DINHIDZA MINE WORKERS (E.MUTEMA AND 58 OTHERS)
versus
NYARADZO CATHERINE MAGOGE
AND
TANGO MINE (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
FOROMA J
HARARE, 21 February 2017 and 25 July 2018

Civil Trial

T.G Musarurwa, for the applicant
L. Uriri, for the respondents

FOROMA J: The trial of this matter was set down before me with two defendants cited as follows – first defendant was Nyaradzo Catherine Magoge –Mashindi and second defendant as Tango Mining P/L T/A Dinhidza Mine. Second defendant was the former employer of the plaintiffs. The summons was apparently served on persons who had taken over Dinhidza mine from second defendant without being second defendants' successor in title. As a result an appearance to defend was erroneously entered on the instructions of the persons served with the summons who instructed Mr Muza who has since realised that those that instructed him to enter appearance to defend had no power or authority to act for and on behalf of second defendant. As a result the appearance to defend as well as the plea that Mr Muza filed purportedly on behalf of second defendant was thus unauthorised. Mr Muza has since withdrawn from the matter after applying for the striking off of both the appearance to defend and the plea invalidly filed as aforesaid.

Plaintiffs have since decided that they will only proceed against first defendant and not against second defendant on whom as a matter of fact they did not validly serve the summons and declaration.

At the pre-trial conference the parties agreed that the issue as to whether plaintiffs' claims were prescribed would be dealt with as a point *in limine* at the trial. As a result at the commencement of the trial the parties agreed that they would make submissions on the issue of

prescription on which the court would be required to rule before proceeding with the trial appreciating of course that in the event that the court upheld the defence's case on prescription that would defeat plaintiffs' claims and the converse would be true.

Parties in addition agreed to deal with two additional legal issues *in limine* which depending on the court's findings could also dispose of the matter. The parties agreed therefore to address the following issues in limine.

1) Whether the plaintiffs summons are defective in their citation of plaintiff.
2) Whether plaintiffs claim (the debt) has prescribed.
3) Whether the plaintiffs' cause of action is bad on the basis that the currency of the claim (debt) as pleaded is not the currency of the debt.

Both parties addressed heads of argument in support of their respective positions. It is important to give a bit of background of the dispute so that the resolution of the issues is easier to follow. I accordingly give a brief factual background below.

The plaintiffs are former clients of defendant. Defendant successfully negotiated with the plaintiffs' former employer and agreed some retrenchment benefits for plaintiffs at the time the former employer was disposing of its mine (Dinhidza Mine). It is common cause that defendant managed to secure a total sum of ZW$60 billion being the retrenchment amount due to the plaintiffs cumulatively.

Plaintiffs allege that their former employer paid by cheque the ZW$60.00 billion due to the plaintiffs through defendant as their legal practitioner but defendant did not pay over to the plaintiffs the said amount nor did defendant render an account to them in respect of the said amount. As a result plaintiffs filed their complaint against defendant to the Law Society of Zimbabwe which after investigating the matter appears to have ruled that plaintiffs were owed the amount but needed to excuss defendant before it would be required to consider compensating the plaintiffs' presumably through in terms of its Compensation Fund rules. As a result of the position taken by the Law Society of Zimbabwe plaintiffs sued defendant claiming the ZW$60 billion which they claimed defendant misappropriated. Plaintiffs' claim is pleaded in the declaration from paragraph 4 as follows.

> "(4) Sometime in November 2008 second defendant (plaintiffs employer issued a cheque in favour of first defendant) (now defendant)'s law firm in the sum of ZW$60 billion being

> retrenchment benefits due and payable to the plaintiffs in terms of the retrenchment exercise that had been concluded by and between the parties during that period."
> (5) First defendant undertook to pay the plaintiffs their retrenchment benefits as soon as the cheque had matured in her trust account maintained at Metropolitan Bank in Harare.
> (6) Undertakings (sic) the first defendant failed neglected and / or refused to pay the said amount to plaintiffs and converted the whole amount to her own use."

Plaintiffs claim is for payment of US$121 857.82 being the US$ equivalent of ZW$60.00 billion as converted using the exchange rate as determined by the Reserve Bank of Zimbabwe's Exchange Control Inspectorate.

Defendant in its first objection *in limine* as enumerated above objected that plaintiff identified itself as Dinhidza Mine Workers (E Mutema and 58 others) suggesting that plaintiff was a single entity as opposed to plaintiffs. Defendant further argued that in any event the 58 others were not named in the summons and declaration. In essence the argument defendant advanced was that the summons is a nullity to the extent that there is no person natural or juristic who answers to the name Dinhidza Mine Workers as plaintiff. Defendant further argued that the qualification E Mutema and 58 others does not resurrect the dead.

In response to this argument plaintiffs' counsel refers to Rule 11b of the High Court Rules 1971 which reads as follows;

> "Contents of summons
> Before issue every summons shall contain …(b) the full name, and address for service of the plaintiff and if he sues in a representative capacity the capacity in which he sues."

In para 1 of the declaration plaintiffs pleaded their citation as follows – "The plaintiffs" are former workers of the second defendant herein and their names are listed on Annexure A hereto. Their address of service No. 9 28 George Silunduka Avenue Harare (sic). The Annexure A which is attached to the declaration lists the full names of plaintiffs. It is noteworthy that in subsequent paragraphs of the declaration plaintiffs are referred to not as plaintiff but as plaintiffs. Clearly therefore when reference of plaintiff is given as Dinhidza Mine Workers this is a summary of plaintiffs purely for convenience and not that plaintiff is Dinhidza Mine Workers. In reality and as pleaded plaintiffs are Emmanual Mutema and 58 others (certain) as cited with their full names per Annexure A who are natural persons. I accordingly do not find merit in the first ground of objection.

b) Defendant also argues that plaintiff's claim has prescribed in terms of s 15 (d) of The Prescription Act [*Chapter 8:11*] considering the cause of action arose in 2018 and summons was only served on defendant on the 8th April 2014. Plaintiffs' counsel counter argued that defendant's claim of prescription is a triable issue and that the debt in any event has not prescribed. According to plaintiffs the cause of action arose when the Law Society completed its investigation and informed the plaintiffs of its findings including the location of defendant on 2 April 2014. To determine the date when prescription commenced to run i.e. the due date of the debt there are certain criteria to be satisfied - See *ZIMSACO P/L* v *San Mining (Pvt) Ltd* where CHIGUMBA J had the following to say–

> "when is a debt due for purposes of the calculation of the time when prescription begins to run? Section 16 (3) of the Prescription Act stipulates that 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" However a creditor is deemed to have become aware of such identity and of such facts if he could have acquired knowledge … thereof by exercising reasonable care"

See also *Ndlovu* v *Posts and Telecommunications Corporation* 19…8 (2) ZLR 334 H at 336 and *Mukahlera* v *Clerk of Parliament & Others* 2005 2 ZLR 365 (SC).

In *Mukahlera's* case the Supreme Court quoted with approval WATERMEYER J in *Abrahamse & Sons* v SARH 1933 CRD who said;

> "The cause of action in relation to a claim 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".

Defendant *in casu* did not indicate the date on which it claims the plaintiff's claim either became due or was deemed to be due. Plaintiffs argued that plaintiffs were not aware of the combination of facts that were material in proving their case and as a result had to await the determination of their complaint to the Law Society against the defendant which only was determined and communicated on 2 April 2014. Defendant argues that the cause of action arose sometime in November 2008 and prescribed at the very best for the plaintiffs on 30 November 2011. The court has not been made aware as to when the debt became due and claimable or on what basis the debt is deemed to have become due and payable. Section 16 (2) of the Prescription Act provides as follows -

> "16 If a debtor willfully 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."

Plaintiffs argue that defendant avoided both the Law Society and plaintiffs by changing her offices various times without informing plaintiffs of her changed addresses. It is arguable therefore whether prescription continued to run during this period when defendant was evading plaintiffs.

In the circumstances it is not possible to find definitively whether or not plaintiffs claims have prescribed. It will be necessary for defendant to adduce evidence to prove its defence as the onus is on defendant on the issue of prescription.

Currency Nominalism

Defendant's last point *in limine* was that plaintiffs claim is a bad cause of action on account of conversion by plaintiffs of the debt which originally arose in Zimbabwe dollars to the United States dollars in the summons. The case authorities cited by defendant's counsel correctly state the legal position and plaintiffs' counsel fairly conceded so. However plaintiff's counsel argues that the said authorities are distinguishable in that in those cases the applicants sought to alter the currency of the claim as ordered by the court in the judgment either on the basis of inflation or non-use of a currency which is not the case in this matter.

The principle of currency nominalism entails the recognition of the nominal value of the debt at the time of its accrual. In *casu* there is no dispute that the debt accrued as a Zimbabwe dollar debt. All plaintiffs did was enquire from the Reserve Bank of Zimbabwe what the nominal value of their debt in United States dollars was in 2008. The Reserve Bank informed plaintiffs that the nominal; value was in the amount that plaintiffs then sued on in this action i.e. *per* summons. Indeed this is different from a case where a litigant seeks to alter an already obtained judgment or amend summons on account of fluctuations in the original currency of the debt. I consider the basis of the distinction of the authorities cited by defendant as well taken. In the circumstances the point *in limine* that defendant based on currency nominalism is without merit.

Accordingly the preliminary points raised by defendant are hereby dismissed with costs.

The matter will accordingly proceed to trial on the merits.

Mambosasa Legal Practitioners,plaintiff's legal practitioners
Muchineripi & Associates, defendant's legal practitioners