JOHANNES MUZENDA DONDO
versus
WILDSEARCH SAFARI & TOURS (PRIVATE) LIMITED
and
REQUIT (PRIVATE) LIMITED
and
REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
MHURI J
HARARE, 17 November 2022 & 13 April 2023

Advocate Hashiti, for the plaintiff
Mr T E Govere, for the 1st defendant
No appearance for the 2nd and 3rd defendants

Special Plea in Bar

MHURI J:

On the 1st of August 2022 plaintiff issued summons against the defendants in which he was claiming:

a) Cancellation of a deed of transfer made in favour of first and second defendants in respect of an immovable property known as a certain piece of land situate in the district of Charter, called the remainder of Swindon, measuring 746, 7170 hectares (The Property) held under deed of transfer 8373/2002.
b) Costs of suit on an attorney client scale against 1st defendant

In his declaration, plaintiff stated that on 10 November 1998 he purchased the property held under a deed of transfer 6850/85 dated 18 December, 1985 from one Arnoldus Mauritius Rinke (deceased).

Thereafter one Eric Nhodza (deceased) took the deed of transfer from plaintiff under the pretext of taking it to the seller's conveyancers Costa and Madzonga Legal Practitioners, the understanding between plaintiff and Eric being that after taking transfer of title, plaintiff would sub divide the property and sell 200 hectares to Eric. Unbeknown to plaintiff Eric proceeded to fraudulently transfer the property to first and second defendants through his legal

practitioners Tapiwa Mudambanuki (Tapiwa) (deceased). The seller's signature on the power of attorney to pass transfer was forged which enabled Tapiwa to transfer the property from the seller to the first and second defendants.

Under HC 4086/22, plaintiff discovered that the declarations and resolutions were also forged misrepresenting that first and second defendants purchased the property from the seller on 4 January 2001.

As an alternative to pleading on the merits, first defendant raised a special plea of prescription, its submissions being that it has been more than 3 years and to be specific 20 years since the property was transferred. Evidently, in terms of section 15 (d) of the Prescription Act [Chapter 8:11] the claim has prescribed, in that:

1) The property having being transferred on 25 July 2002, the registration of transfer is constructive notice to the whole world of the change of ownership. Every person including plaintiff is deemed to have had knowledge of the existence of first defendant's duly registered real right as far back as 25 July 2002.
2) In an application for a prohibitory interdict and *mandamus* under HC 4086/22 filed on 21 June 2022 by first defendant, plaintiff deposed to an opposing affidavit on 29 June 2022 stating that his daughter A Rashai conducted a deeds search in 2018 where she discovered that the property had been fraudulently transferred. Plaintiff attached as well a letter from his Legal Practitioners dated 23 May 2018 stamped Credsure Insurance in which the Legal practitioner acknowledged that the deed of transfer was registered in the first and second defendants' names.
3) Plaintiff's daughter A Rashai deposed to an opposing affidavit in case HC 4086/22 on the 29 June 2022 in which she stated that she conducted a deeds search in 2014 and discovered that the property had been fraudulently transferred to first and second defendants
4) Through the correspondence between the parties attorneys under HC 4086/22 over the custody of the deed of transfer dated 11 January 2019, 12 January 2019, 14 January 2019, 17 January 2019, 7 February 2019 and 29 March 2019, plaintiff was aware of the registration of the deed of transfer as far back as the said dates show. These dates show that the summons was filed more than three (3) years after the cause of action arose whether by invocation of the doctrine of constructive notice or plaintiff's even sworn deposition.

First defendant prayed that the special plea be upheld and the plaintiff claim be dismissed with costs on the attorney-client scale.

In support of its plea, first defendant filed heads of argument, an affidavit of evidence attaching various annexures (24). Plaintiff also filed his replication to the special plea. He also filed his affidavit opposing the special plea and his heads of argument. This was in compliance with the procedure as stated by Gowora JA (as she then was) in the case of:

1) *Jennifer Nan Brooker* v *Richard Mudhanda and Registrar of Deeds*
2) *Adrienne Staley Pierce* v *Richard Mudhanda and Registrar of Deed*s SC 5/18.

In his replication, plaintiff disputed that a special plea of prescription is available to first defendant as:

1) First defendant fraudulently acquired title to the property which property plaintiff purchased from the lawful holder of the title, as such nothing legal can flow from a fraud.
2) Under HC 4086/22 the late Eric Nhodza (whose wife and daughter are directors of first defendant) together with first defendant used the fraudulently obtained title deed as collateral to fraudulently acquire a loan.
3) Whatever correspondences exchanged between the parties, legal practitioners does not take away the fact that a fraud was committed and this fraud unravels everything.
4) The perceived rights which first defendant seeks to enforce or invoke emanate from a fraud and such are enforceable.
5) The special plea is misplaced and is to be dismissed with costs on the attorney-client scale.

The undisputed factual background is that plaintiff purchased the property from Rinke in November 1998. Title was not transferred from Rinke to plaintiff. On 25 July 2002 the property was transferred from Rinke to R*equit (Private) Limited* (2nd defendant) and *Wildsearch Safaris and Tours (Private) Limited* (1st defendant), Deed of Transfer No 8373/2002 refers.

After various unsuccessful engagements between the first and second defendants' Legal Practitioners in relation to the subdivision of the property, first defendant filed an application for a prohibitory interdict and mandamus in this Court (HC 4086/22 refers) where in first defendant's prayer was for second defendant and plaintiff to be interdicted from denying first defendant access and utilization of the property and secondly a *mandamus*

compelling second defendant and plaintiff to subdivide plaintiff the property into two equal portions to enable each party to own and utilize their portion separately.

This application is still pending.

On 1st August 2022, plaintiff instituted these proceedings, as stated at the beginning of this judgment, claiming cancellation of the deed of transfer 8373/2002 on the basis that the transfer from Rinke was fraudulently done. From July 2002 (date of transfer) to August 2022 (date of summons) a period of 20 years have lapsed. Section 15 of the Prescription Act [Chapter 8:11} provides for prescription of debts. The Act defines "debt" as:

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

Section 15 sub section (d) provides:

"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 16 provides when prescription begins to run. It provides:

i. Subject to subsections (2) and (3), prescription shall commence to run as soon as a debt is done
ii. …..
iii. A debt shall not be deemed to be done 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 of such facts if he could have acquired knowledge thereof by excising reasonable care."

In casu, plaintiff's claim falls under the definition of debt. The cancellation of the deed of transfer is something that can be sued for or claimed for either by reason of an obligation arising from….. or otherwise. Its falling under the definition of a debt, the claim also falls under the ambit of subsection (d) of section 15 to wit that prescription period is three years. In terms of section 16, the prescription commences to run as soon as the debt becomes due. As stated by GOWORA JA (as she then was) in the case of *Jennifer Nan Brooker* v *Richard Mudhanda & Anor* to determine the question of prescription one has first to make a finding on the cause of action upon which the claim is premised and when specifically the cause of action arose. The Learned Judge of Appeal on the authority of *Abrahams & Sons* v *Sa Railways & Barbours 1933 CPD 626* described a cause of action as:

> *"*the entire set of facts which give rise to enforceable claim and includes every act which is material to be provided to entitle a plaintiff to succeed in his claims. It includes all that a plaintiff must set out in his declaration in order to disclose a cause of action."

From the undisputed factual background, transfer of the property was effected in July 2002. All being equal, the cause of action arose on the date of transfer and it is this date that the three years plaintiff was to litigate is reckoned from.

First defendant relied on the case of *Efrolou* (Private) Limited vs *Muringani* HH 112/2013 in its submission that plaintiff had constructive notice of the registration of title by third defendant as of July 2002, constructive notice being notice to the world at large of the change in ownership.

I am however not persuaded by first defendant's submissions in that regard, in view of the manner in which the transfer was done.

Harry Silberberg *The Law of Property, Durban, and Butterworths 1975* referred to in the case of *Efrolou (Private) supra* says at page 67:

> *"The registration of a real right protects its holder and the public alike. As far as the* former is concerned, he is entitled to rely on the doctrine of constructive notice which means that every person is deemed to have knowledge of the existence of a duly registered real right. In other words, once a real right has been registered it becomes enforceable against the world at large, provided only that it has been obtained in good faith. Conversely, every member of the public is subject to certain exceptions-entitled to rely on the deeds register being correct.*"* (Underlining for emphasis)

The obtaining of title in good faith is challenged and it is the basis of the cancellation of the deed of transfer by plaintiff. Be that as it may I need to look at the other facts to determine when plaintiff became aware of the facts that give rise to the cause of action.

As stated earlier, there are several correspondences between plaintiff's and defendant's Legal Practitioners in connection with the subdivision of the property. In particular there is an email dated 14 January 2019 from plaintiff's legal practitioner to the defendant's legal practitioner which reads in part as follows:

> "… no doubt a subdivision is necessary but it cannot be effected without yours honouring existing terms and conditions of the parties agreement. Nonetheless, I shall take comprehensive instructions and revert. May I reiterate that this matter calls for amicable resolution based on mutual respect and honesty?"

There is also a letter authored by plaintiff's legal practitioners to the Managing Director of Credsure, dated 23 May 2018 referenced.

Requit Investments (Private) Limited and Wildsearch Safaris and Tours (Private) Limited v *Credit Insurance Z*imbabwe confirming a meeting of the 14th May 2018 and also confirming the following

i. "that indeed you received the deed of transfer in question from the late Eric Nhodza in a bid to securitize certain obligations due from Wedzera Petroleum (Private) Ltd. You failed to register a surety mortgage bond over the property as you did not receive authority to do so from the title holder.
ii. …
iii. …''

Plaintiff however averred that he is not identified in the letters referred to and relied upon, as the client represented by Mambosasa legal practitioners and therefore it cannot be assumed that he had knowledge of the fraud. It should be noted however that it is not the knowledge of the fraud but the knowledge of the transfer of the property that is in issue. It is also noted that plaintiff's daughter A Rashai who conducted a deeds search as per her affidavit and discovered that the property had been transferred fraudulently, as per her and plaintiff's affidavits, is a director of 2nd defendant which is referred to in the correspondences, in some of which there is mention of plaintiff. Rashai, reading from her affidavit was keenly and actively involved in plaintiff's affairs vis a vis the property. She became aware of the transfer of the property in 2018 if not in 2014.

In paragraph 5 of her affidavit she deposed:

"after the untimely death of Eric Nhodza in 2014, I contacted his wife and daughter and enquired about the deed of transfer and they professed ignorance about the issue. I then carried out a deed search and discovered that the property had been transferred into the names of Applicant and second respondent. I also discovered that the title was encumbered as there was a caveat registered in favour of Credsure. In a bid to save my father's farm, I engaged the late family of the late Eric Nhodza and offered that despite non perfomance and fraud on the part of the deceased, the farm could be subdivided and two hundred and twenty hectares transferred to Credsure in settlement of the late Eric Nhodza's obligations."

In paragraph 6 she states "unfortunately, our family's generosity was misconstrued as weakness…"

In paragraph 5 of his opposing affidavit in case HC 4086/22, plaintiff deposed that:
"… in 2018 a deeds search was conducted by my daughter and she discovered that the property had been fraudulently transferred to two body corporates one of which was a shell company given to her by the late Eric Nhodza for future use…"

The above narration convinces me that plaintiff became aware of the facts that gave rise to the cause of action in 2018 when Rashai discovered that the property had been transferred. Even if I were to be wrong in my finding above, plaintiff would be affected by subsection (3) of section 16 of the Prescription. Considering Rashai's deposition, plaintiff should have acquired the knowledge about the transfer by exercising reasonable care and diligence. Having become aware of the facts giving rise to the cause of action as far back as 2018, plaintiff's claim had prescribed at the time he issued summons in August 2022. The remarks by BHUNU JA that once prescription has run its course it deprives the aggrieved party of the remedy or relief sought regardless of whether or not one has a valid claim on the merits. The nature of the defence (prescription) is that it even allows a litigant at fault to keep his ill-gotten gains, are apt. John *Conrade Trust* v *The Federation of Kushanda Preschools Trust & 3 Ors* SC 12/2017.

In my considered view, the special plea was well taken and I uphold it.

To that end, IT IS ORDERED THAT, the special plea be and is hereby upheld. Plaintiff to bear costs on the ordinary scale as I find no basis to order costs on the higher scale.

Mambosasa, plaintiff's legal practitioners
Govere Law Chambers, first defendant's legal practitioners