TIMOTHY MUKAHLERA
versus
CLERK OF PARLIAMENT
and
MINISTRY OF FINANCE AND ECONOMIC DEVELOPMENT
and
RESERVE BANK OF ZIMBABWE
and
AMALGAMATED MOTOR CORPORATION

HIGH COURT OF ZIMBABWE
PATEL J
HARARE, 21 September, 27 October and 23 November 2005

Opposed Application

Mr. Mawere, for the applicant
Mr. Chihambakwe, for the 1st respondent

PATEL J:

The Application

The applicant in this matter seeks an order, *inter alia*, compelling all the respondents to facilitate and pay for a Pajero motor vehicle which he had ordered through the 4th respondent. The basis of his claim is that he is entitled to acquire the said vehicle through the Members of Parliament Vehicle Loan Scheme which was initiated in 2001 ("the Scheme") and that the respondents have unlawfully denied him the benefits of that facility.

Objections *in limine*

At the hearing of this matter, counsel for the parties canvassed certain points *in limine* that were raised in the 1st respondent's opposing papers.

Firstly, it was submitted by *Mr Chihambakwe* that the agreement on which the applicant's claim was predicated was concluded in April 2001 and that his claim had therefore prescribed in April 2004. Secondly, the point was taken that the applicant should have cited the Members of Parliament Vehicle Revolving Fund ("the Fund") and not the present respondents. Thirdly, it was

argued that the applicant's claim was one sounding in South African Rands and that a claim in foreign currency was incompetent as the Fund was denominated in local currency. Lastly, it was contended that the papers before the court evinced a number of material and triable disputes of fact and that the application procedure instituted *in casu* was accordingly incompetent.

Mr Mawere, for the applicant, countered all of the 1st respondent's objections. He submitted that the applicant's claim had not prescribed as his cause of action only arose in June 2002 and the present application was therefore timeously launched in March 2005 within the prescription period of three years. He further contended that the running of prescription had in any event been interrupted by dint of a letter of demand written to the 1st respondent by the applicant's erstwhile legal practitioners in June 2002. As for the citation of the parties *in casu*, it was argued that it was the 1st, 2nd and 3rd respondents who effectively operated the Fund and the attendant Scheme and that the present respondents were therefore properly cited as agents of the Fund. It was also argued for the applicant that he was unaware of the existence of the Fund as a legal entity in its own right.

Claim in Foreign Currency

As part of the relief claimed, the applicant seeks an order compelling the 2nd and 3rd respondents to pay the sum of R 243,396.00 as the purchase price for the motor vehicle identified by him. There is nothing in the papers before the Court to justify a claim sounding in Rands or in any other foreign currency. Nevertheless, the principal thrust of the applicant's claim is an injunction to provide the money required, in whatever currency is available, to purchase the vehicle in question for him. This is obviously an aspect that can be readily cured by amending the specific relief sought in the draft Order so as to reflect the equivalent amount in local currency. Accordingly, I do not deem

the 1st respondent's objection in this regard to be sufficient to preclude the applicant's claim.

Material Disputes of Fact

The applicant in his papers avers that he has been unlawfully discriminated against and that he was superseded in the provision of motor vehicles under the Scheme. The respondents repudiate the applicant's assertions in this respect. Whatever the factual position may be, it is undisputed that the applicant was the only Member of Parliament who, being eligible as such, did not benefit from the Scheme at the relevant time. That being so, I do not think that the factual disputes alluded to are of vital significance to a proper determination of this matter. In any event, even if they were to be treated as being material, I foresee little difficulty in having them referred to trial on the papers before the Court.

Prescription of Claim

In terms of section 15(d) of the Prescription Act [*Chapter 8:11*], the period of prescription applicable to debts generally is three years. Section 16(1) provides that prescription commences to run "as soon as a debt is due". The word "debt" in this context encompasses "anything which may be sued for or claimed by reason of an obligation arising from statute, contract, delict or otherwise" (see section 2 of the Act). By virtue of section 16(3), 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".

The authorities cited by MALABA J in N*dlovu v Posts & Telecommunications Corporation* 1998 (2) ZLR 334 (H) at 336, illustrate the circumstances when a debt becomes due. A debt is due when it is "owing and

already payable" (*Escom v Stewarts & Lloyds SA (Pty) Ltd* 1979 (4) SA 905 (W) at 908E) or "immediately claimable" (*Deloitte Haskins & Sells Consultants (Pty) Ltd v Bowthorpe Hellerman Deutsch (Pty) Ltd* 1991 (1) SA 525 (A) at 532H) or "immediately exigible at the will of the creditor" (*Benson & Anor v Walters & Ors* 1984 (1) SA 73 (A) at 82H).

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" (*per* WATERMEYER J in *Abrahamse & Sons v SA Railways and Harbours* 1933 CPD 626 at 637). Similarly, in *Patel v Controller of Customs & Excise* 1982 (2) ZLR 82 (H) at 85, GUBBAY J (citing *Controller of Customs v Guiffre* 1971 (2) SA 81 (R) at 84A, and *Read v Brown* (l888) 22 QBD 131) defined the cause of action as being "every fact which it would be necessary for the plaintiff to prove if traversed, in order to support his right to the judgement of the court". Again, Smith J in *Dube v Banana* 1998 (2) ZLR 92 (H) at 95, observed that "the cause of action means the combination of facts that are material for the plaintiff to prove in order to succeed in his action". See also *Peebles v Dairiboard Zimbabwe (Pvt) Ltd* 1999 (1) ZLR 41 (H) at 45.

Having regard to the affidavits filed *in casu*, the relevant facts are as follows. At the beginning of 2001, the applicant submitted his application to the Fund to obtain a motor vehicle through the Scheme. In April 2001, the Fund made arrangements to purchase a Nissan Double Cab vehicle for the applicant. In June 2001, the Fund paid the sum of *circa* $21 million in local currency to the 4th respondent for the purchase of the vehicles bought under the Scheme, including the original Nissan vehicle identified for the applicant. However, before the vehicle was delivered, the applicant decided that he did not want that particular vehicle and identified a Mercedes Benz ML 320 instead. Since the Nissan vehicle had already been purchased, it was allocated in 2001 to the next Member of Parliament eligible under the Scheme.

Thereafter, on the 10th of June 2002, the applicant was advised that he would be refunded the contributions deducted from his salary under the Scheme.

On these facts, the applicant's cause of action arose either in 2001, when the vehicle acquired for him under the Scheme was allocated to another Member of Parliament, or later in June 2002, when he was advised that the contributions paid by him under the Scheme were to be refunded. I take the view that proof of the latter event is immaterial and was not necessary to found the applicant's claim in this matter. Rather, the material fact giving rise to his cause of action was the re-allocation of the Nissan vehicle originally acquired for him under the Scheme. This is a fact that the applicant was either aware of at the time that it occurred or should have become aware of by exercising reasonable care at that time. It follows that the applicant's claim was prescribed in 2001 and not in June 2002 as was argued on his behalf.

Before concluding this aspect, it is necessary to deal with *Mr Mawere's* contention that the letter of demand written by the applicant's erstwhile legal practitioners in June 2002 constituted the service of process entailing the judicial interruption of prescription in terms of section 19(2) of the Prescription Act. In support of this proposition, counsel cited a case supposedly reported in the 1995 Zimbabwe Law Reports, a case which I have scoured for in vain.

It is abundantly clear to me that a letter of demand, whether issued through a lawyer or otherwise, does not constitute "process" in its ordinary sense nor within the meaning of that term as defined in section 19(1) of the Act. Indeed, this was precisely the position taken by SMITH J in *Masara & Ors v Forestry Commission & Anor* 1999 (1) ZLR 174 (H) at 176, where it was held that a letter of demand by legal practitioners claiming damages, which was followed by negotiations and correspondence to reach a settlement, was not court process and did not operate to interrupt prescription. *Mr Mawere's* contention in this respect is patently misconceived and must be rejected out of hand.

Citation of Parties

The applicant in this matter has cited the first three respondents, namely, the Clerk of Parliament, the Ministry (*sic*) of Finance and the Reserve Bank of Zimbabwe, on the basis that they played an active part in running the Scheme and the Fund. However, the Fund itself has not been cited as a party to these proceedings. This is so even though the applicant must have been aware of its existence and its constitution when he applied for a vehicle under the Scheme and also when he signed the requisite pledge of security for a loan from the Fund.

The Constitution of the Fund declares, in Article 1, that it was established in terms of section 30 of the Audit and Exchequer Act [*Chapter 22:03*]. Article 2 makes it clear that the Fund has the power to sue and be sued in its own name in all matters affecting it or its operations and assets. In terms of Article 3, the object of the Fund is to grant loans to Members of Parliament for the purchase of motor vehicles. By virtue of Article 4, the Fund is to be administered, controlled and applied by the Board established under Article 8. The 1st respondent, *qua* Clerk of Parliament, is an *ex officio* member of this Board.

It is very clear from the foregoing that the Fund is an independent and distinct entity with its own legal *persona* and the capacity to sue or be sued in its own name. It is equally clear that it is the Fund, through its Board, which administers the Scheme and that it is the Fund which disburses the moneys required to purchase the vehicles acquired under the Scheme. Again, the relief sought by the applicant pertains to matters which are directly within the purview of the Fund's objects and operations.

In these circumstances, it clearly behoved the applicant to make the Fund a party to these proceedings. Indeed, it should have been cited as the principal respondent in this matter. The other respondents *in casu*, properly

regarded, were acting as officers or agents of the Fund in its administration of the Scheme. The failure to cite the Fund is, in my view, fatal to the disposition of this application and the relief sought thereunder.

Conclusion

To sum up, I am of the view that the applicant's claim *in casu* has prescribed and that this application was therefore instituted out of time. I am also of the view that these proceedings are defective for want of citation of the Fund as the principal respondent.

In the result, the 1st respondent's objections *in limine* are upheld and this application is accordingly dismissed with costs.

Garikayi & Co., applicant's legal practitioners
Chihambakwe, Mutizwa & Partners, 1st respondent's legal practitioners