

JO-AN IRELAND N.O.
(In her capacity as the Executrix Estate Late Joshua Bechowitz Weller)
versus
OLD MUTUAL LIFE ASSURANCE COMPANY ZIMBABWE LTD
100 THE CHASE, EMERALD HILL, HARARE

HIGH COURT OF ZIMBABWE
TAKUVA J
HARARE, 1 March & 7 October 2024

Civil Trial

T Mupangwa, for the plaintiff
R Moyo, for the 1st defendant

TAKUVA J:

Introduction

On 7 June 2023, plaintiff issued summons claiming:

- “1) Payment by the defendant to the plaintiff the sum of eighty four thousand three hundred and twenty-two United States dollars (USD 84 322) being unpaid annuity payments arising from retirements annuity contracts issued by defendant effective 31 July 2021.
- 2) Interest on the aforesaid sum at the prescribed rate calculated from the date of summons to date of full payment.
- 3) Costs of suit on Attorney Client scale.”

The claim was opposed by the first defendant who raised a special plea of prescription. After replication, the matter was set down for hearing on the sole issue of whether or not the plaintiff’s claim had prescribed.

The Facts

Sometime in 1988 and 1994, the parties entered into a written retirement annuity policy namely number 7097386 and 7262909. In terms of the policy, the defendant undertook to pay monthly annuities to the plaintiff upon his retirement. Thereafter, the plaintiff advised the defendant of his retirement and demanded payment of monthly annuities as per the agreement.

The late Joshua Bechowitz Weller after consulting “experts” demanded monthly annuities of USD481.22 and USD61.26 respectively from policy number 7097386 and from policy number 7262909 effective from 1 April 2013 payable in arrears. Plaintiff has duly complied with his obligations under the respective policies up to his demise on 8 August 2021. According to the deceased’s computation, the total in unpaid monthly payments since 2013 adjusted to interest at 10 per cent is USD84 322 effective 31 August 2021.

The defendant entered an appearance to defend on 12 June 2023. On 14 July 2023, first defended raised a special plea of prescription on the grounds that:

- a) Plaintiff’s claim arose when he retired in May 2010.
- b) It is plaintiff’s contention that on 1 April 2013 a dispute arose between plaintiff and first defendant on the calculation of the amounts due to the plaintiff by the first defendant.
- c) These are the amounts plaintiff has claimed from the first defendant in the sum of USD84 332 with interest thereon at the prescribed rate from the date of summons to date of payment in full and costs of suit at legal practitioner and client scale.
- d) In his earlier summons under HC 6415/21, plaintiff alleged that he retired from his employment in May 2010. It is therefore on that date that the alleged amounts fell due from the first defendant.
- e) Even assuming plaintiff’s cause of action arose on 1 April 2013 when a dispute as to the calculation of the amounts due to him arose, still his claim has prescribed. The plaintiff’s claim should have been brought within three (3) years of his alleged grievance in April 2013 when he came to the conclusion that the amount that had been calculated and or paid to him was insufficient or had not been properly compiled.
- f) The plaintiff has made his claim against first defendant ten (10) years later after his grievance. Therefore plaintiff’s claim against first defendant has been extinguished by prescription in terms of the Prescription Act [*Chapter 8:11*].

In its REPLICATION to the first defendant’s special plea, plaintiff averred as follows:

- i. It is denied that the plaintiff’s claim has prescribed and that plaintiff’s cause of action arose from the date of retirement or on 1 April 2013 when a dispute as to calculation of the amounts.

- ii. In terms of the law, pension is an ongoing obligation right from the start. Therefore the matter can not prescribe.
- iii. The defendant has always acknowledged being indebted to the now deceased. Therefore, the question for determination before the court is of how much is to be paid to the plaintiff.

The Issue

The sole issue for determination by this court is whether or not the plaintiff's claim has prescribed.

The Law

Section 14 of the Prescription Act [*Chapter 8:11*] provides that:

“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.”

Section 15 then provides as follows:

“PERIODS OF PRESCRIPTION OF DEBTS

The period of prescription of debts shall be:

- (a)
- (b)
- (c)
- (d) Except where an enactment provides otherwise, three years in the case of any debt.”

Further section 2 of the said Act defines a debt as follows:

“In this Act, debt without limiting the meaning of the term, includes anything which maybe sued for or claimed by reason of an obligation arising from statute, contract, delict or otherwise.”

In *Old Mutual Property Investment Corporation (Pvt) Ltd v GMB* HH 216/02, the court stated that:

“The issue for consideration and determination on the facts of this matter is when did the plaintiff's cause of action arise? In law prescription commences to run when the plaintiff's cause of action reaches completion. See *Paul Robin Denton v Director of Customs & Excise* HH 216/89 and *EM Powerpoint (Pvt) Ltd t/a Powerpoint Building Contractors v City of Bulawayo* HB 5/2001. Put in another way, prescription can not begin to run against a creditor before its cause of action is fully accrued. That is to say before he is able to pursue his claim...”

In *Mackenzie v Farmers' Cooperative Meat Industries Ltd* 1922 AD, the court explained the meaning of cause of action as follows:

“every fact which it will be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment of the court. It does not comprise of every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.”

The rationale of prescription was set out in *Murray & Roberts Construction (Cape) (PTY) Ltd v Upington Municipality* 1984 (1) 8A 571A at 587 in the following terms:

“...its main practical purpose is to promote certainty in the ordinary affairs of people. Where a creditor lays claim to a debt which has been due for a long period, doubt may exist as to whether a valid debt ever arose, or if it did, whether it has been discharged. The alleged debtor may have come to assume that no claim would be made, witnesses may have died, memories would have faded, documents or receipts may have been lost etc. These sources of uncertainty are reduced by imposing a time limit on the existence of a debt and the relevant time limits reflect to some extent, the degree of uncertainty to which a particular type of debt is ordinarily subject.”

In *casu*, counsel for the plaintiff unfortunately raised constitutional issues in the heads of argument. I say unfortunately because no such issues were raised in replication. A concession was made that there are only two defences raised in paragraphs 5 and 6 of the replication. Accordingly, the constitutional issues are not properly before the court.

In para 5 of plaintiff’s replication to defendant’s special plea, plaintiff stated that the matter has not prescribed because “in terms of the law pension is an ongoing obligation.” In my view, this argument has no merit because the dispute is on the liability to pay. From facts that are common cause this grievance arose in April 2013 when defendant refused to pay the sum claimed. In fact, the alleged amounts fell due from defendant in May 2010, the date plaintiff retired from work. It follows therefore that the cause of action *in casu* arose in April 2013. Plaintiff has filed his claim ten (10) years later after his grievance with defendant had arisen. Therefore plaintiff’s claim against the defendant has been extinguished by prescription in terms of the Prescription Act [*Chapter 8:11*].

As regards costs, I do not find any reason to order plaintiff to pay defendant’s costs of suit at a higher scale. **In the result, it is ordered as follows:**

- 1) The Special Plea of Prescription be and is hereby upheld.
- 2) The plaintiff’s claim be and is hereby dismissed with costs at ordinary scale.

Thompson Stevenson & Associates c/o Coghlan, Welsh & Guest, plaintiff’s legal practitioners
Gill, Godlonton & Gerrans, defendant’s legal practitioners