DISTRIBUTABLE (77)

(1) MUTESWA WHOLESALERS (PRIVATE) LIMITED (2) LAWRENCE MUTESWA (3) TAKAADINI LANGTON MUTESWA
v
DELTA ZIMBABWE LIMITED T/A DELTA BEVERAGES

SUPREME COURT OF ZIMBABWE
GARWE JA, GUVAVA JA & MAVANGIRA JA
HARARE, NOVEMBER 20, 2017 & OCTOBER 17, 2019

T. Mpofu, for the appellants

L. Madhuku, for the respondent

GUVAVA JA

[1] This is an appeal against a judgment of the High Court, sitting at Harare, dated 31 May 2017 wherein the court granted absolution from the instance at the close of the plaintiff's case.

FACTUAL BACKGROUND

[2] The respondent instituted an action against the appellants in the court *a quo* seeking payment of the sum of US$249,169.00 being the amount due for goods sold and delivered to the first appellant. The liability of the second and third appellants was predicated upon deeds of suretyship which they executed as co-principal debtors in favour of the respondent.

[3] When the first appellant filed its plea on the merits, it also filed a counterclaim. It is important to note that the main claim was resolved on 9 February 2017 by DUBE J and

judgment was granted in favour of the respondent. The trial that was conducted *a quo* was entirely on the counterclaim filed by the appellants.

[4] In that counterclaim, the first appellant contended that it had concluded an agreement in May 2011 with the respondent in which the respondent agreed to supply both alcoholic and non-alcoholic beverages to the first appellant. It was a term of the agreement that the respondent would grant the appellant a five percent discount on the purchase price of all goods delivered. The first appellant stated that problems arose when the respondent breached that agreement by unilaterally decreasing the discount rate from five percent to 2.6 percent, coupled with a reduction of payment terms from 30 days to 7 days and later on a demand of payment upon delivery of the goods.

[5] The first appellant argued that this arrangement crippled it financially resulting in its failure to make the agreed payments on time and the consequent default. The first appellant further claimed that the respondent stopped supplying to first appellant's other outlets notwithstanding that only one outlet had failed to settle their debt within the agreed time. That being the case the first appellant, therefore, prayed for judgment in the sum of US$ 705 982.17 as net loss of business suffered due to the respondent's unilateral variation of the discount rate and its consequent failure to supply goods to the first appellant as per their agreement.

[6] The respondent vehemently defended the counterclaim. In its plea in reconvention, it averred that the agreement concluded with the first appellant was for one year i.e. from 26 March 2011 to 26 March 2012 and when that period lapsed the respondent no longer

had an obligation to continue supplying goods on the same terms. The respondent denied all claims made by the first appellant against it.

[7] The respondent also raised a plea of prescription in its plea in reconvention. It claimed that the appellants had waited for nearly four years before bringing their claim before the court. It argued that the Prescription Act [*Chapter 8:11*] states that a debt prescribes after three years from the time the debt becomes due. The appellants in response denied that the first appellants' claim had prescribed on the basis that it had been interrupted by arbitral proceedings that were conducted in the same matter.

[8] During the trial, the first appellant's witness, one Gerald Mazwi, who was employed as the operations manager of the first appellant, testified that the loss suffered by the first appellant was unknown to him.

[9] At the close of the first plaintiff's case *a quo* (first appellant in this matter), the respondent made an application for absolution from the instance. The basis of this application was threefold. Firstly, the respondent averred that the counterclaim had prescribed. Secondly, it argued that the evidence adduced did not establish any alleged breach of the agreement, and thirdly, it stated that there was no evidence before the court to prove the *quantu*m of the loss claimed.

[10] The court a *quo* granted the application for absolution from the instance as prayed for by the respondent. The court a *quo* reasoned that the first appellant's witness had testified that it had received communication regarding the reduction of the discount rate in March 2012. The effective date of the new rate from 5 percent to 2,6 percent of the

purchase price was to be effective from 26 March 2012. This was not in dispute as the letter was filed of record. The court *a quo* also found, on the issue of prescription, that the counterclaim that the court a *quo* was seized with had been instituted on 23 June 2016. A simple calculation showed that a period of four years had elapsed from the time that the letter from the respondent changing the terms of the agreement was received by the first appellant. It was the court's view that the debt had become due when the respondent changed the terms of the agreement. The court *a quo* also found that prescription had not been interrupted by the arbitral proceedings conducted in October 2014. It found that the appellants were not a party to such proceedings and therefore could not seek to rely on those proceedings as a basis of interrupting prescription. The court *a quo* in granting the application, further found that the *quantum* of loss had not been proved as insufficient evidence was placed before the court to substantiate the amounts claimed. As a result it found in favour of the respondent.

[11] It is this decision of the court *a quo* that the appellants sought to impugn on the following grounds of appeal.

i. "The court *a quo* erred in relating to the prescription point which had neither been raised in the pleadings nor raised in appropriate form.
ii. The court *a quo* erred (*sic*) coming to the conclusion that the appellants' claim could be defeated at the close of their case *a quo* and defeated on the basis of a defence raised by a defendant who had not testified in support of such defence.
iii. The court *a quo* erred in coming, without a basis, to the conclusion that the debt in this matter became due at the same time it arose.
iv. The court *a quo* erred in coming to the conclusion that no evidence had been led to prove the claim made and so grossly misdirected itself in failing to consider that appellants had led all the evidence at their disposal and that the onus was on respondent to dispute such evidence.**"**

APPELLANTS' SUBMISSIONS ON APPEAL

[12] In submissions before this Court, the appellants argued that the court *a quo* erred in upholding the point of prescription, which point had not been raised in the pleadings by the

respondent. They further submitted that absolution from the instance could not be granted based on a defence raised by the respondent in the court *a quo*. The granting of absolution from the instance had to be based on the case presented by the plaintiff (appellants in this case). It was therefore, the appellant's submission that the granting of such an application was misplaced. Reliance was placed upon the cases of *Standard Chartered Finance Zimbabwe Ltd v Georgias & Anor* 1998 (2) ZLR 547 (HC), *Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403 (A) 409.

[13] Mr *Mpofu*, for the appellants, further contended that, assuming that it was correct for the court *a quo* to rely on the defence of prescription raised by the respondent, a debt does not become due when it arises but when it becomes due. It was his submission that the critical question which the court *a quo* ought to have determined was when the need to make a claim arose. It was his argument that loss was not suffered on the date when the breach occurred in 2012 but when it was felt. In the appellants' view, the debt only arose after the negative financial consequences of the decision were felt. The appellants also submitted that this was a dispute which the court *a quo* ought to have resolved only after hearing both parties.

[14] Finally, the appellants submitted that the court *a quo* erred when it stated that the *quantum* of damages had not been proved. They argued that assessment of the damages depended on findings of fact which findings could only have been after the court had heard both parties.

RESPONDENTS' SUBMISSIONS ON APPEAL

[15] Mr *Madhuku*, for the respondent, submitted that what was essentially before this Court was an appeal against a decision involving the exercise of judicial discretion. Therefore,

the court could not interfere with such exercise of discretionary power unless it is shown that the exercise of such discretion was irrational or was not supported by the facts. In his view, nothing raised by the appellants warranted the setting aside of the court *a quo*'s exercise of discretion.

[16] On the question of prescription, he submitted that prescription had been properly pleaded and that the appellants, in agreeing to have it referred to trial, had accepted that it was one of the issues to be determined at trial. He also submitted that the debt became due when the letter altering the terms of the agreement was received in March 2012.He thus submitted that the court *a quo* was correct in finding that the debt had prescribed.

[17] With regards to the issue of the *quantum* of damages the respondent submitted that the appellants had thumb sucked a figure of US$ 705 982.17 without any justification. No evidence was led by the appellants to prove those damages as the appellants' witness had stated in evidence that he did not know the amount of damages suffered.

ISSUES FOR DETERMINATION

[18] Although the appellants raised four grounds of appeal, I am of the view that those grounds only raise three issues for determination which are as follows:

1. Whether or not the issue of prescription was properly before the court.
2. If so, whether the appellants' claim had prescribed.
3. Whether or not there was sufficient basis to grant absolution from the instance at the end of the plaintiff's case.

I propose to deal with these three issues *in seriatim.*

Whether or not the issue of prescription was properly before the court.

[19] In determining this issue, it must be stated from the onset that the onus to prove prescription was on the respondent. A plea of prescription is proved by placing before a court sufficient facts and/or evidence which would enable the court to find in the respondent's favour. In the case of *Masole v Emmanuel* 2006 (1) BLR 541 (HC) [High Court, Francistown], it was held:

> "A plea of prescription must always set out sufficient facts to show what it is based on. Onus is on the person raising the special plea to show that the claim prescribed*."*

The party raising prescription must therefore favour this Court with evidence on when the debt became due for the court to uphold the special plea of prescription.

[20] The appellants alleged that the court *a quo* erred in relating to the issue of prescription which had neither been raised in the pleadings nor proved in evidence. It is important to note that when the respondent filed its initial plea to the counter claim, it had not pleaded prescription. The respondent however later applied to amend its plea to incorporate prescription by Notice of Amendment dated 19 October 2016. The amendment was admitted at the pre-trial conference. It was also one of the issues referred to trial in terms of the Joint Pre Trial Conference Minute dated 4 November 2016. The court *a quo* satisfied itself in the judgment that the plea of prescription had been properly raised in the pleadings. It seems to me, from these facts that the plea of prescription was properly before the court.

[21] The respondent argued that the appellants' claim must be determined by s 15 (d) of the Prescription Act [*Chapter 8:11*] (the Act) which states as follows:

> *"*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."

The Act applies to debts. A debt is defined under s 2 of the Act. Its centrality to the issue under consideration necessitates its reproduction. It reads as follows;

> "Without limiting the meaning of the term, includes anything which may be sued for or claimed by reason of an obligation arising from statute, contract, delict or otherwise."

*(*See *Desai N.O. v Desai & Others* 1996 (1) SA 141 (A) – which deals with the equivalent definition in the South African Prescription Act (No. 68 of 1969)).

[22] From this definition, it is apparent that the Act only applies where there is a debt as defined in terms of s 2 of the Act.

The important question to be answered is whether there was any debt that could be sued for or claimed by reason of any obligation arising from statute, contract, delict or otherwise. The fact that the appellants were claiming monies that accrued as a result of the variation of the percentage discount rate amounts to a debt. In my view the claim made by the appellants constituted a debt.

[23] Having regard to the above finding, it is my view that the court *a quo* cannot be faulted in finding that the issue of prescription was properly before it. I now turn to the second issue.

Whether the appellants' claim had prescribed

[24] The issue before the court *a quo* was whether or not the claims against the appellants by the respondent had prescribed. The party who alleges prescription must allege and prove the date of the inception of the period of prescription. It is trite that prescription starts to run as soon as the debt becomes due.

[25] In order to determine the question of when the debt became due the court had to make a finding on the cause of action upon which the respondent's claim was premised. It also had to determine specifically when the cause of action arose. What constitutes 'a cause of action' was described in *Abrahams & Sons v SA Railways and Harbours* 1933 CPD 626. At 637 WATERMEYER J stated:

> "The proper meaning of the expression 'cause of action' is the entire set of facts which gives 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."

[26] Section 16 of the Act outlines when prescription begins to run. The provision reads as follows;

> "16 When prescription begins to run
> (1) Subject to subsections (2) and (3), prescription shall commence to run as soon as a debt is due.
> (2) If a debtor wilfully prevents his creditor from becoming aware of the existence of a debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt.
> (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."

The Act therefore provides that a debt is deemed to be due when the creditor becomes aware of the identity of the debtor and of the facts from which the debt arises. To prove that a party became aware of the identity of the debtor or facts from which the debt

arose, there is need to lead evidence for the special plea to be sustained. As a general rule prescription will need to be established by the presentation of evidence.

[27] In *casu*, what was before the court a *quo* was testimony to the effect that the reduction of discount rate from five percent to 2.6 percent was communicated to the first appellant in March 2012. The effective date of the new discount rate was to be 26 March 2012. A letter communicating this fact is filed of record. This letter in my view is evidence of the fact that there was no longer any duty on the respondent to give the first appellant a five percent discount. The first appellant did not dispute both the contents and the authenticity of that letter in its evidence.

[28] If, indeed, it was the appellants' case that the first appellant was entitled to a five percent discount, the first appellant was supposed to lead evidence to support this averment. This, the first appellant did not do, contrary to the sentiments expressed in *Circle Tracking v Mahachi* SC 4/07. It is trite that he who alleges must prove.

[29] In my view the first appellant has not placed such evidence before the court. That being the case, the appellants have therefore not proved that they incurred a 2.4 percent shortfall. The four years that they remained silent must be regarded as a tacit acceptance of the prevailing contractual agreement. The fact that they continued to trade after the five percent rate had lapsed shows their acceptance of the new discount rate. Therefore, by virtue of the doctrine of *quasi-mutual* assent, they are estopped from claiming damages.

[30] In *Smith v Hughes* L.R 6 Q.B 597 at p 607, the court stated that:

> "If, whatever a man's real intention may be, if he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms."

[31] Applying the above principles to the present case, the appellants, by not disputing the propriety of the 2.6 percent discount applied by the respondent and by their continued trade with the respondent for more than four years afterwards, they had, by conduct, accepted the variation of the terms of their contract. If they genuinely felt that the variation breached their contractual rights, the appellants ought to have refused delivery and challenged the same. In the absence of any challenge to the variation of the discount, it is clear that, after the variation of the percentage discount, there was acquiescence by the appellant. In *Jcdecaux Zimbabwe (Pvt) Ltd v City of Harare* HH 400/17 the court held that:

> "It is trite that silence does not necessarily amount to acquiescence. Each case must be decided upon its own circumstances. However, where the circumstances are such that a party was reasonably and fairly expected to respond and does not do so, then the court may infer acceptance of an offer …. In the circumstances of this case, that the respondent did not respond to, and decline, appellant's exercise of its option to renew the lease agreement when it had a duty to do so carries with it a presumption of acquiescence, more so since the respondent did not refute the existence of a contract for more than a year thereafter."

[32] By their conduct the appellants consented to the variation of their contract. The court *a quo* correctly found that the matter had prescribed and that prescription began to run as soon as the appellants became aware of the percentage variation.

[33] The appellants also alleged that, assuming the plea of prescription was properly raised, their claim had not prescribed because it was interrupted by arbitration proceedings on 21 October 2014. The respondent disputed this and submitted that the

appellants could not seek to rely on those arbitration proceedings as they were not a party to them.

[34] It is not in dispute that the arbitration proceedings addressed the issue of variation of the percentage discount rates and involved other outlets which were being supplied by the respondent. Whilst the cause of action leading to the institution of arbitral proceedings might have emanated from the respondent's unilateral variation of the discount rate, the appellants could not seek to rely on those proceedings as they were not a party to them. The claimant in those proceedings was the Beverages Wholesale and Retailers Association.

By virtue of the fact that the appellants were not a party to these proceedings, they could not have relied upon the arbitral proceedings. In any event the claim in the arbitral proceedings was not for damages which is the claim *in casu*. It is also highly unlikely that the papers exchanged in arbitration proceedings would constitute "process" as defined in s 19 (1) of the Prescription Act.

[35] It is for the above reasons that the court finds that the court *a quo* was correct in finding that the appellants' claim had prescribed. Although the issue of prescription would, in my view, dispose of this appeal, it seems to me that since it was one of the issues upon which the application for absolution from the instance was raised before the court *a quo*, it is necessary, for the sake of completeness, to deal with the third issue, which is set out below.

Whether or not there was sufficient ground to grant absolution from the instance at the end of the respondent's case.

[36] The first appellant (then plaintiff in reconvention) submitted before the court *a quo* that the respondent would supply alcoholic and non-alcoholic beverages at 5 percent discount. The first appellant claimed that the respondent then unilaterally decreased the discount to 2.6 percent. As a result, it alleges that it suffered loss in the sum of US$ 705 982.17. After making this submission the first appellant closed its case. The respondent then applied for dismissal of the first appellant's case on the basis that the first appellant had failed to establish a *prima facie* case at the end of its case. The respondent relied on the case of *United Air Charters v Jarman* 1994 (2) ZLR 341 (S), which sets out the test for granting absolution from the instance at the end of plaintiff's case. GUBBAY CJ, had this to say;

> "The test in deciding an application for absolution from the instance is well settled in his jurisdiction. A plaintiff will successfully withstand such an application if, at the close of his case, there is evidence upon which a court, directing its mind reasonably to such evidence, could or might (not should or ought to) find for him."

See *also Munhuwa v Mhukahuru Bus Service (Pvt) Ltd* 1994 (2) ZLR 382 (H).

[37] It is trite that the court cannot *mero motu* consider whether absolution must be granted. It is an option which is available to the defendant, upon application. When an application for absolution from the instance is made at the end of the plaintiff's case the test is**:** what might a reasonable court do, that is, is there sufficient evidence on which a court might make a reasonable mistake and give judgment for the plaintiff; if the application is made after the defendant has closed his case the test is: what ought a reasonable court do?

In deciding what a court may or may not do, there is an implication that the court may make an incorrect decision, because at the close of the plaintiff's case, it will not have heard all the evidence.

[38] The respondent argued that no evidence was placed before the court to support the allegations raised by the first appellant. The respondent further argued that the first appellant could not enforce rights of an agreement that had terminated. Although the first appellant's witness confirmed that the agreement had expired, the first appellant remained adamant that the agreement had been renewed on the same terms. No evidence was placed before the court to support this averment.

The respondent further argued that no evidence was led to substantiate the losses claimed by the first appellant. There was no proof that the first appellant had sold the volumes claimed, neither were audited accounts produced to prove the level of profitability.

[39] A decree of absolution from the instance is derived from Roman Dutch law. It is the appropriate order to make when the plaintiff has not discharged the ordinary burden of proof. If, at the end of the plaintiff's case there is insufficient evidence upon which a reasonable man could find for him, the defendant is entitled to absolution. See *LH Hoffman, DT Zeffert, The South African Law of Evidence* (4th ed) p 507, who notes the following:

> "It has also been said that the term 'absolution from the instance' is used to describe the finding that may be made at either of two distinct stages of trial. In both cases it means that the evidence is insufficient for a finding to be made against the defendant."

[40] In the case of *Nobert Katerere v Standard Chartered Bank Zimbabwe Limited* HB 51-08, it was stated that:

> "The court should be extremely chary of granting absolution at the close of plaintiff's case. The court must assume that in the absence of very special considerations, such as the inherent unacceptability of the evidence adduced, the evidence is true. The court should not at this stage evaluate and reject the plaintiff's evidence. The test to be applied is not whether the evidence led by the plaintiff establishes what will finally have to be established. Absolution from the instance at the close of the plaintiff's case may be granted if the plaintiff has failed to establish an essential element of his claim- Claude neon Lights (SA) Ltd v Daniel 1976 (4) SA 403(A); Marine & Trade Insurance Co Ltd v Van Der Schyff 1972 (1) SA 26(A); Sithole v PG Industries (Pvt) Ltd HB 47-05".

[41] What flows from the cases cited above is that absolution from the instance will be granted if there is insufficient evidence on which a court directing its mind reasonably to such evidence, could or might (not should or ought to) find for the plaintiff. In other words, if the appellant fails to discharge the onus on his cause of action, which evidence, would have enabled the court to call the respondent to answer the allegations, the court can grant absolution from the instance.

[42] In *casu*, what was before the court a *quo* was an allegation that the parties had entered into an agreement in May 2011. It terms of this agreement, the first appellant was entitled to a five percent discount on all products supplied. The first appellant further alleged that the respondent had unilaterally decreased the discount rate from five percent to 2.6 percent. According to the first appellant this caused loss on its part. However, no comment is made by the first appellant regarding a letter communicating the change on the discount rate which was before the court *a quo*.

[43] Also before the court *a quo* was the agreement entered into by the parties. Clause 2 of the agreement is clear that the contract was for a period of 12 months terminating in 12 June 2012. It seems to me that, after that date, the parties were at liberty to renew

the agreement upon its expiration. No proof was placed before the court by the first appellant showing that the agreement was renewed and that the parties retained the five percent discount. On this basis alone, the first appellant failed to prove that it was entitled to a five percent discount after the termination of that agreement.

[44] Also, before the court *a quo* was a letter by the respondent reminding the first appellant of the credit terms. The letter by the first appellant addressed to the respondent which is filed of the record confirms that the respondent had changed the aging of invoices. Nothing suggests that there was any obligation on the respondent to consult the first appellant before changing the days of aging of invoices especially in the absence of an agreement to that effect.

[45] The court *a quo* cannot be faulted for coming to the conclusion it did. In any event, an order granting absolution from the instance is an exercise of judicial discretion and it was properly made.

DISPOSITION

[46] The respondent had claimed costs on a legal practitioner and client scale. In my view there is no basis which has been made out for such an award.

[47] In the result the appeal be and is hereby dismissed with costs.

GARWE JA: I agree

MAVANGIRA JA: I agree

Chinawa Law Chambers, appellants' legal practitioners

Mundia & Mudhara, respondent's legal practitioners