

OLD MUTUAL PROPERTY INVESTMENT (PRIVATE) LIMITED
versus
MOGOLA ENTERPRISES (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, 5 July 2016 and 13 April 2017

Opposed Application

T. Mpofu, for the applicant
L. Madhuku, for the respondent

CHITAKUNYE J. This is an application for the rescission of a default judgment entered against the applicant and in favour of the respondent in HC 7509/15 on 18 November 2015. The application is made in terms of r 63 of the High Court of Zimbabwe Rules 1971.

On 7 August 2015 the respondent caused summons to be issued against the applicant seeking a total sum of US\$ 300 455.50 plus 14% interest per annum from the date of summons to the date of full payment and costs of suit. The Sheriff's return of service states that the summons was served on the applicant's receptionist at number 100, The Chase West, Emerald Hill, Harare on 21 August 2015. It does not however state the name of that receptionist.

On 11 November 2015 the respondent filed a court application for default judgment and the judgment was duly granted on 18 November 2015.

Pursuant to the court order the respondent caused a writ of execution to be issued against applicant's movable property and proceeded to instruct the Sheriff to execute the writ. On 4 and 7 December 2015, the Sheriff, acting on the respondent's instructions, served copies of the Notices of Seizure and Attachment on CABS and Standard Chartered Bank in respect of the applicant's accounts with those two financial institutions. On 14 December 2015 the Sheriff served a copy of the Notice of Attachment on the applicant at 100, The Chase West, Emerald Hill, Harare.

As a consequence of the service of the Notices of attachment the applicant, upon investigations through its legal practitioners, became aware of the default judgment that had been entered against it on 18 November 2015.

It was in these circumstances that the applicant approached this court in terms of r 63 seeking an order for the rescission of the default judgment and that it be granted the opportunity to file its defence to the respondent's claim.

The applicant's grounds for seeking the relief were couched as follows:

1. The applicant has a good and acceptable explanation for its default in that it did not have knowledge of the proceedings instituted against it and, in the circumstances, did not deliberately abstain from defending the same;
2. The order sought to be rescinded was improperly sought and obtained without exhausting the remedies provided by the Arbitral Award binding on the parties and in any event, in breach of a binding Arbitration clause.
3. The Respondent did not have any cause of action against the Applicant. Alternatively, any cause of action the Respondent might have entertained against the Applicant had prescribed at the time of institution of proceedings in the main matter.
4. In any event part of the Respondent's claim predates the adoption of the United States dollar as legal currency. It was therefore incompetent for the Respondent to claim any costs which predate February 2009 in United States dollars.

The respondent opposed the application. In its opposition the respondent contended that the applicant had not proved the essential elements for the rescission in that it had not provided a reasonable explanation for its default despite being served with the summons. The respondent also contended that the applicant had no reasonable prospects of success on the merits. In the circumstances the application should be dismissed with costs on the higher scale.

It is trite that in order to succeed in an application for rescission of a default judgment in terms of r 263 the applicant must show good and sufficient cause. In this regard rule 263 (2) provides that:-

"If the Court is satisfied on an application in terms of sub rule (1) that there is good and sufficient cause to do so, the Court may set aside the judgment and give leave to the defendant to defend or to the Plaintiff to prosecute his action on such terms as to costs and otherwise as the Court considers just."

The requirement of good and sufficient cause has been a subject of judicial interpretation in several cases. The common denominator in most of the cases is the

explanation for the default and whether applicant has shown that he has a prima facie defence that has some prospect of success.

In *Stockil v Griffiths* 1992 (1) ZLR 172 (S) at 173 D- F GUBBAY CJ aptly noted that:

“The factors which a court will take into account in determining whether an applicant for rescission has discharged the onus of proving “good and sufficient cause”, as required to be shown by Rule 63 of the High Court of Zimbabwe Rules 1971, are well established. They have been discussed and applied in many decided cases in this country. See for instance, *Barclays Bank of Zimbabwe Ltd v CC International (Pvt) Ltd* S-16-86 (not reported); *Roland & Anor v McDonnell* 1986 (2) ZLR 216(S) at 226E-H; *Songore v Olivine Industries (Pvt) Ltd* 1988 (2) ZLR 210 (S) at 211C-F. They are: (i) the reasonableness of the applicant’s explanation for the default; (ii) the bona fides of the application to rescind the judgment; and (iii) the bona fides of the defence on the merits of the case which carries some prospect of success. These factors must be considered not only individually but in conjunction with one another and with the application as a whole.”

The above entails that the applicant must proffer an explanation for the default. In considering the bona fides of the explanation for the default, and in deciding whether good and sufficient cause exists for the granting of rescission, the courts have taken into account the concept of willful default.

In *Zimbabwe Banking Corporation v Masendeke* 1995(2) ZLR 400 the Supreme Court held, *inter alia*, that:

“Wilful default occurs when a party freely takes a decision to refrain from appearing with full knowledge of the service or set down of the matter. Where there is negligence in relation to the default, the court will examine whether the negligence is so gross as to amount to willfulness.”

In *Deweras Farm (Private) Limited & Others v Zimbank Corporation* 1997 (2) ZLR 47(H) at 56 E- F GILLESPIE J illustrated the above point as follows:

“On a proper approach to the concept of wilful default in High Court matters, it should be seen that the expression refers to that extreme of circumstance where the explanation for default reveals that the applicant for rescission knowingly and deliberately refrained from opposing the relief sought. He acquiesced in the judgment being taken against him.”

At p 57 E-F the learned judge opined that even where there was wilful default or acquiesce, good and sufficient cause can still be established in these words:

“I therefore hold that, in any application for rescission of a judgment given in default in the High Court, the wilful default of the applicant for rescission may well justify the court in refusing rescission of judgment without further consideration of the matter. It will not necessarily always have this effect, however, since the grant of **the indulgence is a discretion to be extended or refused according to all the circumstances** and it is undesirable to impose any restrictions on that discretion. If, therefore, even in the case of a

wilful default, a satisfactory explanation for that acquiescence in a judgment can be given, and the circumstances, including the merits of the defence, justify such a conclusion, good and sufficient cause might in the proper case be established.” (the emphasis is mine)

In *casu*, the applicant’s explanation for the default was to the effect that it was not aware that the respondent had instituted proceedings against it as it had no knowledge of the summons in spite of the Sheriff’s return of service indicating that service was effected on a receptionist.

In support of its stance the applicant tendered supporting affidavits from two receptionists it said were the receptionists on duty on the day when the summons were said to have been served. The deponents to the affidavits, namely; Rejoice Mabodo and Barbara Sagambe, clearly stated in their respective affidavits that they were not served with summons on that day. Apart from denying being served they also stated that they had checked with the applicant’s mail registers for the day in question for both the applicant’s reception and main foyer and did not see any entry or record that summons were received. The extracts of the two registers were attached to their affidavits.

It is in these circumstances that counsel for the applicant argued that the applicant did not deliberately abstain from defending the proceedings. Counsel argued for the applicant’s explanation to be accepted as meeting the requirement of a reasonable and acceptable explanation

The respondent’s counsel on the other hand contended that the explanation by the applicant was not reasonable and so should not be accepted. Counsel contended that the applicant must be taken to have had knowledge of the summons as the Sheriff’s return clearly stated that the summons was served on the applicant’s receptionist.

Counsel for both parties agreed that the Sheriff’s return of service constitutes *prima facie* proof of service. It is not final and conclusive. Counsel aptly alluded to the words of GUBBAY JA (as he then was) in *Gundani v Kanyemba* 1988 (1) ZLR 226 (SC) at 229 C-E wherein after a summation of the development of the law on this aspect the learned judge stated that:

“In the earliest times the inclination was to refuse to allow the return to be impeached for want of accuracy or truth, and to leave the aggrieved party to his remedy in damages against the serving officer concerned. See *de Kork v van Niekerk and Johnson* (1861) 1 Ros 1; *Haycroft v Filmer* (1863) 1 Ros 98. Subsequently a more rational view was adopted, which recognised that a return of service was not final and conclusive but merely *prima facie* evidence of the contents thereof. See *Ritchie v Andrews* (1882) 2 EDC 254 at 257; *Wolhuter v Foote* (1883) 2 HCG 258 at 271; *Deputy Sheriff for Witwatersrand District v Goldberg & Ors*

1905 TS 680 at 684; *Lister & Tocknell v Winter* (1906) TS 211 at 214; *van Rooyen v Colonial Government* (1960) 16 CTR 296.”

At page 229 F, the learned judge agreed with the relaxation of the approach when he stated that:-

“But what the second series of cases I have referred to laid down, and this is important in the local context, was that the Return of Service of an officer of the court, whether he be the Sheriff, the Deputy Sheriff or the Messenger, was to be accepted as prima facie proof of what was stated therein, capable of being rebutted by clear and satisfactory evidence. That is a view with which I respectfully agree.”

See also *Fox & Carney (Pvt) Limited v Sibindi* 1989 (2) ZLR 173(S)

The above legal position places the onus on the applicant to show that such service was not effected or was defective.

Whilst the applicant’s counsel argued that the affidavits by the two receptionists were adequate proof, respondent’s counsel contended that the affidavits were insufficient. He alluded to the fact that the applicant ought to have indicated whether these were the only receptionists or not; in any case the evidence tended to portray the Sheriff as having lied which is a serious accusation. Such accusations need the Sheriff to be cited as a party.

I am, however, of the view that the applicant has shown on a balance of probabilities that it had no knowledge of the summons and so it could not have deliberately abstained from defending the process. The applicant’s position as supported by the affidavits filed of record shows clearly that the two receptionists who were on duty on that day did not receive the summons. Apart from denying service, the two receptionists stated that they checked the register of incoming mail and process for the day in question for both the reception and the main foyer and established that there was no record of the Summons having been served on that day. Copies of the extracts from the registers which collaborate that fact were attached to the affidavit of Rejoice for all to see. That, in my view was adequate to rebut the presumption that proper service had been effected.

Whilst one would not wish to cast aspersions on the office of the Sheriff, one cannot fail to notice the anomaly of not stating the name of the receptionist who was served with the summons. Rule 42B (2) states that:-

“Where any process has been served on a responsible person in terms of paragraph (b),(d),(e) or (f) of sub rule(2) of rule 39, the name of that person shall be stated on the return of service, endorsement, certificate or affidavit referred to in sub rule(1).”

The applicant being a body corporate, service was in terms of rule 39 (2) (d) and so the name of the responsible person upon whom service was effected was supposed to have been stated.

It is the practice that where such a person declines to give their names, the server endorses on the return of service a statement to the effect that the person refused to give his or her name. The failure to state the name of the responsible person upon whom service was effected had the effect of tainting the process.

It may also be noted that the issue of the respondent's counter claim, and basis thereof, had been contested before the arbitrator who referred the issue for further arbitration if the respondent persisted with its claim after applicant's auditors had determined the operational costs owed by respondent and co-respondents. It was therefore clear that applicant was contesting the claim and, taking into account the quantum of the claim, it is highly unlikely that the applicant would have deliberately abstained from defending the process had such process come to its notice. The applicant's explanation for the default was probable.

I am of the view that in the circumstances of this case the applicant was not in wilful default and the explanation for the default is reasonable and acceptable.

In any case, even if it were to be found that the applicant was in wilful default and that its explanation was not reasonable, that would not be the end of the inquiry. As already alluded to, Court must still consider other factors before determining that no good and sufficient cause has been shown.

In *Deweras Farm (Private) Limited & Ors v Zimbank Corporation (supra)* at p 57C GILLESPIE J reiterated the position that:

“the fact that this wilful default might justify the Court in refusing the application for rescission without further ado does not mean that in a proper case the Court will not be entitled, if it considers it fair and just to do so, to consider whether circumstances nevertheless warrant consideration of the merits of the defence, and if these are satisfactory, the extension of the indulgence sought.”

The next point to consider is the *bona fides* of the application. The applicant's counsel argued that the application is not being made to delay the execution of the judgment, or for some other frivolous and vexatious reasons as the applicant has already paid the Sheriff the judgment debt. The applicant has a firm conviction that the judgment debt is not due.

The fact that the applicant has paid the sum to the Sheriff was not disputed. That in my view shows applicant's *bona fides* and that it is in not seeking rescission to simply delay

the inevitable or to frustrate the judgment creditor. I am of the view that the application is bona fide.

The last leg of the inquiry pertains to the prospects of success in the main matter. The requirement of a bona fide defence which *prima facie* carries some prospect of success is another element of good and sufficient cause. See *Stockil v Griffiths (supra)*, *V Saitis & Co. (Pvt) Ltd v Fenlake (Pvt) Ltd* 2002 (1) ZLR 378 (H).

Counsel for the applicant submitted that the applicant has good prospects of successfully defending the respondent's claim in the main matter if given the opportunity to do so. In this regard counsel alluded to the various defences raised by the applicant in its affidavit as regards the respondent's claim. The respondent's counsel, on the other hand, submitted that the applicant had no *bona fide* defence that carries some prospect of success. The defences raised by the applicant will be dealt with in seriatim.

1. That the dispute should have been resolved through arbitration in accordance with the arbitral award by SMITH J (which was registered as an order of this Court) or in any event, Clause 40 of the Lease Agreement relied upon by the Respondent.

It is common cause that an arbitral award was issued which affected all the parties who had gone for arbitration. The award, *inter alia*, ordered that:-

- (i) The cancellation of the lease agreement between the claimant and the first respondent (Entertainment Unlimited (Pvt) Ltd) and that all persons claiming occupation of shop 15 through Entertainment Unlimited vacate the premises;
- (ii) That the question of operating costs owed by the respondents shall be referred to the claimant's auditors, acting as experts and not arbitrators to determine; and
- (iii) If the first and fourth respondents, after receiving the determination of the auditors, wish to persist with their counter claim, the matter shall be referred for arbitration by a person qualified in the legal field who is agreed on by the parties or, failing such agreement, appointed by the chairman of the Commercial Arbitration Centre, Harare.

The award having been registered as an order of this court, the applicant's counsel argued that the respondent should have referred the counter claim to arbitration before resorting to this court as that award was binding on the parties.

It is clear from clause 3 of the award that the arbitrator never determined the merits of the counterclaim but provided a mechanism for resolution of the dispute on the counter claim. It is that mechanism that became part of an order of this court upon registration of the award and so in that context the respondent was bound by that mechanism.

Besides that clause 3, the applicant's counsel also argued that clause 40 of the lease agreement the respondent relied on for its claim provided, *inter alia*, that:-

“any dispute between the parties in regard to any matter arising out of this lease agreement or its interpretation or their respective rights and obligations shall be submitted to and decided by Arbitration.”

The applicant's counsel thus argued that the respondent was also in breach of this clause in instituting legal proceedings in relation to its counterclaim before exhausting remedies provided by the award and by the lease agreement respondent relied on.

The respondent's counsel in response to the above referred to the respondent's opposing affidavit, more specifically paragraph 8, as adequate answer in respect thereof. Unfortunately in that paragraph the respondent seemed to gloss over the specific issues raised by the applicant. For instance, in sub-paragraphs 8.2, 8.4, 8.5 and 8.6 the respondent stated that:

“8.2 This core of the claim is not seriously disputed by the Applicant. The Applicant does not even address the issue and has chosen to dwell on procedural points which cannot defeat the claim.

8.4 There are only two points raised, both of which are not competent defences. The first is that the claim ought to have been referred to arbitration. The second is a speculative point on prescription.

8.5 Both points are matters of law to be dealt with convincingly by the respondent's legal practitioners in their legal arguments. However, it must be pointed out that the Respondent's claim for payment by the Applicant for the use of the Respondent's generator is not the type of claim that was subject to any arbitration clause. The fact that it was originally raised as a counter claim in arbitral proceedings cannot affect the Respondent's claim.

8.6 It is also clear that the Applicant's reference to arbitration is only for purposes of determining the quantum of its liability and not for determining the very question of whether it is liable at all. It accepts liability. Given the scientific manner in which the quantum was determined as directed by the High Court order in case number HC 13801/12 (attached and incorrectly numbered Annexure 'O' on page 107 of the application), no useful purpose can be served by insisting on arbitration. The Applicant has not challenged the scientific basis from which the amount claimed in the summons was derived.”

The respondent's counsel in his submissions basically adhered to the above assertions. It is my view that if anything has no merit it is the respondent's contentions. In the first place, the applicant from the inception denied ever entering into a lease agreement with the respondent. The lease agreement was with Entertainment Unlimited. That agreement did not permit subleasing. The rights that the applicant sought to enforce before the arbitrator were in

terms of that lease agreement. The respondent got into the dispute as an appendage of Entertainment Unlimited and made a counter claim. It is the respondent that sought to rely on the lease agreement in its counter claim before the arbitrator.

It is also common cause that the arbitrator in clause 3 referred the issue of the counter claim to arbitration if the respondent persisted with its claim. It is thus not correct to say that the issue of the counter claim was not subject to arbitration clause. Equally the lease agreement that respondent sought to rely on clearly required disputes to be referred to arbitration. I thus cannot accept submissions by respondent's counsel that the argument that the claim ought to have been referred to arbitration is not supported by any reference to arbitration clause.

Further, counsel for the respondent submitted that the applicant's argument based on arbitration is merely focusing on the quantum and not on the issue of liability. Thus as far as counsel is concerned the applicant should accept the figure put forth by the respondent because, in respondent's view, the quantum was scientifically arrived at and was in accordance with directions by the High Court in HC 1380/12.

Unfortunately, the document referred to as on p 107 of the record is not a scientific calculation of the quantum but is a court order registering the arbitral award on the 6 February 2013. The document on the computation done by LCA & Company is at p 32 of the record and there is nothing scientific about the calculation of the quantum.

It may also be noted that the issue of the applicant's liability and the quantum of the claim by respondent has always been in issue as between the parties hence the inclusion of clause 3 in the arbitral award. It is thus incorrect to state that the issue of liability is not disputed. A careful examination of the proceedings before the arbitrator clearly confirms this. The respondent's contention that the issue of liability is no longer in issue just because it now holds a default judgment is without merit. The parties themselves agreed before the arbitrator that should the first and fourth respondent persist with the counter claim after the applicant's auditors will have done the quantification, the issue of the counter claim shall be referred to an arbitrator with legal knowledge. That clause should be binding on the parties.

It is trite that in certain instances this court has withheld its jurisdiction to allow domestic remedies or procedure for the resolution of the dispute that the parties would have agreed as of first instance. In *Southbay Real Estate (Private) Limited v Southbay Properties (Private) Limited & Ors* 2009 (2) ZLR 438 (H) at 441 MAKARAU J (as she then was) stated the position as follows:

“The court has at times withheld its jurisdiction to allow domestic and statutory remedies to be exhausted. The test as to when this honourable court will withhold its jurisdiction is, in my view, well settled. In a judgment that has since been endorsed by the Supreme Court, MUTAMBANENGWE J, observed in *Tutani v Minister of Labour & Ors* 1987(2) ZLR 88(H) at 95D that where domestic remedies are capable of providing effective redress in respect of the complaint and the unlawfulness alleged has not undermined the domestic remedies themselves, a litigant should exhaust his domestic remedies before approaching the courts unless there are good reasons for not doing so. See *Girjac Services v Mudzingwa* 1999(1) ZLR 43(S).”

In *casu*, not only did the parties agree in terms of the arbitral award (which is now an order of this court) that the counter claim be referred to arbitration, but the lease agreement upon which the respondent based his cause of action clearly provided for arbitration.

I am of the opinion that where a court order directs that parties shall refer their outstanding matter to arbitration it is only proper that such be complied with unless there is good reason for not so complying. In this case respondent did not allude to any good reason for not complying with that directive other than the desire to cling onto the default judgment.

Equally where parties have resolved in terms of their agreement that any dispute between them be resolved through arbitration, court is obliged to grant them that opportunity unless again there are good reasons why such arbitration should not be followed.

In *Capital Alliance (Private) Limited v Renaissance Merchant Bank Ltd & Others* 2006 (2) ZLR 232 (H) at 236C-D PATEL J (as he then was) restated the legal position as follows:

“In *Zimbabwe Broadcasting Corporation v Flame Lily Broadcasting (Private) Limited t/a Joy TV* 1999(2) ZLR 448(H), it was held that a clause in a contract to refer a dispute to arbitration is binding on the parties and a party is not at liberty to revoke this clause at any time if he wishes to do so. In *PTA Bank v Elanne (Private) Limited & Others* 2000(1) ZLR 156(H), it was observed that the question whether a dispute fell within the arbitration clause in an agreement was primarily a question of interpretation of the agreement and the arbitration clause. Once it is established that the dispute falls within the ambit of the arbitration clause, the onus to show why court proceedings should not be stayed falls on the party challenging the reference to arbitration. See *Independence Mining (Private) Limited v Fawcett Security Operations (Private) Limited* 1991(1) ZLR 268(H) at 272.

Earlier on, in *Bitumat Ltd v Multicom Ltd* 2000(1) ZLR 637 (H) at 639H-40C SMITH J had aptly opined that:

“In my opinion, where parties have entered into an agreement which contains an arbitration clause that is clearly intended to be widely cast, the court should not be astute in trying to reduce the ambit of the arbitration clause. Where an arbitration clause exists in any such agreement, the court is required to give effect thereto-- see Article 8(1) of the UNCITRAL Model Law which was adopted as part of our law by the Arbitration Act 6 of 1996 and *Zimbabwe Broadcasting Corporation v Flame Lily Broadcasting (Private) Limited t/a Joy TV* 1999(2) ZLR 448(H). It may well be that at some stage after a dispute has arisen, because of changed circumstances, the parties concerned agree that the matter should be determined by a court of law, rather than by arbitration in terms of the agreement in question. In these

circumstances, the decision of the parties to abandon the arbitration clause in their agreement must be specific and clearly evidenced. It cannot be implied by the conduct of, or correspondence between the parties -- it must be explicit. After all, if the arbitration clause is contained in a written agreement, then the decision to change the agreements must either be in writing or else so clearly evidenced by the conduct of the parties that there is no room for doubt.”

In *casu*, there was nothing before the court in the main matter which suggested that the arbitrator’s reference of the counter claim to arbitration, with the agreement of the parties, or the arbitration clause in the agreement relied upon by the respondent, was null and void, inoperative or incapable of being performed.

In the circumstances it was within the applicant’s expectation that the dispute would be referred to arbitration. The respondent’s explanation for not complying with the court order or the lease agreement it relied on was without merit.

2. The next issue is the applicant’s contention that the respondent had no cause of action against the applicant in the main matter.

The applicant’s argument was essentially that it never entered into a lease agreement for its premises with the respondent. In that regard the lease agreement referred to by the respondent is in respect of the applicant as lessor and Entertainment Unlimited (Private) Limited as lessee. That agreement prohibited subletting. Applicant further stated that it never entered into any Generator lease agreement with the respondent. The Generator lease agreement that the respondent sought to rely on was between its lessee, Entertainment Unlimited (Private) Limited, and a company called Hyperfreight (Private) Limited. Neither the applicant nor the respondent was party to the Generator lease agreement.

The respondent in its main claim and in this application did not tender any lease agreement for the premises in its name or for the Generator in which the applicant and the respondent are parties. These failures were despite the respondent’s claim being based on such purported lease agreements. In this regard in clause 4 of its declaration the respondent stated as follows:

“The plaintiff and the defendant were lessee and lessor respectively during the period from 1 July 2005 to 13 September 2012, at shop numbers 14, 15 and 16 Borrowdale Brooke Complex.”

On the generator the respondents declaration states as follows:

- “5. The plaintiff installed a Kohler 63 KVA diesel generator around the 1st of January 2006 at Old Mutual premises at Borrowdale Brooke Shopping Complex where the plaintiff was a tenant.
6. Plaintiff installed the refurbished generator at its own cost for its own use. Defendant realising its need, installed a heavy duty 16 mm core cable to power its offices, complex

car park, borehole and water pump for the entire shopping complex utilizing its own separate change over switch. This heavy duty cable was deemed necessary to power the various needs.

7. Plaintiff allowed this and, as per the lease agreement, defendant was responsible for paying plaintiff for the use of this generator, calculate its dues and credit plaintiff's operating cost account and then recover costs from its tenants."

From the above it is apparent that the claim was premised on the lease agreement and yet the respondent did not tender a lease agreement in its own name. The lease agreement respondent relied upon was between the applicant and Entertainment Unlimited. This agreement is dated 29 August 2005 and not 1 July 2005 as alleged by the respondent. A careful perusal of the lease agreement does not show that there was any clause pertaining to the lease of a Generator either at the time of signing the agreement or in the future.

In both the main claim and in this application respondent did not claim to have been the entity Entertainment Unlimited that entered into the lease agreement on 29 August 2005.

In the circumstances in as far as the respondent's claim is premised on the lease agreement which it has not been able to show pertains to itself and the applicant, the respondent may have difficulty in establishing a cause of action. I state so principally because of the clear need for a plaintiff to base its claim on a clearly defined cause of action. If a claim is based on contract a plaintiff must be able to state the terms of such contract and as in this case tender such contract document especially as it is in dispute. If the plaintiff is not party to the written contract being relied upon such must be disclosed and the basis for the claim in the circumstances must be clearly spelt out.

A cause of action may be defined as every fact which it would be necessary for plaintiff to prove every fact which is material to be proved to entitle plaintiff to succeed in his claim. See *Rodgers v Rodgers* SC64/07; *Peebles v Dairiboard Zimbabwe (Pvt) Ltd* 1999 (1) ZLR 41 (H) at 45

In *casu*, the respondent as plaintiff in the main matter would be expected to prove the existence of the lease agreement it alleges and the terms thereof. These are aspects the respondent has not clearly done as the written lease agreement it relied on was in fact between the applicant and Entertainment Unlimited. The purported agreement on the generator was between Entertainment Unlimited (Private) Limited and Hyperfreight (Private) Limited.

It is important to note that at this stage applicant is not required to prove on a balance of probabilities but to merely establish a prima facie defence with some prospect of success. This, I believe, the applicant has achieved.

3. The applicant's counsel submitted in the alternative that if for any reason the respondent did have a cause of action, any cause of action the respondent might have entertained against the applicant had prescribed at the time of institution of proceedings in the main matter.

It is trite that the Prescription Act, [*Chapter 8:11*] places statutory limitation on a litigant's right to enforce his or her rights. Generally a debt as defined in s 2 of the Act is extinguished by prescription after three years.

A debt is defined as including anything which may be sued for or claimed by reason of an obligation arising from the statute, contract, delict or otherwise. See s 2. As to when prescription begins to run s 16 of the prescription Act provides that:

- “(1) Subject to subsection (2) and (3), prescription shall commence to run as soon as a debt is due.
- 2.
- (3) A debt shall not be deemed to be due until the Creditor becomes aware of the identity of the debtor and of the facts from which the debt arises.
Provided that a creditor shall be deemed to have become aware of such identity and such facts, if he could have acquired knowledge thereof by exercising reasonable care.”

The facts from which the debt arises maybe taken to mean all material facts from which the cause of action arises.

In *casu*, the question to ask is when did the debt arise in terms of the alleged lease agreement? The applicant alleged that in terms of the lease agreement the respondent is relying upon such debt would have arisen from 1 January 2006 to September 2012. This period is evident from the computation by the respondent on p 32 of the application. According to that computation the rentals and costs for the Generator arose each month as monthly rentals and costs. This is the time the monthly rental and costs became due. It was thus the applicant's argument that as the last date in terms of the computation is September 2012, it follows that when the respondent instituted its main claim in August 2015; only costs from September 2012 were still recoverable. Any debt before September 2012 had prescribed.

The respondent's counsel, on the other hand, contended that the debt became due in September 2012 and so by August 2015 it had not prescribed.

As aptly noted by MAFUSIRE J in *Efrolou (Private) Limited v Muringani* 2013 (1) ZLR 300 (H) at 308D:-

“Prescription goes to the root of a claim or defence. In terms of rule 137 it is a special plea in bar. It is taken where the matter is of substance which would not involve delving into the merits of the case. If a special plea is allowed, it disposes of the case.”

In *casu*, if the applicant proves that the claim is prescribed that would dispose of the matter.

It is clear that from the respondent’s claim the debt, if proved, would be from 1 January 2006. That debt was due on monthly basis. This means as at the end of each month the respondent would be aware of all the facts from which the debt for that month arose and could easily have sued for it. This did not happen till August 2015. The issue of prescription may thus not be discounted as a ruse. It is an issue that, in my view, the applicant should be afforded the opportunity to argue.

It is also common cause that in the years January 2006 to January 2009 the United States dollar currency had not yet been adopted as the legal tender and rentals and services were being paid for in Zimbabwe dollar currency. Thus the respondent would be expected to justify its claim in United States Dollar currency for a debt that arose and became due during the Zimbabwe dollar era.

In conclusion, I am of the view that the applicant has shown good and sufficient cause for the rescission of the default judgment.

Though the applicant’s counsel asked for costs in the event of the application being granted I am not inclined to grant costs at this stage, I believe this is case where costs should be in the cause.

Accordingly it is hereby ordered that:

1. The order granted by this court in case no. HC 7509/15 on 18 November 2015, be and is hereby rescinded.
2. The Applicant herein shall file its appearance to defend, request for further, plea or other answer to the respondent’s claim in case No. HC 7509/15 within ten (10) working days of this Order being granted.
3. The costs shall be costs in the cause.

Wintertons, applicant’s legal practitioners
Mundia & Mudhara, respondent’s legal practitioners