RITA MARQUE MBATHA
versus
FARAI BWATIKONA ZIZHOU
and
CONFEDERATION OF ZIMBABWE INDUSTRIES

HIGH COURT OF ZIMBABWE
DUBE J
HARARE, 14 January 2016and 3 February 2016

Opposed Matter

The plaintiff, in person
H Mutasa, for the defendant

DUBE J: The application before me is a special plea and exception.

The brief facts surrounding this claim are as follows. The plaintiff was employed by the Confederation of Zimbabwe Industries reporting to the first defendant who was its President and Chief Executive Officer. On 18 June 2014 the plaintiff issued summons against the two defendants claiming damages for shock, non-patrimonial damages, post traumatic damages and pain and suffering. The plaintiff claims that during the course of her employment with the second defendant which ran between September 2002 and June 2003, she was sexually harassed by the first defendant who would pester her for an improper relationship. She claims that her resistance to the sexual advances culminated in the termination of her employment by the first defendant for a petty offence. She challenged the dismissal. The matter ended up at arbitration. An arbitrator ruled in her favor after having found that she had been sexually harassed by the first defendant .The arbitrator ordered the defendants to jointly compensate her for the damages she had suffered as a result of the sexual harassment.

The defendants have filed a special plea and also except to the plaintiff's summons and declaration. They take two points. The first point both defendants take is that the plaintiff's claim has prescribed. The defendants submitted that by the time summons was issued on 18 June 2014,

the plaintiff's claim had prescribed. The second defendant challenges the summons on the basis that it does not disclose a cause of action against it. It avers that the second defendant's liability can only be vicarious. The second defendant challenges the declaration on the basis that it does not allege that the actions against the plaintiff were committed "during the course and within the scope of his employment." The defendants contend that the omission is fatal to the plaintiff's claim.

At the hearing of the application, the plaintiff raised a point in *limine* with respect to the first defendant. The plaintiff submitted that the first defendant was barred for failure to file his plea on time. The first defendant maintained that he was not barred for the reason that the bar was effected on the same day he filed his special plea. The first defendant also submitted that the matter was *res judicata* because the plaintiff had earlier tried to obtain default judgment against the defendant. The attempt to obtain default judgment was turned down on the unopposed roll by Tsanga J. The first defendant insisted that the court heard argument over the issue resulting in the application being removed from the roll on the basis that the first defendant was not barred. There was a heated argument between the parties over what transpired on the unopposed roll and regarding whether the court had resolved the issue of the bar.

After the matter was removed from the roll, the plaintiff complained to the authorities about the manner in which the matter had been handled. The judge gave the following explanation:

> "This matter was removed from the roll and not referred to the opposed roll as stated. I did not give a judgment but merely removed the matter from the roll because the defendant filed a special plea on 29 July – the same date as the effective date of the notice to bar. The special plea must be heard. There are accordingly no reasons to be given."

It appears to me that the issue of the bar was dealt with by the court when it dealt with the application for default judgment filed by the plaintiff. Although no reasons were given for the removal of the matter from the roll, what I get from the explanation given by the judge is that she removed the matter from the roll. The reason for this seems to be that the first defendant filed a special plea and exception on the same date as the effective date the first defendant was barred and therefore that the first defendant was not barred. I am aware that the application was not formally dismissed, however, the effect of the ruling was to dismiss the contention that the defendant was barred. Once the court removed the matter from the roll, the plaintiff was

expected to comply with that ruling. By bringing this issue up again, the plaintiff is having another bite at the cherry. This conduct amounts to an abuse of process. If the plaintiff felt aggrieved by the ruling she ought to have appealed it. Even assuming that I am wrong in my understanding that the removal of the matter from the roll meant that the application for default judgment had been resolved, I still view that the plaintiff's assertion that the first defendant is barred lacks merit. At the risk of reviewing my sister judge's ruling, I must say that I do not agree with the approach adopted by the plaintiff.

The notice of intention to bar was filed in terms of r 80.The bar envisaged in terms of r 80, is different from that envisaged by r 50 which provides for a scenario where, if a litigant has failed to file appearance to defend within the stipulated days, he is automatically barred. The purpose of the notice to plead and intention to bar is to give the other side 5 days within which to file their plea, failure of which they may be barred. Where a notice to plead and intention to bar has been served on the other party and the plaintiff fails to effect the bar on the expiry of 5 days , the other party is at liberty to file its plea for as long as the bar has not been effected. The bar envisaged by r 80 is in that sense, not an automatic bar which takes effect automatically on the expiry of the five days. The plaintiff is required to effect the bar by getting the notice to plead stamped by the registrar on the return date and thereby effecting the bar. The other side becomes barred only if he fails to file the plea before the bar is actually effected. Where the bar is effected on the same date as the filing of the plea or special plea it becomes unnecessary to determine who filed his papers first. Where a party effects a bar, that bar takes effect as at the close of business that day.

The plaintiff filed a notice to plead and intention to bar on 21 July 2015 and served it on the first defendant the same day. On 29 July the first defendant filed his special plea. The plaintiff effected the bar the same date as the plaintiff. There are no endorsements reflecting the times when the special plea and exception was filed as well as the time the bar was effected. The plaintiff sought to argue that she effected the bar around 8 am in the morning and that the defendant could only have filed his special plea later and after her. In doing so, the plaintiff sought to lead evidence from the bar. That is unacceptable.

The bar became effective at the end of the day on the 29th. The plaintiff insists that the first defendant is barred. The plaintiff is simply being frivolous and vexatious. The point is

unsustainable, groundless and without foundation. I see this as an attempt to snatch at a judgment and that is highly unacceptable. This court is not interested in technicalities regarding who filed his papers first. It is clear that the first defendant is desirous defending this matter. The court will not detain itself over this issue. The first defendant is not barred. The point fails.

The court will proceed to determine the application on the merits. The next issue is that of prescription. I have chosen to deal with this point first as it is capable of disposing of the matter without the need to delve into the second point raised on the merits.

It is trite that a debt or cause of action prescribes after 3 years in terms of 15 (a) of the Prescription Act, [*Chapter 8:11*], as read with s 2. The term cause of action was succinctly defined in *Chiwawa* v *Mutzuris and Ors* HH 7/09 at p 5 of the judgment, where the court stated as follows;

> "It is now settled in our law , in my view , that the term refers to when the plaintiff is aware of every fact which it would be necessary for him or her to prove in order to support his or her prayer for judgment. It is the entire set of facts that the plaintiff has to allege in his or her declaration in order to disclose a cause of action but does not include the evidence that is necessary to support that cause of action."

See also *Shinga* v *General Accident Insurance Co* (Zimbabwe) Ltd 1989 (2) 268.

Prescription begins to run when a litigant becomes aware of all the facts that she requires to allege in her prayer for judgment. There are instances when the setting in of prescription is delayed. One such instance is provided for in s 17 (1) (d) of the Prescription Act. The section provides that prescription is delayed,

"If the debt is the subject matter of a dispute submitted to arbitration----"

Section 17 covers a situation where a debt or cause of action has been submitted to arbitration. Section 17 (1) (d) is applicable where the subject matter of a dispute is submitted to arbitration. The rationale behind the section must have been to ensure that litigants who pursue the arbitration route do not get barred from bringing their claims to the formal court system should they wish to do so that after the expiry of three years from the time the cause of action arose. The time that litigants take when attempting to get the dispute resolved by way arbitration is not counted for purposes of determining if the debt or cause of action has prescribed. Prescription is in those circumstances is delayed until the arbitration proceedings are either finalized or abandoned

The cause of action as outlined in the summons is the sexual harassment that occurred during the time the plaintiff was employed by the second respondent. The plaintiff was employed by the second defendant between 2 September 2002 and 19 June 2003. The cause of action arose during that period. Summons was only issued on 18 June 2014 some 11 years after the plaintiff had left the second defendant's employment. The plaintiff was, by the end of June 2003, aware of every fact which was necessary for her to prove in order to support her claim for damages for sexual harassment. Instead of approaching the High Court claiming damages for sexual harassment, she went for conciliation with a complaint of sexual harassment and claiming that an unfair labour practice had occurred and that she had been wrongly dismissed. The matter ended up with an arbitrator who on 28 March 2014. The terms of reference of the arbitrator did not include determination of the question of damages for sexual harassment. The questions referred by the conciliator were simply whether she had been sexually harassed and the issue concerning her dismissal. The arbitrator ruled that the plaintiff was sexually harassed by the first defendant and both defendants were ordered to jointly compensate the plaintiff for damages for sexual harassment.

The jurisdiction of arbitrators when dealing with unfair labour practices is limited to stopping the conduct complained against. The role of the Labour Court and arbitrators when dealing with claims involving sexual harassment is to make a finding on allegations of unfair labour practice and only seek to stop the practice. The Labour Court or tribunal does not have jurisdiction to assess damages arising from a complaint of an unfair labour practice. Similarly, a Labour Court or tribunal faced with a complaint of sexual harassment cannot proceed and make an award for damages arising out of the sexual harassment.

The claim for damages was never properly before the arbitrator. The arbitrator erred in dealing with the issue regarding damages suffered as a result of the sexual harassment as damages were not part of the arbitrator's terms of reference His terms of reference were clear that he was required to deal with the unfair labour practice only. He dealt with the claim for damages out of his own initiative and wrongly so. He went on a frolic of his own. The award was subsequently set aside by this court on the basis that the arbitrator lacked jurisdiction to award civil damages. The claim for damages was not properly before the arbitrator. If it was not properly so, then there was no submission and hence there is no delay to talk about.

There setting in of prescription was not delayed by the purported submission to arbitration because the claim for damages was improperly before the arbitrator. Section 94 deals with prescription of labour disputes and hence has no relevance to this claim.

The issue of damages is being raised for the first time in a competent court well after the claim has prescribed. By the time summons were issued, the claim had prescribed.

In the result, it is ordered as follows:

1. The defendant's special plea is upheld.
2. The plaintiff's claim is dismissed with costs.

Gill, Godlonton & Gerrans, respondents' legal practitioners