

HERBERT MASIYA  
versus  
DISTRICT DEVELOPMENT FUND  
and  
KENNEDY MARIMBE

HIGH COURT OF ZIMBABWE  
CHAREWA J  
HARARE, 21 January 2016 & 17 February 2016

### **SPECIAL PLEA**

*T K Mudzimbaseka*, for the plaintiff  
*H. Magadure*, for the defendants

CHAREWA J: Plaintiff, issued summons against the defendants claiming, jointly and severally, the one paying the other to be absolved, payment of USD250 000-00, being damages arising out of a road accident as a result of which his wife died, interest at the prescribed rate from date of summons and costs on the higher scale.

The accident occurred on 16 August 2011, and deceased died on the same day. The second defendant was convicted of and sentenced for culpable homicide on 5 September 2012. On 12 September 2013, the plaintiff notified the first defendant of his intention to sue for damages. Summons was eventually issued on 3 October 2014 and served on 9 October 2014.

The defendants raised the following special plea:

1. That the first defendant is not a legal *persona* capable of suing and being sued. Therefore the plaintiff's citation of the first defendant is improper as in terms of s 3 (2) of the District Development Fund Act [*Chapter 29:06*], plaintiff ought to have cited the Trustee of the Fund.
2. The citation of the second defendant is improper in terms of s 4 of the State Liabilities Act, since he is being sued in his official capacity, rather than his personal capacity.
3. The matter has prescribed, the cause of action having arisen on the date of accident or death of the deceased on 16 August 2011 and summons having been issued and served more than three years later.

In his reply to the special plea, apart from restating his position in detail refuting the issues pleaded, plaintiff raised a point in *limine*: that the special plea did not conform to the rules as it did not state that it was a “special plea in bar”. Clearly, he was wrong and properly abandoned this argument at the hearing. I will therefore not belabour this point.

The issue that concerns me is whether the special plea raised is well taken.

WHETHER OR NOT THE DISTRICT DEVELOPMENT FUND (THE FUND) IS A LEGAL PERSON

The defendants argued that the first defendant, being a Fund constituted as a settlement *inter vivos*, had no legal *persona*. The defendants cited various case law where it was settled that, as a general rule, a trust is not a legal person, but that the trustee is the person to be considered for purposes of acquiring rights, suing and being sued. They further submitted that, for purposes of the present case, the trustee of the Fund being a Minister, then the provisions of s 3 of the State Liabilities Act [*Chapter 8:14*] ought apply when instituting legal proceedings in that the Minister must to be cited.

For the plaintiff, it was argued that the case law on trusts that was cited was irrelevant as it did not apply to statutory bodies. It was further argued that the Fund was a department in the relevant Ministry, in which case plaintiff was at liberty to cite the Fund or the Minister as s 3 was permissive rather than peremptory.

It is trite that only legal persons may be brought to court. And if constituted by statute, the relevant act of parliament must vest legal *persona* on that person. Consequently, for summons to have force and effect it must be issued against a legal person with capacity to sue and be sued. See Malaba J (as he then was) in *Gariya Safaris (Pvt) Ltd v Van Wyk* 1996 (2) ZLR 246 (H) at 252G where he stated:

“A summons has legal force and effect when it is issued by the plaintiff against an existing legal or natural person. If there is no legal or natural person answering to the names written in the summons as being those of the defendant, the summons is null and void *ab initio*.”

The District Development Fund was established by the District Development Fund Act [*Chapter 29:06*] upon the repeal of the African Development Fund Act 232 of 1974. The purpose of the Fund is stated in the preamble as

“To provide for the control and application of a fund to be used for the purpose of developing Communal Land and such other areas as may be declared by the Minister, to provide the raising of revenue for such fund and to provide for matters incidental or connected thereto”.  
(My paraphrasing)

Section 3 (2) vests in the Minister for Local Government, Rural and Urban Development, the sole management, control and use of the Fund as the trustee, while s 4 also vests the control of the Fund's assets, liabilities and expenditure in the Minister. The development of areas and application of the fund is also vested in the Minister in terms of ss 5 and 6.

Consequently, the first defendant is clearly a fund set up for a particular purpose and managed by a legal person, who is responsible for its assets and liabilities, and has the authority to sue and be sued with regard thereto. There is thus no provision in the Act creating corporate identity or legal *persona* for the Fund. First defendant is thus not a self-administering institution.

This is quite unlike s 18 (1) of the Health Service Act [*Chapter 15:16*] which makes any government hospital self-administering and capable of being sued and suing in its own right. The relevant s 18 (1) of the Health Service Act provides as follows:

“18 Corporate status of central, provincial, district and general hospitals.  
Subject to subsection (3), each central, provincial, district or general hospital shall be a body corporate capable of suing and being sued in its own name and subject to the Act, performing all acts that bodies corporate may by law perform”.

The significance of this is that, for an institution created by statute, the relevant Act must make provision for it to operate as a legal *persona*. This principle was aptly enunciated in *CT Bolts v Workers Committee* SC 16/12 at p.2 where Garwe JA stated:

“The Act has not made provision for the workers' committee to operate as a legal *persona*. Had this been the intention, the Act would have no doubt said so.”

See also *Gweru Water Workers Committee v City of Gweru* SC 25/2015 at p.12 where Malaba DCJ had this to say, of s24 of the Labour Act [*Chapter 28:01*]:

“The legislature did not intend that a body, acting in terms of s 24 should have capacity to sue and be sued.”

It is my view that the first defendant is a trust created by statute as clearly stated in s 3 (1) and (2) of [*Chapter 29:06*]. Hence, both statutorily and at general law, it has no legal *persona*. I am therefore persuaded that the law relating to the legal *persona* of any other trust as enunciated in *WLSA and Ors v Mandaza and Ors* 2003 (1) ZLR 500, *Crundall Bros (Pvt) Ltd v Lazarus N.O. and Nor* 1990 (1) ZLR 290 and other cases is applicable in this case, particularly since the plaintiff advances no case law to the contrary.

Further, I am not convinced that the first defendant is a mere department of Ministry of Local Government, Rural and Urban Development citation of which may be permissible in

terms of s3 of the State Liabilities Act. In terms of s 2 of [*Chapter 29:06*], it is a stand-alone fund which is capable of being assigned to the trusteeship and administration of any minister or ministry. Its purpose and objective is not so integral to any ministry that it cannot be excised without affecting the integrity, either of itself or of that ministry.

In any event, even though s 3 of the State Liabilities Act appears to be couched in permissive terms, plaintiff cites no authority for his assertion that it is not fatal to fail to cite the relevant Minister in whom the legal *persona* of the fund vests. On the contrary, it is my view that a presumption is raised that the citation on court process must follow the schedule of persons (in their official capacities) on whom notice to sue must be served in accordance with s 6 of [*Chapter 8:14*].

While I agree that the first defendant is a statutory body, the significance of the principle cited by Garwe JA and Malaba DCJ in *CT Bolts (supra)* and *Gweru Water Workers Committee (supra)* then comes into play. Has the DDF Act clothed the first defendant with legal *persona*? In my view, it has not. The case of *Tamanikwa and Others v Zimbabwe Manpower Development Fund* SC 197/11 would have been apposite since ZIMDEF is both a creature of statute and a fund set up to administer manpower development funds. Part V of The Manpower Planning and Development Act [*Chapter 28:02*] also does not clothe ZIMDEF with legal *persona*. However, in that case there was no challenge to ZIMDEF's corporate legal *persona* depriving the Supreme Court of the opportunity to make a definitive ruling on the issue.

In the present case therefore, my interpretation is that the District Development Fund cannot acquire rights and is not capable of suing or being sued because the relevant Act has not made provision for it to act as a legal *persona*.

I therefore uphold this special plea.

#### WHETHER OR NOT THE SECOND DEFENDANT IS PROPERLY CITED

I do not think anything turns on this special plea. The second defendant was the driver of the vehicle which caused the accident upon which plaintiff's claim is based. Clearly he is being sued for his own negligence, while DDF is being sued vicariously as his "employer", (which of course it is not as DDF is not legally capable of employing anyone as is clear from the DDF Act). The argument that the second defendant should have been sued in his official capacity does not gain any traction with me as he is not an "officer" of the Fund or of the relevant ministry. He is responsible for his negligent acts for which he is liable at delict.

This special plea is dismissed without further ado.

WHETHER OR NOT THE PLAINTIFF'S CLAIM HAS PRESCRIBED

It is not disputed that the accident upon which plaintiff's claim is grounded occurred on 16 August 2011.

Defendants assert that the cause of action consequently arose on that date as this is the date the plaintiff became aware that a wrongful act had been committed against him. Defendants further argued that as at that date, the plaintiff could reasonably have found out who had caused his wife's death and the manner in which that occurred, and must be deemed so. Therefore the fact that summons was eventually issued on 3 October 2014 and served on 9 October 2014 meant that plaintiff's claim had prescribed. In addition, defendants argue that the notice of intention to sue given on 12 September 2013 is not process for purposes of interrupting prescription in terms of s 6 (4) of the Prescription Act, [*Chapter 8:11*].

On the other hand, the plaintiff advances that the cause of action only arose either on 5 September 2012, upon conviction of the second defendant for culpable homicide or on 12 September 2013 when he became aware of the first defendant's identity.

It goes without saying that the general prescription period for all debts is 3 years (s 15 (d) of the Prescription Act [*Chapter 8:11*]), except for those debts circumscribed under S15 (a), (b) and (c). Obviously, this being a claim for damages, the general prescriptive period of 3 years applies. The question to determine therefore is: when did the debt become due?

It is settled in our law that a debt does not become due until the claimant is aware or ought reasonably to have become aware, of the facts from which the debt arose. These "facts" have generally been interpreted to mean the material or broad facts from which a cause of action arises or all the facts which a plaintiff must prove to obtain judgment in his favour. For loss, injury or death claims, these facts relate to the damage and loss suffered, how such loss or damage was caused and the wrongful conduct and negligence from which the loss flowed. The plaintiff will be deemed to have such knowledge if he is aware of the cause of damage or loss and that he has been wronged by the defendant, even if he may not know all the details of the wrongdoing. It is not necessary or required that plaintiff should have specific knowledge of the actual details of how he was wronged.

It is also settled that the *onus* is on the defendant to prove that within three years prior to the date of service of summons, the plaintiff had or ought to have had knowledge of the facts on which the debt arose.

Wrong legal advice and ignorance of the law are therefore irrelevant. For these principles, see *Peebles v Dairibord Zimbabwe (Pvt) Ltd* 1999 (1) ZLR 41.

In the present case, the plaintiff contended that though he knew that his wife had died in an accident, he was not aware who actually caused the accident and how until the time of the second defendant's conviction for culpable homicide. This, he asserts, was because there were two accused persons and he could only proceed against one or the other at the conclusion of the prosecution and conviction. Further, he was not aware that the first defendant was the second defendant's employer and could be sued for vicarious liability until he was so advised by his lawyers.

To discharge the onus that the plaintiff had or ought to have had knowledge of the facts upon which the debt arose, the defendant argued, correctly in my view, firstly that a proper application of the legal position enunciated in *Peebles (supra)* does not require the conviction of a person so as to ground awareness of the plaintiff's rights or claim. I am of the view that the occurrence of the accident itself and the circumstances thereof alerts a plaintiff of the cause of his action. In any event, s 16 of the Prescription Act requires that, by exercising reasonable care, plaintiff ought, within a few days of the accident, to have discovered how the accident occurred and who the suspected culprits were.

Secondly, whether the plaintiff's wife died as a result of the negligence and wrong doing of one or other of the two persons charged with her death was, immaterial to the issue of the plaintiff's awareness of the facts giving rise to his claim. Indeed, I opine that, what matters is that at the very least, at the time the two drivers collided, one or other of them caused the accident, and upon being informed that his wife had died in an accident, plaintiff became aware of the cause of his wife's death.

Thirdly, I also agree with the defendants that the conviction of a person for his wrongdoing is a matter of evidence which does not go towards discharging the onus of exercising reasonable care to discover the necessary broad facts to support plaintiff's cause of action. See *Chiwawa v Mitzuris & Ors* HH7/09 at p 5. I would even go further and note that delictual liability is not predicated on a conviction for any offence.

Finally, I am not convinced by the argument that plaintiff was not aware of the first defendant's identity or that it could also be sued until advised by his legal practitioners. It is trite that ignorance of the law is no defence. And as rightly pointed out by defendants, if prescription was to be based on when one seeks advice from one's legal practitioners, then matters would never prescribe.

In any case, a check with the police report would have revealed the owners of the vehicles involved in the accident, the employers of the drivers as appropriate and the material circumstances of the accident.

On the papers and at the hearing, plaintiff did not dispute that he was aware of his loss on the date of the accident. Nor can it be seriously challenged that, on the same day, he was aware how his loss occurred, i.e. through a road accident. Obviously the occurrence of a road accident presupposes wrongful or negligent conduct on the drivers involved, a fact which plaintiff was also aware of on the date of the accident.

What he claims not to have been aware of were the persons to hold culpable. However, acting as a reasonable man intent on protecting his interests, all he need to do to scale this hurdle was to check with the police report to obtain the necessary facts. This he did not do. He waited for the prosecution and conviction of the second defendant. And even after this, he let more than a year pass before issuing summons.

In my view, the principle that a debt becomes due when a plaintiff becomes aware of the broad facts grounding his cause cannot have been intended to protect a party who sits back and does not diligently or reasonably make any effort to unearth those facts as that would surely defeat the intention of the Prescription Act.

I therefore find favour with defendants' argument that in cases such as these, generally a plaintiff ought reasonably to be deemed to be aware of the facts from which his cause of action arises at the time the accident occurs or at the latest when the driver is charged.

In answer to plaintiff's averment that prescription was interrupted on 12 September 2013, the defendants argued that the issuance of a notice of intention to sue in terms of the State Liabilities Act [*Chapter 8:14*] does not interrupt prescription as such notice is not process of the Court.

Section 7(1) of the State Liabilities Act defines process as:

- “(a) A petition.....
- (b) A notice of motion.....
- (c) A rule *nisi*...
- (d) Any other document whereby legal proceedings are commenced”

Section 6 (4) of the Prescription Act provides that:

“...legal proceedings shall be deemed to be instituted by service of process, including a notice of application...and any other document by which legal proceedings are commenced in which the claim is made.”

The question is whether, within the parameters of s 7 (1) (d) of the State Liabilities Act and s 6 (4) of the Prescription Act, a notice of intention to sue can be considered as commencement of proceedings, the service of which, in terms of s 7 (2) of the Prescription Act, interrupts the running of prescription . I think not, as s 7 of the Prescription Act in its ordinary meaning is intended to denote to judicial process, i.e. process filed in court. My view is buttressed by the ordinary meaning of “process” which is defined as

“formal notice or writ used by a court to exercise jurisdiction over a person or property..”

or

“summons, writ, certiorari, charge, citation, controversy, lawsuit, prosecution, search warrant, subpoena, complaint. Any means used by a court to acquire or exercise its jurisdiction.” (my emphasis)

(See *Wikipedia* and *The Legal Dictionary* respectively).

I am therefore persuaded by defendants’ argument that a notice of intention to sue in terms of the State Liabilities Act is not legal process for the purposes of s 7 (2) of the Prescription Act. The time lag between the notice of intention to sue and the issuance of summons suggest to me that the plaintiff laboured under the misconception that the notice to sue had interrupted prescription and he therefore did not have to act expeditiously. He is therefore hoist by his own petard.

Consequently, I find that the plaintiff is deemed to have been aware of the material or broad facts from which his cause of action arose as at the time of the accident from which his wife died, that is, on 16 August 2011. As a result, the debt due to him from the defendants arose from that date. Therefore, when summons were served on 9 October 2014, his claim had therefore prescribed.

### COSTS

I was not addressed as to costs during the hearing, particularly on the issue of costs on the higher scale claimed in the summons, and find myself constrained in that regard. However, I note that costs normally follow the result. The plaintiff having succeeded on one issue, and the defendants on two, I believe that it is just and equitable that plaintiff should pay defendants two thirds of their costs on the ordinary scale.

### DISPOSITION

In the event, it is ordered that

1. The special plea is upheld in the following respects:

- a. The District Development Fund is not a legal person and is thus improperly cited;
  - b. The matter has prescribed;
2. Plaintiff shall pay two thirds of defendants' costs.

*Mushangwe & Company*, plaintiff's legal practitioners  
*Civil Division of the Attorney General's Office*, 1<sup>st</sup> and 2<sup>nd</sup> defendant's legal practitioners