(1) NORRIS TRUST **HC 1141/09**

Versus

MERCY MUZONDIWA (nee MHAKA)

(2) MERCY MUZONDIWA (nee MHAKA) **HC 256/19**

Versus

NORRIS TRUST

And

ESTATE LATE IRENE HELEN GERTENBACH

And

GARY GERTENBACH

And

REGISTRAR OF DEEDS

And

MASTER OF HIGH COURT

IN THE HIGH COURT OF ZIMBABWE
KABASA J
BULAWAYO 7 AND 21 NOVEMBER 2024

Civil Trial - Prescription

G. Madzuka with Mujaya and Madotsa, for the plaintiff (first defendant)
S. Chimedza, for the defendant, (plaintiff)

KABASA J: - These two matters were consolidated following an application made by defendant in HC 1141/09 and plaintiff in HC 2256/19. For ease of reference I will refer to the plaintiff in HC 1141/09 as “the Trust” and defendant in HC 1141/09 who is plaintiff in HC 2256/19 as “Mercy.”

On 20 July 2009 the Trust sued out summons against Mercy seeking her ejectment from No. 2B Flamboyant Avenue Msasa Park, Kwekwe, holding over damages at the rate of US$ 300 per month with effect from the date of service of summons to date of eviction, interest thereon at the prescribed rate from date of summons to date of final payment and costs of suit.

The Trust's claim, as elaborated in the declaration was premised on the fact that it claimed to be the owner of the property, known as stand 376 Que Que Township of Stand 410 Que Que Township. The claim of ownership was as per Deed of Transfer which is in its name. The Deed of Transfer was attached as Annexure A. The Trust had given notice to Mercy to vacate the premises to no avail necessitating the issuance of summons for her eviction and all those claiming occupation through her.

Entry of appearance to defend was entered for the two matters, on 28 July 2009 and on 7 June 2011, respectively. The Trust subsequently filed an application for summary judgment. In that application the Trust set out the basis for its claim, referred to an Agreement of Sale which was attached as Annexure 'A' and that the purchase price had been paid in full. The Trust also referred to the fact that it now had title over the property and a copy of the Deed of Transfer was attached as Annexure B.

The application for summary judgment was dismissed ostensibly because Mercy was also claiming to have bought the same property and alleging the existence of a double sale. In her opposition to the application for summary judgment, which opposition was filed on 15 June 2011, she also averred that the Trust's Deed of Transfer was a forged document.

Following the dismissal of the application for summary judgment, Mercy filed her plea on 4 November 2009 in which she stated that the Deed of Transfer was a forged document and that she had bought the property by special arrangement with Gary Gertenbach before 2008.

The parties subsequently came up with a joint pre-trial conference minute whose issues as they appeared thereon were adopted and consequently the matter was referred to trial. The authenticity of the Deed of Transfer was one of the issues so referred.

On 20 September 2019 Mercy issued summons and the Trust was the first defendant seeking the cancellation of Deed of Transfer number 2106/2008 in favour of the Trust and an order compelling Estate Late Irene Helen Gertenbach and Gary Gertenbach to sign transfer documents transferring the contentious property into her name.

In her declaration she averred that she bought the property through a special arrangement with Gary and advised the Trust representative when in 2008 one Thomas Norris came to the property and indicated his intention to buy it, that she had already bought the property 5 years earlier. The Trust therefore did not obtain clean transfer of the property and consequently its title must be set aside and transfer passed to her instead.

Upon receipt of the summons, the Trust requested for further particulars. Among the particulars so requested was the following:-

> "When did plaintiff come to know that the 1st defendant obtained transfer of stand 376 Que Que Township of stand 490 Que Que Township measuring 2165 square meters into its names?" In response to this particular issue, Mercy stated:-
>
> "When defendant was now applying for summary judgment under HC 1520/11."

After the further particulars were furnished, the Trust filed its plea and therein raised a point *in limine* to the effect that Mercy's claim had prescribed as she had come to know of its title on 9 June 2011 and if she was inclined to challenge that title she had 3 years reckoned from 9 June 2011 to file a claim. The 3 years lapsed on 9 June 2014. The parties subsequently attended a pre-trial conference and the issues as agreed by the parties at a round table conference were adopted and referred to trial. The first issue was whether or not Mercy's claim as against the Trust had prescribed.

This background was necessary as it informed the proceedings of 7 November 2024 when this matter finally came for trial.

Counsel for Mercy did not pursue an objection regarding how the issue of prescription was raised. I must say counsel's decision was wise in light of MANZUNZU J's decision in *Pomelo Mining (Private) Limited* v *Mutunja* HH 609-21. The learned Judge in that case, agreed with counsel for the defendant's argument that prescription can be raised at any point in the proceedings and cited section 20(2) of the Prescription Act [Chapter 8:11] which provides that:

> "(2) A party to litigation who invokes prescription shall do so in the relevant documents filed of record in the proceedings: Provided that a court may allow prescription to be raised at any stage of the proceedings."

The learned Judge therefore was not persuaded that the plea of prescription ought only to be raised as a special plea and found the manner in which it had been raised, which was by notice that a point *in limine* on prescription was going to be raised at trial, appropriate. The objection having been abandoned, I do not intend to make reference to it henceforth.

At the commencement of the trial counsel for the Trust indicated that he would lead evidence on the preliminary point. The decision was informed by GOWORA JA's pronouncement in *Brooker* v *Mudhanda & Ors* S 5-18 where she said:

> "It can therefore be accepted as settled that evidence is necessary when disposing of a matter in which a special plea of prescription is raised. The rationale behind this is that where a party raises a special plea as a defence, new facts arise and because of the introduction of fresh facts which did not appear in the declaration, there is need for a court to hear the evidence of the parties where facts are disputed before a ruling on the plea."

To that end therefore Thomas Norris the founder of Norris Trust testified. His evidence was that: In 2009 the Trust sought the eviction of Mercy under HC 1141/09 on the basis that the Trust was the owner of the property and had obtained title to it. Reference was made to the Deed of Transfer which was also attached as Annexure 'A'. He bought the property in 2008. After summons was served Mercy entered appearance to defend on 28 July 2009, in which she denied that the property was owned by the Trust and that the Deed of Transfer was a forged document. In June 2011 an application for Summary Judgment was filed and served on 15 June 2011.

Mercy then issued summons on 20 September 2019, 10 years after service of the Trust's summons seeking her eviction. A request for further particulars was made seeking to find out when Mercy became aware of the existence of the Title Deed to which she responded that it was at the time when Summary Judgment was applied for. Under HC 2256/19 Mercy is seeking transfer of the property on the basis that she is the owner based on an oral agreement she entered into on 12 December 2003. The oral agreement having been so entered in December 2003 and summons having been issued in September 2019, a period of 16 years has since lapsed between the two dates.

Under cross-examination the witness confirmed what he had already testified on. The rest of the cross-examination appeared to zero in on the aspect of the Deed of Transfer being a fraud which can only be ventilated when the matter is heard on the merits should it proceed beyond the point *in limine* on prescription.

The witness's evidence was simple and straightforward. He only stated that which found support in the documents filed of record. There is no issue that the Trust issued summons in 2009 and Mercy was served in 2009. A copy of the Deed of Transfer was annexed to that summons. When Summary Judgment was subsequently sought the facts upon which such

application was premised, spoke to the Trust's claim being based on a sale agreement and subsequent title obtained after payment of the full purchase price. The Deed of Transfer and the Agreement of Sale were annexed to the application.

In her opposition to that application, Mercy again raised the issue of the Deed of Transfer being a forged document.

This was the only witness who testified and after his evidence counsel for Mercy advised that no evidence was going to be led as reliance was being placed on the pleadings and the evidence led from Thomas Norris.

The question which begs an answer is whether Mercy's claim has prescribed.

In addressing the court *Mr. Madzuka*, counsel for the Trust highlighted the date when summons was issued under HC 1141/09 introducing the Title Deed sought to be impugned in HC 2256/19. From date of summons to date of Mercy's claim is a period of 10 years.

The reckoning of time is from when the cause of action arose, which is 22 July 2009, the date on which summons was served on Mercy.

In response to a request for further particulars when summons were issued in HC 2256/19 Mercy said she became aware of the Title Deed when the application for Summary Judgment was filed. If she became aware of the Title Deed in 2011, so counsel contended, she only approached the court in 2019, a period of 8 years. She therefore approached the court outside of the 3 year period stated in 15 (d) of the Prescription Act, [Chapter 8:11]. Mercy chose not to lead evidence and such failure denotes a decision to avoid embarrassment in case facts adverse to her would emanate from the evidence. The only version was from the Trust. Counsel relied on the decision in *Dendorp Municipality* v *Setzkorn* 1960 (4) SA 85 for this proposition.

Counsel further contended that the questions posed to the witness concentrated on the authenticity of the Title Deed, which relates to the merits and not the preliminary point of prescription. Further, the claim for specific performance regarding transfer of property into Mercy's name is based on an oral agreement of 12 December 2003 and 16 years has since lapsed from 2003 to 2019. Equally the plea filed in HC 1141/09 gives the impression that as at 4 November 2009 the date when the plea was filed Mercy regarded herself as the owner of the property and so knew she was claiming ownership but did nothing until 2019, a period of 10 years.

In conclusion counsel referred the court to section 2 and section 15 of the Prescription Act which provisions speak on what a debt is, when such should be claimed and when the period of prescription is reckoned from.

With that, counsel prayed that Mercy's claim be dismissed due to prescription.

In response, counsel for Mercy argued that Mercy's claim is not one where prescription applies. Section 15 of the Act talks of a debt and there was no mention of how the claim qualifies as a debt.

Mercy's claim for transfer has nothing to do with the Trust as it affects other parties and points of law cannot be raised on their behalf. Mercy is not seeking enforcement of a right but correction of a nullity so the only claim which could prescribe is the Trust's claim against Mercy as she has been in occupation of the property since 2003 to date, so counsel argued.

Since the Title Deed is a nullity as it is a fraud, prescription does not arise and the claim is not for a debt. Mercy only became aware of the fraud before filing HC 2556/19 and so did file her claim within the 3 year period. She was also defending the Trust's claim thereby asserting her rights, such pleadings had the effect of interrupting prescription. Prescription therefore did not run.

What does the law say with regards to prescription? Where a litigant leads evidence to show when the cause of action arose and there is no replication speaking to interruption of prescription can such interruption be adverted to in counsel's submissions? Can a litigant introduce new issues that were not ventilated in pleadings? I pose these questions as they raise issues I have to determine in this matter.

Section 15(d) of the Prescription Act "the Act" provides that:-

"The period of prescription of a debt shall be –

(a) ………

(b) ………

(c) ……….

(d) except where any enactment provides otherwise, three years, in the case of any other debt."

Section 2 of the Act defines a debt as:

> "Without limiting the meaning of the term, includes anything which may be sued for or claimed by reason of an obligation arising from statute, contract, delict or otherwise."

In the *Brooker* v *Mudhanda* case (*supra)* the claim was for transfer of immovable properties. The issue of transfer was held to amount to a debt as contemplated in the Act.

> "In the context of this dispute, debt would constitute the right to have transfer into the respondent's name." (per GOWORA JA in *Brooker* v *Mudhanda*).

Where a litigant impugns another's title and seeks to have transfer of title into their name, albeit from a party cited in that same action, is such a claim not a debt as contemplated by section 2 of the Act? I think it is.

In *City of Harare v Aqua – Jets (Private) Limited & Anor* HH 65-23 the court had to determine whether the claim by the plaintiff in which was sought cancellation of a Deed of Transfer and upon such cancellation that such title reverts to plaintiff had prescribed or not. The claim itself was adjudged to be a debt as contemplated in section 2 of the Act. The facts of the matter are not necessary for purposes of this judgment.

In casu Mercy seeks the cancellation of the deed of transfer held by the Trust and for her to get the title. What she seeks as against the Trust amounts to a debt as contemplated in section 2.

The argument that it is an action that seeks to nullify a non-event is an ingenious argument that finds no favour with the court.

Counsel for Mercy opted not to lead evidence. The pleadings made no mention of Mercy's claim being anything other than a debt. The Deed of Transfer was attached to the summons as at July 2009 and when in 2019 Mercy issued summons the issue of prescription was raised by the Trust in its plea. There was no replication speaking to the claim not being a debt as contemplated by section 2 of the Prescription Act. The issue only came at the very end when counsel was making his submissions. It was as if it was an afterthought.

In *Medlog Zimbabwe (Private) Limited* v *Cost Benefit Holdings (Private) Limited*, S 24-18 GARWE JA (as he then was) made the point that a party cannot plead one cause and change at trial without amendment. Pleadings serve to inform the other party the case they have to meet and unless a cause not pleaded is properly ventilated during trial and duly investigated, a party cannot seek to rely on a point not pleaded.

> "The whole purpose of pleadings is to bring clearly to the notice of the court and the parties to an action the issues upon which reliance is to be placed." (*Durboch* v *Faiway Hotel Ltd* 1949 (3) SA 1081 (SR)).

The Durboch case was cited with approval in the *Medlog* case (*supra)* making the point that a party cannot indicate right then turn left without warning. (See also *Minister of Agriculture and Land Affairs & Anor* v *De Klerk and Ors* 2014 (1) SA 212).

The claim by Mercy under HC 2256/19 is a claim for a debt and therefore section 15(d) of the Act applies as regards when such should be litigated.

When did the cause of action arise? In *Chirinda* v *Van der Merwe & Anor* HH 51-13, a case cited by PHIRI J in the *Trust Bank Corporation Limited* v *Tafirenyika & Anor* HH 349-18, CHIWESHE JP (as he then was) had this to say:-

> "It is therefore trite that prescription runs from the date that a debt becomes due. A debt becomes due when the creditor becomes aware of the identity of the debtor and the facts giving rise to the cause of action. The cause of action in any action is the entire set of facts which give rise to an enforceable claim and includes every act which is material to be proved to entitle a plaintiff to succeed in his claim." (underlining my emphasis)

Mercy was aware of the Deed of Transfer as at the time summons was issued as it was attached to the summons which was served on her on 22 July 2009. The same Deed of Transfer and the sale agreement which resulted in that Deed of Transfer were attached to the application for Summary Judgment filed in 2011. Mercy's plea before the application for Summary Judgment was filed, which was filed on 4 November 2009 already described the Deed of Transfer as a forged document and that was the position throughout.

It therefore cannot be true that Mercy became aware of the Deed of Transfer when the Summary Judgment application was filed. And even if that is accepted the application was filed in 2011 and summons in HC 2256/19 was only issued on 20 September 2019, 8 years later.

It is no wonder that in his submissions counsel sought to glaze over the issue choosing to merely say Mercy became aware of the Deed of Transfer before filing the 2019 case. When did she become aware? The failure to address such by counsel was, to my mind, a ploy to run away from the fact that such knowledge was at time of service of summons in November 2009 or at the very latest at time of the Summary Judgment application in 2011. Whichever way one looks at it, the period of 3 years had lapsed.

There is nothing new that Mercy alleges in her own pleadings in HC 2256/19 which suggests that as at November 2009 or June 2011 the entire set of facts which gave rise to an enforceable claim were not known to her which she only became aware of "before filing the 2019 case."

It follows therefore that prescription began to run as at 22 July 2009 when the Trust served her with summons for eviction.

As stated earlier Mercy may have alleged interruption of prescription in her replication to the Trust's plea in HC 2256/19 but there is nothing which speaks to such interruption. Counsel sought to suggest that her assertion of her right as shown in her plea and in defending HC 1141/09 amounts to interruption of prescription. One cannot seek to ventilate the issue of interruption in submissions as counsel sought to do.

> "In a plea of prescription the onus is on the defendant to show that the claim is prescribed but if in reply the plaintiff alleges that prescription was interrupted or waived, the onus would be on the plaintiff to show that it was so interrupted or waived. (*Brooker* v *Mudhanda (supra*), Cassim v *Kadir* 1962 (2) 473 (NPD)). The Trust raised the issue of prescription in its plea to HC 2556/19. In her replication Mercy stated that prescription was interrupted when she resisted eviction.

There was no acknowledgement by the Trust of the claims by Mercy and Mercy did not prosecute her claim as against the Trust. She chose not to testify and merely stating so in pleadings can hardly amount to discharging the onus on her to show such interruption.

> "Interruption of prescription can only be determined by the leading of evidence as it is from the weighing of factual evidence that a court can reach a decision on that aspect." (*City of Harare* v *Aqua-Jets* (supra).

In terms of section 16 of the Act prescription begins to run as soon as the debt is due. I have already alluded to when such debt became due.

Prescription has the effect of extinguishing the debt.

> "… it cannot be denied that society is intolerant to stale claims. The consequence is that a creditor is required to be vigilant in enforcing his rights. If he fails to enforce them timeously he may not enforce them at all." (*John Conrad Trust* v *Federation of Kushanda Pre-Schools Trust and Ors* HH 503-15*)*.

It is only on succeeding to impugn the Deed of Transfer in favour of the Trust that Mercy can seek to have title transferred to her by second and third defendants. I must just say the citation of second defendant is problematic as there is no entity which answers to such. In

essence there is no 2nd defendant under HC2256/19. This matter is however not really concerned with this issue and so I will not exercise my mind on this any further than I have.

That said, the point *in limine* on prescription succeeds.

I accordingly make the following order:-

1. The point *in limine* on prescription succeeds.
2. The plaintiff's claim under HC 2256/19 be and is hereby dismissed, with costs.

The parties may set the matter down with regards to the Trust's claim, should they consider that necessary given the resolution of the point *in limine* which formed the basis of Mercy's resistance to the Trust's claim under HC1141/09.

Mawadze & Mujaya Legal Practitioners and Madotsa & Partners, plaintiff's legal practitioners (1st defendant)
Messrs Jarvis Palframan, defendant's legal practitioners (plaintiff)