

ECKEM WILLIAM SITHOLE

Versus

PG INDUSTRIES (ZIMBABWE) LIMITED

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 17 JULY 2012 AND 20 SEPTEMBER 2012

Applicant in person
Mrs Bhebe for the respondent

Special Plea

MAKONESE J: This matter has a long history which dates back to 1998. In these proceedings plaintiff's claim is for one million five hundred thousand United States Dollars , being damages arising from the wrongful and unlawful breach of the plaintiff's rights under section 18(9) and 18 (10) of the Constitution of Zimbabwe. The defendant has entered an Appearance to Defend and has filed a Special Plea premised on the ground that plaintiff should be precluded from proceeding with these claims as the matter is now *res judicata*. The defendant further states that even assuming, without conceding, that the matter is not *res judicata*, the plaintiff's claim should fail as it now prescribed.

In 2004, under case number SC2/04, the plaintiff filed an application in the Supreme Court in terms of section 24(1) of the Constitution of Zimbabwe, seeking an order declaring, *inter alia*, that his right to a fair hearing within a reasonable time by an independent and impartial court, as enshrined in section 18(9) of the Constitution of Zimbabwe had been violated. The Supreme Court ordered as follows:

- “1. It is ordered that the applicant's rights in terms of sections 18(9) and 18(10) of the Constitution of Zimbabwe were violated.
2. It is declared that the attachment and removal of the applicant's property--- were wrongful and unlawful.
3. ---.
4. At the hearing of case number HC3222/98, the High Court shall deal with the following additional issues:

- (a) the compensation to be paid to the applicant for loss of his property in accordance with the formula set out in this judgment.
- (b) the question of the damages payable to the applicant for the unlawful deprivation of the use of his property from the date it was removed from his residence to the date of commencement of the trial; and
- (c) whether the sum of \$150 000-00 allegedly spend by the applicant when he appeared at the High Court for trial in May and July 2003, is recoverable from the respondent---."

In 2009, following the Supreme Court decision, under case number HB 4/09, the plaintiff's claims were heard by the High Court and the following order was made:

"Accordingly, it is ordered that:

- (a) the plaintiff was wrongfully dismissed by the defendant company.
- (b) the defendant company shall pay the plaintiff an amount of \$70 162 577 950-50 as damages for such wrongfully dismissal with interest thereon at the prescribed rate from 20th August 1998 up to date of payment in full.
- (c) the defendant is to pay the costs of this application."

The brief facts of the matter are that on 1 June 1995 the plaintiff joined the defendant company as one of its employees in Bulawayo. On the 4th, 5th and 6th December 1995 the plaintiff did not report for duty. The plaintiff alleged that he had been authorised to be away from work as he was sitting for examinations, but this was disputed by the company. On the 14th December 1995 the plaintiff was duly found guilty, in terms of the company's Code of Conduct for absenting himself from duty without lawful excuse. The plaintiff was given a final written warning. On the 15th March 1996 he was transferred to the company's Mutare branch, but he refused to go there. He was consequently suspended pending dismissal for disobedience to a lawful order, and acting in a manner inconsistent with the fulfilment of the express or implied conditions of his employment contract. On 2 April (1996) the company's disciplinary committee was convened. After hearing the matter the committee found plaintiff guilty and recommended his dismissal. His employment was terminated on 31 May 1996. Aggrieved by the termination of his employment the plaintiff instituted proceedings under HC 3222/98 claiming, *inter alia* damages for wrongful dismissal.

The High Court, in accordance with the earlier ruling of the Supreme Court under case number SC 2/04, determined the issues and held that the plaintiff had been wrongfully

dismissed and ordered that plaintiff be paid the sum of \$70 162 577 950-50 as damages for wrongful dismissal.

The present action has been filed for payment of the sum of US\$1 500 000-00 “as damages” for the wrongful breach of plaintiff’s rights under section 18(9) and section 18 (10) of the Constitution of Zimbabwe. The defendant has filed a Special plea on the basis that the plaintiff’s claims are *res judicata*. It is important to note that when plaintiff approached the Supreme Court he sought several forms of redress including those that arose as a result of the breach. The Supreme Court did make specific findings on these claims. Plaintiff sought to be reimbursed for expenses incurred as a result of the postponements (section 18(9) of the Constitution) and the Supreme Court did make a directive and left it open to the High Court to deal with the issues at trial.

I have carefully examined both the Supreme Court and High Court judgments referred to in this matter and it seems to me that the Supreme Court did address its mind in exercising its powers in applications brought in terms of section 24(1) of the Constitution. The Court appreciated and noted that, as far as remedies are concerned, the court has a very wide discretion. Plaintiff was subsequently heard by the High Court and he was awarded damages for wrongful dismissal under case No. HB 4/09. The Supreme Court left it to the High Court to deal with the claim for reimbursement of expenses which he incurred when the matter was postponed but plaintiff elected not to pursue the claim and the trial was finalised on the one outstanding issue. The Supreme Court, it should be noted, gave specific directions to compensate the breach and referred to additional issues which the High Court had to deal with.

Armed with the Supreme Court order, the plaintiff went back to the High Court and elected to abandon certain parts of the order granted. The Plaintiff went further to bite the cherry when he finalised the matter at trial. He elected not to execute the order only to return to court years later to try and bite the same cherry under the guise of a fresh claim. This, the plaintiff, may not do. This is because a single cause of action cannot support a plurality of claims. See the cases of: *De Klerk and others v Makvura* 1992(1) ZLR 73 at page 75 and *Schnellen v Rondalia Assurance Corp of SA Ltd* 1969(1) SA 517 at page 520.

Spenser Bower on Res Judicata cited in Schnellen's case *supra*; put it succinctly at page 311 when he summed up instances when the plea of *res judicata* applies:

"Where there is substantially only one cause of action and it is not a case of splitting seperable demands but of splitting into two quantitative parts, that plea is sustained. In homely phrase, a party is entitled to swallow two separate cherries in successive gulps, but not to take two bites at the same cherry. He cannot limit his claim to a part of one homogenous whole, and treat the inseperable residence as available for future use, like the good parts of a curate's egg."

In *casu*, the plaintiff bit the cherry by claiming damages for wrongful dismissal under case number HB 4/09. Should he be allowed to have a second bite of the cherry by claiming what he terms damages arising from the wrongful and unlawful breach of his rights under section 18(9) and 18(10) of the Constitution? I think not. The plaintiff's present action arises of the same cause of action adjudicated upon the High Court and Supreme Court in 2004 and 2009. In my view the matter is now *res judicata* and the plaintiff must be precluded from proceeding with these claims.

On the issue of prescription, the plaintiff states in his replication to the defendant's plea that his claims are not prescribed. The plaintiff's claims were clearly filed outside the prescriptive period of 3 years. The summons in respect of the delictual damages were issued more than 7 years after the delict was committed and there is no doubt that the action should be quashed. Not only has the action prescribed but the judgment has become superannuated and plaintiff cannot seek enforcement and execution based upon it. Plaintiff became aware of the delict in 2004 and did not at that stage raise the alternative claim of damages for the breach, which claim was open to it on the same set of facts.

See the case of : *Seacrest Investments (Pvt) Ltd v Inchdale Investments (Pvt) Ltd and Standard Chartered Bank of Zimbabwe Ltd* HH 77/09.

Despite having knowledge of the breach in January 2004, the plaintiff only issued summons for damages in July 2011. The plaintiff knew and was aware of his options to file a claim for damages but he elected not to do so. Plaintiff was aware of his entitlement to sue for damages in accordance with the Supreme Court judgment handed down in January 2004.

In the result, I am satisfied that the Plaintiff's claim has been adjudicated upon by a court of competent jurisdiction. It is thus *res judicata*. In any event, the plaintiff's claims have become prescribed by operation of the law. The defendant's special plea is upheld.

I would accordingly dismiss the plaintiff's claims with costs.

Messrs Coghlan & Welsh defendant's legal practitioners