

REPORTABLE (31)

THOMAS KANJERE
v
OLD MUTUAL LIFE ASSUARANCE COMPANY LIMITED

SUPREME COURT OF ZIMBABWE
UCHENA JA, CHATUKUTA JA, & MWAYERA JA
HARARE: 19 SEPTEMBER 2023 & 15 MARCH 2024

T. Biti, for the appellant

T. Mpofo, for the respondent

MWAYERA JA:

1. This is an appeal against the whole judgement of the High Court (“the court *a quo*”) in which it upheld the respondent’s special plea of prescription and dismissed the appellant’s claim.

FACTUAL BACKGROUND

2. The appellant took an insurance policy with the respondent, which is a company registered in terms of the Laws of Zimbabwe. The respondent is in the business of banking, savings, investments and insurance services. The parties agreed to an insurance policy known as the “Independence Maker Insurance Policy (“insurance policy”). The appellant used his Air Zimbabwe Pension Fund exit proceeds to make a payment for the insurance policy.
3. In terms of the insurance policy, the appellant was entitled to a basic benefit of ZWL \$35 521 (or USD \$1 7138.88 plus profit). The maturity date for the policy was 1 July 2013.

4. The guaranteed minimum annuity rate was set as ZWL \$65.23 (or USD \$31.50) per month per ZWL \$1 000 (or USD\$4 825) of the capital sum payable monthly in arrears, during the Life Assured`s lifetime with a minimum of 120 instalments. A single premium of ZWL \$9 914 .24 (or USD \$4 783.62) at issue date was agreed upon in terms of the contract.
5. The respondent promised to pay the appellant ZWL \$ 35 521 plus profits, on 1 July 2013, which was the date of maturity for this 24-year policy. Alternatively, the respondent promised to pay an amount equivalent to the purchasing power of this promise at the time of the agreement which was USD\$34 856.75, when adjusted for profits. The promise of implied benefits was the reason why the appellant signed up for the policy.
6. In 2010, the respondent, unsolicited, offered to pay the appellant USD\$227.58 as the full value of the policy. The appellant rejected the offer and proceeded to seek advice from the Zimbabwe Pensions and Insurance Rights Trust, on the computation of the rightful maturity and pension due from this policy and hence the actual value of the policy.
7. The appellant was advised that he was owed benefits by the respondent and that the benefits cumulatively amounted to a total sum of USD\$34 856.75, being the sum of the basic benefits of USD\$17 138.88 and profits of USD\$17 717.87 at a constant rate of 3% throughout the maturity term. The amount represented a total that would buy the appellant`s annuity, which resulted from the maturation of the appellant`s Independence Maker Retirement annuity contract, issued by Old Mutual on 1 July 1989.
8. The appellant filed a claim against the respondent on 15 April 2016, wherein he sought the payment of USD\$34 856 .75, being the cumulative benefits arising from the maturation of the insurance policy. After service of the summons on 18 July 2016, the respondent in defending the claim raised a special plea of prescription since it alleged that the claim was

based on the contract entered into in 1989 which matured on 1 July 2013. Thus, according to the respondent, the cause of action arose on 1 July 2013 and accordingly in terms of s 14 (1) and s 15 (d) of the Prescription Act [*Chapter 8:11*] (“the Act”), the failure to act when the cause of action arose rendered the appellant’s claim prescribed.

PROCEEDINGS A QUO

9. Before the court *a quo* the parties proceeded by way of a Stated Case, in respect of which they filed for the determination of the issue of prescription. It is necessary to outline the statement of agreed facts in order to assess the decision of the court *a quo* in holding that the appellant’s claim had prescribed.

10. “THE STATEMENT OF AGREED FACTS

DEFENDANT’S SPECIAL PLEA

Take notice that for 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 benefits after conversions the details of the conversions were fully explained and an offer on 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 the 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 true value. When summons was served this was less than three years from the maturity date being 1st July 2013.

- (4) On the 15th of April 2016 the action instituted by the plaintiff under HC 2018 was withdrawn.
- (5) The present proceedings were filed on 15 April 2016. The Sheriff attempted service on Kantor and Immerman on 22nd of April 2016 which service was refused.
- (6) The summons in the present proceedings were then served on the defendant directly on 18 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.”
11. The court *a quo* was therefore addressed from the premises of the statement of agreed facts, in which the defence of prescription was not controverted by the respondent. The statement of agreed facts was silent on the defences but spoke volumes as regards the maturation of the policy and when the cause of action commenced. There was no mention of waiver or interruption of prescription. Further, in the appellant’s replication in the court *a quo*, the appellant gave a bare denial which is outlined below for ease of reference:
- “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.”
12. At the hearing in the court *a quo*, the parties relied on written submissions to motivate their respective contentions as outlined in the statement of agreed facts in respect of prescription. The appellant for the first time, argued that the claim had not prescribed because, firstly, the cause of action was not complete, and secondly, that the obligation to pay in this manner was continuous in nature. Further he asserted that in any event,

prescription had been interrupted by the issuance of summons on 9 February 2016 under HC1218/16.

13. The respondent on the other hand, argued that the cause of action as pleaded by the appellant in his summons was not of a continuous nature. The debt became due upon maturation of the policy on 1 July 2013. The respondent also contended that there was no interruption of prescription since the summons under HC1218/16 was withdrawn on 15 April 2016 as the respondent was not cited in that case. Further, the respondent contended that it was improper for the appellant to raise defences of interruption and waiver which were not in the pleadings and also not part of the statement of agreed facts.

14. The court *a quo* upheld the special plea of prescription and held that the policy matured on 1 July 2013 and as such the cause of action arose on that date. The claim by the appellant arose from the maturity of the policy, whose benefits were due on 1 July 2013. By failing to take action and only claiming on 18 April 2016 the appellant sat on his laurels and only lodged a claim when the same had prescribed. The court *a quo* further upheld the special plea of prescription on the basis that the appellant had not in its pleadings raised the defences of interruption and waiver. It thus, on the basis of the agreed facts and pleadings before it dismissed the appellant's claim.

15. Aggrieved by the decision of the court, the appellant instituted the present appeal on the following grounds:

GROUND OF APPEAL

16. (1) The court *a quo* acknowledged that the appellant's claim was for the payment of guaranteed minimum annuity rate, and a monthly pension and a monthly life pension

payable over 120 instalments, grossly erred in failing to hold that the appellant's claim was a continuous obligation not susceptible to prescription.

- (2) Further the court *a quo* erred on a question of law in that it ignored provisions of s 71(4) of the Constitution of Zimbabwe which makes it clear that where a person had vested interest or contingent right to the payment of a pension benefit, a law which provides for the extinction or diminution of that right is regarded, for the purposes of subsection (3) as a law providing for the compulsory acquisition of property.

RELIEF SOUGHT

17. Wherefore the appellant prays that:

1. The present appeal be allowed with costs.
2. Paragraphs
 - (i) The special plea of prescription is upheld; and
 - (ii) The plaintiff's summons is dismissed with costs of the judgement located at p 10 of the cyclostyled judgement be and is hereby set aside. (sic)
3. The decision of the court *a quo* is therefore updated to read as follows: (sic)

“In the circumstances, the plea of prescription be and is hereby dismissed with costs.”
4. The respondent pays costs of suit.” (sic)

SUBMISSIONS BEFORE THIS COURT

18. Mr *Biti* for the appellant submitted that the appellant's Insurance Policy was of a continuous nature. He contended that the policy could not be extinguished by prescription as the terms of the policy gave rise to a continuous obligation which was payable on monthly basis from the date of maturity.

19. He further submitted that although the appellant's summons *a quo* had restricted the claim to a lump sum amount that did not alter the substance of the policy which required the respondent to pay the appellant a certain sum monthly from the date of maturity that is 1 July 2013.
20. He contended that by upholding the special plea of prescription the court *a quo* ignored the provisions of the Constitution, more specifically s 71 (4). Counsel however conceded that the issue of s 71 (4) had not been brought to the attention of the court *a quo* and was being raised for the first time on appeal. He however maintained that the issue of s 71 (4) was a point of law. He argued that appellant's policy was protected as envisaged by the Constitution such that ss 14 and 15 of the Prescription Act were not applicable to the life insurance policy of the appellant.
21. *Per contra*, Mr *Mpofu* for the respondent, contended that the fact that the appellant claimed a lump sum before the court *a quo* four years after the maturity date of the policy rendered the claim prescribed. He submitted that even if there had been a claim for monthly payments, the same had also prescribed because there was no continuing cause for him to rely on. Counsel further submitted that the appellant's claim was subject to prescription law and thus the claim, being outside the permissible time, had extinguished.
22. In respect of s 71 of the Constitution, he submitted that the provision could not be construed to mean that a pension benefit was not subject to prescription. He further contended that the claim was extinguishable by prescription. Counsel further submitted that the alleged point of law relating to s 71 was improperly raised as there was no notice to the respondent. He averred that the appellant's counsel did not suggest that the relevant sections of the Prescription Act were unconstitutional.

23. It is worth mentioning at this stage that the issue of s 71 of the Constitution will not detain this Court as the concession by Mr *Biti* that the section was not brought to the attention of the court *a quo* resolves the matter. There is no basis for alleging that the court *a quo* ignored to determine the issue which was not brought before it. The second ground of appeal which relates to that issue cannot be sustained in the circumstances. Even if we were to consider the fact that a point of law can be raised at any stage during proceedings such a point is not raised anyhow as that would be prejudicial to the other party. See *Allied Bank Limited v Caleb Dengu & Wilson Tendai Nyabonda* SC 53/2016 at p 5. This Court made pertinent remarks on raising of a point of law when it stated the following:-

“The fact that the issue of locus standi was a point of law which could be taken at any stage in the proceedings could not assist the respondents. Although it is trite that a point of law can be raised at any stage during proceedings, that does not mean that the point of law can be raised anyhow. In order for one to raise a point of law validly at any stage, notice must be given to the other party of the intention to raise the point. There must be a formal way of raising the point. In this case, the issue was raised in correspondence between the parties. The issue of locus standi was not properly pleaded by the respondent. The court *a quo* erred in accepting the plea of lack of locus standi which was not properly raised.” (Underlining my emphasis)

In the present case, the point as properly conceded by Mr *Biti* was raised for the first time during the appeal and it was not an issue for determination before the court *a quo*. The court is only called upon to determine issues before it. To that extent therefore, the second ground of appeal is unsustainable.

ISSUE FOR DETERMINATION

24. The sole issue that commends itself for determination in this case is as follows:-

1. Whether or not the court *a quo* erred by holding that the appellant’s claim had prescribed.

THE LAW

25. The prescription of debts is governed by the Act. Section 15 of the Act provides that:

“15 Periods of prescription of debts

The period of prescription of a debt shall be

(a)-----

(b)-----

(c)-----

(d) except where any enactment provides otherwise, three years, in the case of any other debt.”

26. Section 16 of the same Act further provides that:

“16 When prescription begins to run

(1) Subject to subsection (2) and (3) prescription shall commence to run as soon as a debt is due.

(2) -----

(3) A debt shall not be deemed to be due until the creditor becomes aware of the identity of the debtor and of the facts from which the debt arises.

Provided that a creditor shall be deemed to have become aware of such identity and of such facts if he could have acquired knowledge thereof by exercising reasonable care.”

28. Section 14 of the Act deals with the extinction of debts by prescription. It reads;

“14. Extinction of debts by prescription

(1) Subject to this Part and Part V, a debt shall be extinguished by prescription after the lapse of the period which in terms of the relevant enactment applies in respect of the prescription of such debt.

(2) A subsidiary debt which arose from a principal debt or a debt which is dependent upon a principal debt shall be extinguished by the prescription of the principal debt.

(3) Notwithstanding subsection (1) and (2)-

(a) payment by the debtor of a debt after it has been extinguished by prescription in terms of this section shall be deemed to be payment of the debt;

(b) an agreement made by the debtor to pay a debt after the debt has been extinguished shall be enforceable; whether or not the debtor knew at the time that he made the payment or the agreement that the debt had been extinguished by prescription.”

29. What can be deduced from the Act is that unless prescription is delayed and interrupted as envisaged in ss 17, 18 and 19 of the Act, it commences and or continues to run. Once the creditor is aware of the facts from which the debt arises, prescription commences to run as soon as the debt is due. It is settled that once the entire set of facts which entitle a party to claim exists, then one should claim a due debt to avoid being affected by prescription.

30. The term ‘cause of action’ has been defined by this Court in a number of cases. In *Peebles v Dairiboard (Pvt) Ltd* 1999 (1) ZLR 4 at 45D-E. MALABA J (as he then was) stated:

“The facts from which the debt arises” are terms which have been interpreted to mean all material facts from which the cause of action arises; *Drennan Maud & Partners v Townboard of the Township of Pennington* [1988] 2 All ER 571. A cause of action was defined by LORD ESTHER MR in *Read v Brown* (1888) 22 QB 131 as every fact which it would be necessary for the plaintiff to prove if traversed in order to support his right to the judgment of the court.”

31. Also see the case of *Nan Brooker v Mudhanda & Anor* 2018 (1) ZLR 33 (S) at 35G-36A wherein the court remarked that:

“In order to determine the question of prescription the court first had to make a finding on the cause of action upon which the respondent’s claim was premised and when specifically, the cause of action arose. What constitutes a cause of action was described in *Abrahams & Sons v SA Railway & Harbours* 1933 CPD 626 at 637 where WATERMAYER J stated:

‘The proper meaning of the expression ‘cause of action’ is the entire set of facts which give rise to an enforceable claim and includes every act which is material to be proved to entitle a plaintiff to succeed in his claim. It includes all that a plaintiff must set out in his declaration in order to disclose a cause of action.’”

32. The need for the entire set of facts entitling one to make a claim cannot be over emphasised.

It can be construed from case law that once the cause of action, which is the entire set of facts entitling one to make a claim, is established, and it is ascertained when the cause of action arose, the Court can safely determine whether or not the debt has prescribed.

APPLICATION OF THE LAW TO THE FACTS

33. It is important to note that the parties entered into an annuity insurance contract. Such a policy generally creates a continuous obligation which begins to run from a fixed date and continues to do so monthly through the insured's lifetime. See *Shamili v City of Windhoek* 1610/2016 (2017) NANCMD 288, at p 7.
34. However, the parties are at large to enter into specified contractual terms as they did in this case. In the present case for instance, the appellant elected to pay a single premium, and the parties agreed that the 24-year policy would mature on 1 July 2013. When the appellant claimed his total cumulative benefits of USD\$34,856.75 on 18 July 2016, he did not seek for monthly payments. In fact, he sought in the relief, benefits arising from the maturation of the insurance policy. The claim, as outlined in the declaration and relief sought, does not reflect any continuous nature of the cause of action.
35. Paragraph 10 of the declaration and the relief sought are outlined below to buttress the nature of the claim as presented by the appellant in the court *a quo*.

“The benefits amount to the total sum US\$34 856.75 (Thirty-four thousand eight hundred and fifty six dollars and seventy five cents), being the sum of the Basic benefits of US\$17, 138.88 and profits of US\$17,717.87 at a constant rate of 3% throughout the maturity term. The amount represents a total that should buy the Plaintiff an annuity which results from the maturation of the Plaintiff's Independence Maker Retirement annuity contract issued with Old Mutual on the 1st of July 1989...

WHEREFORE the Plaintiff's claim is for: -

1. Payment by the Defendant to the Plaintiff of the sum of **US\$34 856.75 (Thirty-four thousand eight hundred and fifty six dollars and seventy five cents)** being benefits arising from the maturation of the insurance policy.
2. Interest on the aforesaid sum at the prescribed rate calculated from the day of the summons to the day of full and final settlement
3. Costs of suit at a higher scale.”

36. The respondent raised a special plea in bar of prescription to which the appellant did not raise any recognisable defence in the pleadings.

37. The parties proceeded on a statement of agreed facts seeking the court to determine the issue of prescription only. It is trite that where parties proceed by way of statement of agreed facts, the court is confined to the determination of the legal issue brought before it. See *Kunonga v The Church of the Province of Central Africa* SC 25/17 at para [17] where this Court stated the following:

“Once the facts are agreed, the court should proceed to determine the particular question of law that arises and not delve into the correctness or otherwise of the facts. It is bound to take those facts as correctly representing the agreed position and thereafter determine any issues of law that may arise thereof.”

It is on this backdrop that the court *a quo* found that the respondent had discharged the required onus in so far as proving that the claim had prescribed. The court *a quo* held that the appellant’s claim had prescribed.

38. *In casu*, considering that the appellant’s claim is a debt as defined in s 2 of the Act, the debt became due as at 1 July 2013. The claim was only served on 18 July 2016 which is outside the three years as provided for by the Act. The debt had prescribed, as the running of prescription could not be interrupted by service out of time. Section 19(2) of the Act is instructive. Consequently, the court *a quo* cannot be faulted for coming to the conclusion that the appellant had no defence to proffer to the special plea of prescription. As at 1 July 2013 the cause of action and entire set of facts to institute his claim for the debt arising from the contractual obligation were conspicuous. The appellant did not take action timeously, a fact laid bare in the statement of agreed facts. He was out of time as far as the cumulative claim from maturation date of 1 July 2013 was concerned. The respondents had a duty to pay in terms of the contract but the appellant had to take steps to be paid.

The appellant refrained from taking action within a period of 3 years hence the prescription plea succeeded. The appellant did not raise or plead a defence to the special plea of prescription. In the circumstances, the court *a quo* correctly relied on the statement of agreed facts and the pleadings to uphold the special plea of prescription. The judgment of the court *a quo* is unassailable as the court properly and correctly determined the sole issue placed before it.

DISPOSITION

39. The appeal has no merit, it must fail. Regarding costs, they follow the result. We find no reason to depart from the standard rule. Accordingly, it is ordered that:

“The appeal be and is hereby dismissed with costs.”

UCHENA JA : I agree

CHATUKUTA JA : I agree

Tendai Biti Law, appellant’s legal practitioners

Kantor & Immerman, respondent’s legal practitioners

