

AVRIL MILWARD
versus
DUDUZILE TRACY MANHENGA

IN THE HIGH COURT OF ZIMBABWE
BERE J
HARARE 21 AUGUST 2015 AND 30 AUGUST 2017

Opposed Application

Ms R Peters, for the plaintiff
Mr E T Moyo, for the respondent

BERE J: After hearing arguments in this case I dismissed the plaintiff's case on 21 August 2015. I did indicate then that my reasons would follow. Here they are.

The facts

The following facts are common cause in this matter;

On 15 March 2010 the plaintiff's husband who was riding a motor cycle was involved in an accident with the Defendant's motor vehicle along Sherwood Drive, Mabelreign, Harare. The plaintiff's husband sustained severe injuries as a result of the accident and he died on the same day on admission at the West End Hospital, Harare.

On 15 November 2013 the plaintiff issued out summons in this court against the defendant claiming damages for loss of support, emotional stress and interest from date of judgment to date of full payment. The summons were served on the defendant on the 3rd of December 2013.

Upon being served with the summons the defendant swiftly responded by filing a special plea arguing that the plaintiff's cause of action had prescribed and that the defendant's indebtedness had been extinguished by operation of law, and sought to dismiss the action on this technicality. There was no replication to the special plea filed by the defendant.

Issue for determination

The simple issue for determination arising out of these facts is whether or not the plaintiff's action has been prescribed as argued by the defendant.

Plaintiff's submissions before the court

Ms *Peters* who appeared for the plaintiff sought to rely on section 16 (1) of the Prescription Act¹ and argued that in her understanding the cause of action in this case arose on 7 October 2013 when the defendant's criminal trial was finalized, which trial resulted in the conviction of the defendant for culpable homicide against her late husband.

Counsel argued that after the accident in 2010 the defendant had tendered a plea of not guilty and only changed her plea to guilty in September 2013.

Counsel further argued that in her view, the plaintiff could not have initiated civil proceedings against the defendant before the defendant was convicted in the criminal trial. She was emphatic that the plaintiff's cause of action only arose upon the defendant's conviction in the criminal proceedings.

It was further argued on behalf of the plaintiff that the defendant's delictual liability could only have been acted upon if accompanied by culpa and that according to plaintiff's counsel, the defendant's culpa or negligence was only determined upon her conviction.

Defendant's submissions before the court

Mr *Moyo* for the defendant argued that there was no need for the plaintiff to have waited for exactly three years eight months from the date the cause of action arose until the issuing of court process for damages in this case.

Counsel's view was that the cause of action arose on the date of the accident which claimed the plaintiff's husband's life on the same day.

¹ . Chapter 8:11

Relying on section 14 and 15 (d) of the Prescription Act² counsel further argued that the plaintiff's case was fatally defective and bad at law in that the cause of action had been extinguished by prescription.

Determination of the issues raised

Section 14 of the Prescription Act³ generally provides for the extinction of debts by prescription. The section is framed as follows

“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.”⁴

Under section 2 of the same Act a debt is said to include “--- anything which may be sued for or claimed by reason of an obligation arising from statute, delict, contract or otherwise.”

It will be noted that section 15 of the Prescription Act speaks to periods of prescription of debts and section 15(d) thereof gives three years as the prescription time of debts as in this case.

Section 16 of the same act focuses on when prescription begins to run. In relation to a motor accident the legal position has been sufficiently transversed in this same court. In the case of *Peebles v Dairboard Zimbabwe (Private) Limited* where MALABA J (now CJ) remarked as follows:

“It is trite that a delictual debt arises when wrongful conduct which is not *per se* actionable but is accompanied by culpa causes injury or damage to the person of another or his property. In *Oslo Land Co Ltd v Union Govt* 1938 AD 584 WATERMEYER JA said at p. 590:

“The right of action in such a case is complete as soon as damage is caused to the plaintiff by reason of the defendant's negligent act.”

“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 ----. A cause of action was defined by LORD ESTHER MR in *Read v Brown* (1888) 22 QB 131 as every fact which it would

². (*supra*)

³. (*supra*)

⁴. (*supra*)

be necessary for the plaintiff to prove if traversed in order to support his right to the judgment of the court.”⁵

In the same case the learned Judge, commenting on the case that he was seized with had this to say:

“In this case, “the facts from which the debt arises” are the facts relating: to the damage and loss (the nature and extent of the bodily injuries; the pain and suffering that ensued; the loss of earning; how the damage was caused (the collision, --- and the wrongful conduct accompanied by culpa ---.”⁶

In his well detailed submissions, Mr *Moyo* referred the court to other decided authorities which reinforce the position of the law as enunciated above.

As I have already indicated, the special plea filed by the defendant was not replied to, thereby further weakening the plaintiff’s case. The plaintiff must therefore be deemed to have been contended with the position taken by the defendant.

It is clear to me that the plaintiff had at her disposal all the details entitling her to sue the defendant on the very day her husband died due to the conduct of the defendant. It cannot possibly be true that she needed to wait for the defendant to be pronounced guilty first before she could initiate civil action. It was a monumental blunder by the plaintiff to delay the institution of civil litigation against the defendant and she simply had no answer to the special plea raised.

I am tempted to refer to the wise counsel by CHIDYAUSIKU J (as he then was) in the case of *Lovemore Sango v Chairman of the Public Service Commission and Another* where he remarked as follows:

“Those who sit on their litigation until cows come home have only themselves to blame if condonation is refused when they finally wake up from their years of somnambulism”.⁷

Although the learned Judge was commenting on an application that had been made for condonation of late filing of a civil action, I believe his comments apply with equal force to the present case.

⁵. 1999 (1) ZLR 41 (H) at p 45 C -E

⁶. page 45 F-H

⁷. HH28-96 at p.2

Disposition

In the result, the Plaintiff's delictual debt was indeed extinguished by prescription, and it is bad at law and must be dismissed with costs. It is so dismissed.

J Mambara and Partners, plaintiff's legal practitioners
Scalen and Holderness, defendant's legal practitioners