are

even considered. It raises some special defence that does not flow from allegation the averments in the summons and declaration. It is self-contained answer to the claim which is outside (*dehors*) the plaintiff's cause of action. See *Ahmed v Joina Development Co (Pvt) Ltd* 2020 (1) ZLR 695 (H). The *onus* rests on the defendant to prove the facts underlying the special plea. See Harms LTC *Amlers Precedents of Pleadings* (8th ed. LexisNexis) 305. A special plea is a plea in trial susceptible of a replication and must be heard separately on the adduction of evidence. See *Doelcam v Pitchanik and Ors* 1999 1 ZLR 390 (H) 396 G-E.

[7] I now turn to the special pleas taken by the defendant.

PRESCRIPTION

[8] The thrust of the special plea is that the claim for a debt was instituted after the prescribed period of three years had lapsed, resulting in the claim being prescribed. In support of the special plea of prescription, the defendant argued that the cause of action arose in August 2021 and the summons was issued on 10 September 2024, after the expiry of the three-year timeline for prescription. It was further contended that prescription was not interrupted by a summons filed on 30 July 2024 in case number HCH 3292/24, because it was withdrawn. Per *contra*, in his replication the plaintiff contended that the cause of action arose in November 2021 i.e., the harvest period of the wheat crop. It was contended further that before harvest period the plaintiff would not have managed to establish the loss and the exact quantum or value of the loss of the potential income which was anticipated from the expected wheat yield. Per *contra*, in his replication the plaintiff contended that the cause of action arose in November 2021 i.e., the harvest period of the wheat crop. It was contended further that before harvest period the plaintiff would not have managed to establish the loss and the exact quantum or value of the loss of the potential income which was anticipated from the expected wheat yield. It was contended that the claim for loss of potential income in paragraph (c) of the prayer in the summons has not prescribed as it is within three years of the cause of action. In addition, the plaintiff contended that a letter dated 6 July 2023 interrupted prescription of the matter. The plaintiff abandoned the defences premised on the allegation that prescription was delayed due to plaintiff's disability in terms of the Prescription Act. Further the plaintiff abandoned the defence premised on Third Schedule of the Agriculture Finance Act [*Chapter 18:02*].

[9] In terms of s 16 of the Prescription Act [*Chapter 8:11*], prescription begins to run as soon as the debt is due. A debt is due when it is immediately claimable or recoverable. If the debtor has knowledge of the identity of the debtor and of the facts from which the debt arises, the debt is deemed to be due, as by that stage, the creditor acquires a complete cause of action for the recovery of the debt. The creditor is deemed to have knowledge of the identity of the debtor and of the facts from which the debt arises if it could have been acquired by the exercise of reasonable care. See *Muteswa Wholesalers (Pvt) Ltd & Ors v Delta Zimbabwe Ltd* 2019 (3) ZLR 779 (S).

[10] The *onus* is on the person raising the special plea to show that the claim prescribed. The plea of prescription is proved by placing sufficient facts and/or evidence before court. There must be evidence on when the debt became due. See *Muteswa Wholesalers (Pvt) Ltd & Ors v Delta Zimbabwe Ltd* 2019 (3) ZLR 779 (S); *Van Brooker v Mudhanda & Another AND Pierce v Mudhanda & Another* SC 5 of 2018. In *casu,* there is a factual dispute turning on when the cause of action arose. On one hand, the defendant contends that it arose in August 2021, and on the other hand the plaintiff contends that it arose in November 2021. There is no evidence that the entire set of facts upon which the entire relief sought by the plaintiff arose in August 2021. In other words, the defendant did not adduce evidence to prove that the cause of action arose in August 2021.The plaintiff could not sue in a piece-meal fashion, he had to wait until such time that he had the entire set of facts to mount a complete claim i.e., both claims of USD23 942.85 and USD136 400.00. Without evidence regarding when the cause of action arose, the defendant has not discharged the *onus* of proving that the claim has prescribed. In other words, the seat of the onus is decisive in this matter. It is for these reasons that the special plea for prescription is refused.

MIS-CITATION OF THE DEFENDANT

[11] The defendant contends that the plaintiff cited a non-existent defendant. It was argued that the defendant is known as the Zimbabwe Electricity Transmission Company (Private) Limited, not Zimbabwe Electricity Transmission & Distribution Company. It was submitted that citing a non-existent party renders the entire proceedings fatally defective. Per *contra*, the plaintiff contends that the defendant has been properly cited. It was contended that it conducts itself and its business as Zimbabwe Electricity Transmission & Distribution Company. In addition, the plaintiff attached a letter from the defendant to his replication wherein the letterhead refers to the defendant as

"Zimbabwe Electricity Transmission & Distribution Company." It was further argued that in its website and other various litigation before the courts, the defendant is cited as "Zimbabwe Electricity Transmission & Distribution Company."

[12] This is a special plea. The *onus* is on the defendant to adduce evidence to prove that its special plea has merit. In *casu,* no evidence was adduced concerning the alleged correct citation of the defendant, neither an official document speaking to the alleged proper citation of the defendant was placed before court. In such a case it is imperative for a party who bears the *onus* to place the best evidence before court, e.g., company registration documents. This court cannot merely on the *ipse dixit* of counsel find that the defendant was not correctly cited. The seat of the *onus* is decisive in this issue. In the circumstances, there is no evidence that the defendant was mis-cited. It is for these reasons that the special plea on the alleged mis-citation has no merit and is refused.

NON-JOINDER

[13] The defendant contends that the plaintiff's failure to join a necessary party, namely Cell Insurance (Private) Limited ("insurance company"), which is alleged to have a real and substantial interest in the outcome of these proceedings is prejudicial to the insurance company. It was submitted that the plaintiff in its declaration made reference to insurance company, but failed to join it. Per *contra*, the plaintiff submitted that insurance company has no real and substantial interest in the matter. It is only an insurer of the defendant. It was submitted further that the non-joinder of the insurance company is not fatal to this matter.

[14] The non-joinder of the insurance company is of no consequence. It is of no moment. I say so because it is the insurance company of the defendant, it is the defendant that knows whether the claim is covered by its insurance policy. It is for the defendant, if the claim is covered by the policy to submit it to the insurance company. It is not for the plaintiff to join it in these proceedings. To argue that the plaintiff must have joined the insurance company when he is not privy to the terms and conditions of the policy is disingenuous. It is thoughtless. The fact that the plaintiff mentioned the company in his declaration is inconsequential.

[15] In any event, the general position is that non-joinder is not fatal. Rule 32(11) of the High Court Rules, 2021 provides that:

> "No cause or matter shall be defeated by reason of the misjoinder or non-joinder of any party and the court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter."

[16] In the reading of r 32(11) the trial court may be able to determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to this matter. It is for these reasons that the special plea on the alleged non-joinder of Cell Insurance has no merit and is refused.

LOCUS STANDI

[17] The defendant submitted that the plaintiff is not properly before court, in that the summons and declaration contain conflicting dates as the date the power of attorney was executed. It was submitted further that the power of attorney must be disregarded, which then leaves the plaintiff not properly before court. Pre *contra*, the plaintiff contends that he has *locus standi* in this matter. He is a person with disability and is represented in this matter by his wife in terms of a power of attorney dated 15 January 2014.

[18] *Locus standi* relates to whether a particular applicant is entitled to seek redress from the courts in respect of a particular issue. The defendant's contention, in my view, can be disposed of without breaking a sweat. The discrepancy in the date of the power of attorney in the summons and declaration can be cured by evidence at the trial. In *Madza & Ors v The Reformed Church In Zimbabwe Daisyfield Trust & Ors* SC 71/14 the court said:

> "The issue of *locus standi* raises a dispute of fact which is capable of resolution by the production of further evidence by the parties, if so minded. It falls to be resolved upon consideration of the merits after all the evidence which the appellant is entitled, and wishes, to produce has been placed on record. The insufficiency of evidence contained in the founding affidavit is not in itself fatal to the establishment of *locus standi* since that deficiency can, in given circumstances, be remedied by further evidence. Because of the confused manner in which this application was dealt with by the court *a quo,* the appellant was deprived of an opportunity to adduce, if it so wished, evidence which would establish its *locus standi* to bring the application."

[19] In addition, I agree with the plaintiff that he may seek an amendment before the trial or adduce evidence at the trial to cure what appears to be typographical error. Such cannot anchor a special plea. It is for these reasons that the special plea attacking the plaintiff's *locus standi* has no merit and is refused.

RELIEF SOUGHT IS INCOMPETENT

[20] The defendant attacks the order sought in the prayer. It relied on the preamble and s 36 of the Presidential Powers (Temporary Measures) (Zimbabwe Gold Notes and Coins) Regulations, 2024 to argue that the relief sought to the extent that it is exclusively in foreign currency is incompetent. Further, it was argued that seeking collection commission, when the defendant did not agree to pay such commission is incompetent. Per *contra*, the plaintiff argued that the relief sought in the summons is competent. It was submitted that the fact that the plaintiff sought United States Dollars does not mean that the local currency is not accepted as a mode of payment. It was submitted further that the law allows a litigant to settle a debt in any currency prescribed by the law.

[21] It is clear that the plaintiff set out the value of his loss in the currency in which he alleges he incurred it. There is no statutory bar in seeking a judgment in foreign currency, as long as it is understood that it can be convertible to local currency at the date of payment or enforcement of payment. I agree with the plaintiff that the law allows a litigant to settle a debt in any currency prescribed by the law. See *Ahmed v Joina Development Co (Pvt) Ltd* 2020 (1) ZLR 695 (H). In addition, the argument that seeking collection commission is incompetent is ill-conceived. This is not an issue that can be argued and debated in special plea proceedings. These are issues to be thrashed out at a trial. It is for these reasons that I take the view that the special plea on whether or not the relief sought is incompetent has been ill taken and is refused.

COSTS

[22] It is a well-established principle of law that costs follow the result. No cogent reasons were placed before court why I should depart from the above celebrated principle, neither, could I find any reason on record to decide otherwise. It is thus inevitable that the plaintiff must be awarded his costs. However, no case has been made for costs on a higher scale. See *Kangai v Netone Cellular (Pvt) Ltd* 2020 (1) ZLR 660 (H).

In the circumstances, I find that the special plea is ill-conceived. It is dismissed with costs.

DUBE BANDA J: ……………………………………..

Madotsa & Partners, plaintiff's legal practitioners
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