

TRUST BANK CORPORATION LIMITED  
(In Liquidation)  
versus  
KEVIN TAFIRENYIKA  
and  
EDWARD SOLOMON MAKONI

HIGH COURT OF ZIMBABWE  
PHIRI J  
HARARE, 8 June 2016 and 27 June 2018

### **Opposed Matter**

*C. Mutasa*, for the plaintiff  
*Daphine Sanhanga* for the 1<sup>st</sup> and 2<sup>nd</sup> defendants

PHIRI J: This is a matter in which the plaintiff issued summons claiming against defendants jointly and severally with the one paying the other to be absolved for:

- ‘(a) payment in the sum of US\$109 535-72 together with interest thereon at the rate of 38,66% per annum calculated from the 1<sup>st</sup> August, 2013 to date of full payment.
- (b) A declaratur that the property known as a certain piece of land situated in the district of Salisbury called stand 282 Park Township Lot 60 (stand 249-260 of Park Town Extension Subdivision A of Waterfalls measuring 344 square metre held under Deed of Transfer No. 6163/79 is executable in recovery of the debt herein.
- (c) Payment of plaintiff’s cost of suit on a legal practitioner and client scale.

Defendants excepted to the plaintiff’s claim on the basis that:

1. The summons and declaration are fatally defective in that they do not cite the correct party as liquidator.
2. The summons are vague and embarrassing in that:
  - (i) Plaintiff claims 2 capital amounts
  - (ii) The summons do not specify the date from which interest commences to run.

(iii) In the declaration is claimed at 38,66% in the prayer whereas in the declaration interest claimed is \$36,66%.

### 3. Special Plea

The first and second defendants filed a special plea of prescription on the basis that the amount allegedly owed was due and payable in March, 2012 but summons were issued on 4 November, 2015.

In the premises the first and second defendants averred that the plaintiff's claim has prescribed in terms of s 15 (d) of the Prescription Act [*Chapter 8:11*].

#### Special Plea of Prescription

It is that court's considered view that it is patently clear that the plaintiff's claim has prescribed.

The plaintiff's claim for the amount allegedly owed became due and payable in March of 2012. The plaintiff's summons were served on the defendants on 4 November, 2015 which is more than three years after the date upon which this claim arose.

This court accepts the argument made on behalf of the defendants that the first defendant was obliged to make monthly repayments of US\$2 239-58 in March, 2012. In terms of the agreement between the parties the whole amount of the facility then outstanding together with interest or any other amounts or charges payable or outstanding became immediately due for payment and recoverable through legal process.

It is accepted that prescription began to operate against the plaintiff.

In terms of s 15 (d) of the Prescription Act the period of prescription shall be three (3) years.

Section 25 (d) of the Prescription Act states that:

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

In the case of *Mukahlera v Clerk of Parliament & Ors* 2005 (2) ZLR 365 (S) it was held that:

"The word "debt" in this context encompasses "anything which may be sued for or claimed by reason of an obligation arising from statute, contract, delict or otherwise" (See s 2 of the Act). By virtue of s 16 (3), a debt is not deemed to be due "until the creditor becomes aware of the identity of the debtor and of the facts from which the debt arises."

In the case of *Chirinda v Van der Merwe & Anor* HH 51/13 it was stated by

CHIWESHE JP that:

“It is therefore trite that prescription runs from the date that a debt becomes due. A debt becomes due when the creditor becomes aware of the identity of the debtor and the facts giving rise to the cause of action. The cause of action in any action or claim 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.”

This court accepts that the prescription of the debt, *in casu*, ended around March, 2015, as espoused in para 26 of the Applicants Heads of Argument.

Accordingly the plaintiff’s claim has been extinguished by prescription.

In the words of MATHONSI J in the case of *John Conrad Trust v Federation of Kushanda Pre-Schools Trust and Ors* HH 503-15 and citing the case of MARAIS AJ in *Cape Town Municipality v Allie N.O1981 (2) SA* at p 5:

“...it cannot be denied that society is intolerant to stale claims. The consequence is that a creditor is required to be vigilant in enforcing his rights. If he fails to enforce them timeously he may not enforce them at all.”

In fact there should be legal certainty and finality in the relationship of the parties after the lapse of a certain period of time. It would be against public policy for one who has a complete cause of action to sit on it and not litigate upon it *ad infinitum*.

Accordingly it is the end of the road for the plaintiff.

#### Exception

This court also upholds the exception that the summons and declaration in this case are fatally defective and that plaintiff has no *locus standi*.

In terms of the High Court Order granted on 18 December, 2013 it was one John Mafunge I Chikura who was appointed as liquidator.

The herein cited plaintiff being “The Deposit Protection Corporation” does not, in terms of s 221 (2) of the Companies Act [*Chapter 24:03*], have the authority to represent the plaintiff. That section states that:

“The liquidator shall have power, with the leave of the court or with the authority mentioned in subsection (4) or in paragraph (a) of subsection (4) of section two hundred and eighteen ....  
(a) To bring or defend in the name and on behalf of the company any action or other legal proceedings of a civil nature and subject to any law relating to criminal procedure any criminal proceedings ...”

#### Non Compliance with Order 3 Rule 4

Similarly an exception was filed on the basis that the plaintiff’s summons do not comply with order 3 r 13 sur 4 of the High Court Rules, 1971.

In this matter it was submitted that the plaintiff claimed three different capital amounts. It was also submitted that it was not clear what the actual interest being claimed was as two different rates of interest were being used (See para 12 of Heads of Argument).

Accordingly it was submitted that the plaintiff's summons and declaration were vague and embarrassing in that three different capital amounts were claimed and it was also not stated when the entire debt became due and payable.

The defendants averred that they were left unable to deny or confess to the pleadings in their current form. The defendants maintained that they were entitled to know, with sufficient particularity the case they are to meet. In this context defendants relied on the case of *Trope v South African Reserve Bank and Anor* 1992 (3) SA 208 at p 210 C wherein it was stated that:

“Every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim, defence or answer to any pleading with sufficient particularity to enable the opposite party to reply thereto.”

This court accordingly upholds the plaintiff's exception.

In the final analysis this court upholds the special plea and exception taken by the defendants and accordingly dismisses the plaintiff's claim with costs.

*Gill Godlonton & Gerrans*, plaintiff's legal practitioners  
*Gunje and Chasakara Law Firm*, defendants' legal practitioners