BANKET TRADING COMPANY (PRIVATE) LIMITED
versus
CHIPO CHIKWENGA

HIGH COURT OF ZIMBABWE
DEMBURE J
HARARE, 5 & 20 November 2024

Opposed Application

K Mangwiro, for the applicant
K Choga, for the respondent

DEMBURE J:

[1] This matter was heard on 5 November 2024. I issued an order in terms of which I upheld the respondent's point *in limine* that the applicant's claim had prescribed and consequently, dismissed this application with costs. I gave brief reasons for my decision then. On 7 November 2024, the applicant's legal practitioners requested the written reasons thereof. These are they.

[2] This is a court application for *rei vindicatio.* The applicant is Banket Trading Company (Private) Limited and Chipo Chikwenga is the respondent. The applicant sought an order that the respondent and all those claiming occupation through her should surrender possession and return to the applicant a certain piece of land situate in the district of Lomagundi called stand 1 Kuwadzana Township measuring 314 square metres held under deed of grant number 2535/95 within seven days of service of the court order. Further that in the event the respondent fails to comply with the court order the respondent and all those claiming occupation through her "be and are hereby evicted" from the said immovable property and she pays the costs of suit.

FACTUAL BACKGROUND

[3] The applicant is the registered owner of a certain piece of land situate in the district of Lomagundi called Stand 1 Kuwadzana Township measuring 314 square metres *("the property")*. The applicant averred that it purchased the property from Joseph Chikwenga, the respondent's now deceased husband. It is common cause that the applicant obtained title or ownership of the said property upon registration of a deed of grant number 2535/95 on 13 April 1995.

[4] It is common cause that since the title deed was issued, the respondent and her husband have been in occupation of the property. At the time this suit was instituted and heard the respondent was still in possession of the property after her husband died in 2009. The applicant averred that it made no demand for them to vacate the property despite the applicant having knowledge of their occupation of the property. There was no agreement for any lease either with the late Joseph Chikwenga or the respondent.

[5] On 2 May 2023, through the Sheriff of the High Court, the applicant served the respondent with a letter of demand dated 20 April 2023 for her to vacate the property by 31 May 2023. In response, the respondent through a letter dated 31 May 2023 from her legal practitioners opposed the demand to vacate the property stating that the property was never sold to the applicant and that is evidenced by her stay there together with her husband.

[6] On 9 September 2024, the applicant filed this application for *rei vindicatio* on the basis that it is the owner of the property and that the property is in possession of the respondent without its consent. The respondent opposed this application. She contended that the property was never sold to the applicant at all but her late husband obtained a loan from the applicant in 1993 and used the property documents only as security for the debt. She further averred that she had been in occupation of the property and also with her husband before he died in 2009 and that for a period of over twenty-eight years, the applicant had never demanded vacant possession of the property or asked them to move out.

[7] The respondent raised two points *in limine* namely that:

1. The applicant's claim had prescribed, and
2. There are material disputes of fact incapable of resolution on the papers.

I had to deal with the first point in *limine* being the special defence of prescription as it was capable of disposing of this matter. The first issue for determination was whether the applicant's claim for *rei vindicatio* had prescribed.

WHETHER OR NOT THE APPLICANT'S CLAIM FOR *REI VINDICATIO* OR THE CAUSE OF ACTION HAD PRESCRIBED

RESPONDENT'S SUBMISSIONS

[8] Mr *Choga*, for the respondent, submitted that the applicant averred that it purchased the property in 1995 and in support of that assertion tendered a deed of grant registered on 13 April 1995. That is the only basis upon which the applicant claims entitlement to the property. He argued that by operation of the law, a deed of grant gave the applicant real rights of ownership that entitled it to claim the property against anyone in the whole world. The applicant's papers do not suggest that it made any efforts to have the respondent or her late husband give the applicant possession of the property despite having been conferred with ownership rights in 1995.

[9] Counsel further submitted that the applicant simply said that there was no arrangement as to when possession would be handed over. It only mentioned an agreement of sale that led to the transfer. The question to be asked is whether it is possible to purchase a property and then ask for possession twenty-nine years later. It was argued that prescription begins to run when one has knowledge of the full set of facts which can lead one to succeed in his claim. The applicant had the full knowledge of all facts when the deed of grant was granted. It cannot be that they had to wait for twenty-eight to twenty-nine years to then claim possession without having made any reference to a term of a contract entitling them to possession of the property.

[10] Mr *Choga* further argued that the prescription period ran from 13 April 1995 to 12 April 1998. The matter became prescribed after 12 April 1998 following the lapse of a period of three years from the date of the granting of the deed of grant. He referred the court to further arguments in the respondent's heads of argument.

[11] Counsel also argued that prescription in this case does not begin to run when the demand was made. It begins to run when the cause of action arises. The term cause of action was defined in the case of *Chiwawa* v *Mutzuris & Ors* HH 7/09. The applicant had its property idle for a period of about twenty-nine years. It cannot be said that they became aware when the demand was made. When looking at the full facts necessary to prove their prayer we have to look at the knowledge that the property is theirs, their knowledge relates to the person in occupation and also to the absence of consent to the possession. These facts were known to them by the time they got their deed of grant. In their own words, they said there was no arrangement with the respondent. This entails that there was no consent. An arrangement entails consent.

[12] It was further submitted that the letter of demand was dispatched when the applicant ought to have knowledge of the full facts when the deed of grant was granted. It would have been different if the applicant had said that they had allowed the respondent to possess the property. There would have been some agreement. Mr *Choga* went further to argue that it is trite that placing a party in *mora* relates to an existing obligation from a contract. The letter of demand could not place the respondent in *mora* or allege an arrangement that by a certain time the respondent would have vacated the property. Counsel contended that the issue of prescription settles this matter.

APPLICANT'S SUBMISSIONS

[13] *Per contra*, Mr *Mangwiro*, submitted that the argument by the applicant is that there was no discussion or arrangement as to vacant possession. One of the facts to be established is the refusal to pay a particular debt. He further referred this court to the applicant's submissions at pp 42 to 43 of the record. It was further argued that when there is no

arrangement between the parties about the debt, the letter of demand is required for prescription to begin to run. The respondent and or her husband had no arrangement for vacant possession and no demand was ever made for possession. Only the letter of demand would create the cause of action.

[14] It was further argued that there is no counter-application for ownership of the property. Prescription allows for ownership to pass to another party based on s 4(a) of the Prescription Act. Therefore, it is not surprising why the applicant decided to bring these proceedings as it realises the real threat to its ownership as thirty years have not lapsed. The respondent would want the court to believe that a demand ought to have been made earlier. A party is free to make a demand when it wishes to do so. Counsel also argued that a demand itself cannot prescribe. The amount of time of twenty-nine years for the applicant to have done something is a moot point. In making the demand it became clear that the applicant does not wish to allow the respondent to continue possessing the property any longer. It was the respondent who had to bring the evidence on the agreement leading to the transfer and she failed to do so. The applicant does not need the said agreement of sale to prove its case.

[15] Mr *Mangwiro* also submitted that the case of *John Conradie Trust* v *Federation of Kushanda Preschools Trust & Ors* SC 12/17 is distinguishable. In that case, the court simply classified *rei vindicatio* as a debt. He further argued that the court did not go into the merits. The judgment did not speak about the facts upon which the decision of the High Court was made. Where the parties did not speak about the date of payment, the debt becomes due from the demand for possession. Where there is no arrangement or agreement between the parties then the other party must be placed in *mora*. In this case, he finally submitted, a demand was required for them to be placed in *mora*.

THE APPLICABLE LAW

[16] It is trite that the special plea of prescription, if successful, has the effect of disposing of the matter. The law requires that the claim must have been instituted before prescription

had taken its course. In terms of s 15(d) of the Prescription Act [*Chapter 8:11*] *("the Prescription Act")* any other debt not specifically mentioned under s 15 of the Act prescribes at the expiry of a period of three years from the date the debt becomes due, except where any enactment provides otherwise. The provisions of s 15 of the Prescription Act read:

> **"15 Periods of prescription of debts**
> The period of prescription of a debt shall be—
> *(a)* thirty years, in the case of—
> (i) a debt secured by mortgage bond;
> (ii) a judgment debt;
> (iii) a debt in respect of taxation imposed or levied by or under any enactment;
> (iv) a debt owed to the State in respect of any tax, royalty, tribute, share of the profits or other similar charge or consideration payable in connection with the exploitation of or the right to win minerals or other substances;
> *(b)* fifteen years, in the case of a debt owed to the State and arising out of an advance or loan of money or a sale or lease of land by the State to the debtor unless a longer period applies in respect of the debt concerned in terms of paragraph (a);
> *(c)* six years in the case of—
> (i) a debt arising from a bill of exchange or other negotiable instrument or from a notarial contract;
> (ii) a debt owed to the State; unless a longer period applies in respect of the debt concerned in terms of paragraph (a) or (b);
> *(d)* except where any enactment provides otherwise, three years, in the case of any other debt." (Emphasis added)

[17] It is now settled in our jurisdiction that a claim for vindication of property amounts to a claim for a debt in terms of the Prescription Act. The special defence of prescription may, therefore, be raised even against the owner of a property who seeks to recover his property from anyone in possession of it without his consent. See *John Conradie John Conradie Trust* v *Federation of Kushanda Preschools Trust & Ors supra*. At pp 4-5, BHUNU JA outlining the legal position said:

> "The applicant's proposition has no foundation at law. A perusal of the Prescription Act shows that nowhere does it prohibit or exclude third parties from raising prescription as a defence. What prescribes is the debt and not any of the parties concerned. It is therefore open to third parties to raise the defence of prescription in appropriate cases once prescription has run its course.
> As we have already seen above, the circumstances under which prescription may be raised as a defence are clearly spelt out under s 15 (d) of the Prescription Act which provides that a debt except where statute provides otherwise, shall prescribe after 3 years. Section 2 of the Act goes on to define a debt as:

> 2 (1) In this Act – 'debt', 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." (My emphasis).
>
> The phrase, "anything which may be sued for" gives the term 'debt' a very wide meaning synonymous with cause of action as observed by GREENLAND J in *Denton v Director of Customs & Excise* 1989 (3) ZLR 41 at 48. In that case the learned judge had occasion to remark that:
>
> > "Note that the word "debt "used in this Act (Prescription Act) and the words "cause thereof" used in s 178 (4) of the Customs and Excise Act mean the same thing. This is because of the wide meaning of "debt" set out in the former."
>
> Since the applicant is suing the 3rd respondent for vindication, its suit falls squarely within the ambit of 'anything which may be sued for.' What this means is that a claim for vindication of property amounts to a claim for a debt in terms of the prescription Act. It therefore follows as a matter of common sense that the applicant's suit being a claim for vindication, in legal parlance it is a debt which is subject to prescription in terms of the Act. For that reason, the learned judge in the court *a quo* cannot be faulted at all for determining that the applicant's claim against the third respondent had prescribed." (Emphasis added)

[18] It is accordingly moot or academic for this court to engage in the debate as to whether claims for *rei vindicatio* should properly be subject to prescription in our law. This court is bound by the decision in *John Conradie Trust supra* under the principle of *stare decisis*. That decision defined our law and remains the law unless and until it is reversed. Indeed, the question of whether claims for vindication of property should be subject to prescription had been subject to a variety of views in South African courts with judges offering a variety of views until 2015. Some of these views have even been directly contradictory. For example, in *Barnett and Others* v *Minister of Land Affairs & Ors* 2007 (6) SA 313 (SCA) the court saw no reason why prescription would not include a claim for the enforcement of an owner's rights to property (*per* BARNETT JA par 19).

[19] However, a position different from our own law was finally adopted in *Absa Bank Limited* v *Keet* 2015 (4) SA 474 (SCA). ZONDI JA, writing on behalf of the full bench of the SCA, held: '[i]n my view, there is merit in the argument that a vindicatory claim, because it is a claim based on ownership of a thing, cannot be described as a debt as envisaged by the Prescription Act' (see para 20). He added that '[i]n the circumstances, the view that the vindicatory action is a "debt" as contemplated by the Prescription Act which prescribes after three years is, in my opinion, contrary to the scheme of the Act' (see para 25).

THE ANALYSIS

[20] Since it is settled that prescription applies to a claim for *rei vindicatio* the question that must be answered is whether, *in casu*, the applicant's claim or cause of action had prescribed by the time this application was launched. The prescription period is three years for the debt in this case. It is trite that prescription begins to run from the date the debt becomes due. Thus CHIWESHE JP (as he then was) in *Chirinda* v *Van der Merwe & Anor* HH 51/13 restated this legal position as follows:

> "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 or claim 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."

[21] This is also what s 16(3) of the Prescription Act provides as it states that:

> "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."

[22] For a valid claim to be established there must be a clear cause of action from which the debt arose. The term cause of action has been defined in several cases. In *Chiwawa supra* MAKARAU JP (as she then was) said:

> "It is now the settled position in our law, in my view, that the term refers to when the plaintiff is aware of every fact which it would be necessary for him or her to prove in order to support his or her prayer for judgment. It is the entire set of facts that the plaintiff has to allege in his or her declaration in order to disclose a cause of action but does not include the evidence that is necessary to support such a cause of action. (See *Shinga v General Accident Insurance Co (Zimbabwe) Ltd* 1989 (2) ZLR 268 (HC) at 278 A- C)."

[23] In this case, the applicant's claim is for *rei vindicatio*. It is trite that for such an action to succeed the applicant must prove that it is the owner of the property and that the property is in possession of the respondent without its consent. See *Nyahora Ors* v *CFI Holdings* SC 81/14. It is common cause that the applicant obtained ownership of the property on 13 April 1995 upon the registration of a deed of grant. The fact of ownership was known

by the applicant from that date and that was not disputed. The second issue relates to when the applicant had knowledge that the respondent and her late husband were in possession of its property without its consent. This is easily answered from the applicant's founding affidavit and the concession made by Mr *Mangwiro* at the hearing that there was no agreement or arrangement for the respondent or her late husband to occupy the property after the applicant obtained title on 13 April 1995. This clearly shows that the respondent's continued stay or possession of the property was without the applicant's consent from 13 April 1995 the date the applicant acquired title rights in the said property.

[24] Further, the applicant's founding affidavit and its annexure "C" being the letter of demand dated 20 April 2023 also show that the respondent and her husband's occupation of the property without the applicant's consent was fully within its knowledge from the date it acquired ownership on 13 April 1995. In particular, para(s) 5 and 11 of the founding affidavit, if read together with para 2 of the letter of demand, confirm that all the critical set of facts required to create the cause of action *in casu*, as of 13 April 1995 were known by the applicant. In para 5 of the applicant's founding affidavit it is stated:

> "5. Since the deed of grant was issued by the registrar of deeds, Joseph Chikwenga and subsequently his wife, the respondent continued occupying the property. It was simply a situation where there was no demand for their vacation at the time despite knowledge of the respondent's occupation. Further no rentals were being paid by Joseph Chikwenga nor subsequently the respondent." (Emphasis added)

[25] In para 11 the applicant further states:

> "11. I further submit that the applicant did not at any time consent to selling or letting the property to the respondent nor the respondent's late husband…"

Then the letter of demand dated 20 April 2023 and addressed to the respondent, in particular para 3 further states:

> "The premises are owned by our client, after the property was purchased through/from your late husband Joseph Chikwenga, however you have continued to occupy the premises despite there being no agreement or arrangement to that effect."

[26] The above statements establish that the applicant was fully aware of the respondent and her late husband's occupation of the property and that the continued occupation was

without its consent from the date it was registered as the owner of the property. As counsel for the applicant rightly conceded, there was no arrangement or agreement authorising the respondent and her late husband to occupy the property from 13 April 1995. The remedy of *rei vindicatio* was set forth in a number of cases and in *Chenga* v *Chikadaya & Ors* SC 7/13 at p.7 it was stated:

> "The *rei vindicatio* is a common law remedy that is available to the owner of property for its recovery from the possession of any other person. In such an action there are two essential elements of the remedy that require to be proved. These are firstly, proof of ownership and secondly, possession of property by another person. Once the two requirements are met, the onus shifts to the respondent to justify his occupation (my emphasis)."

[27] In *Stanbic Finance Zimbabwe Ltd* v *Chivhungwa* 1999 (1) ZLR 262 (H) it was held that the principle of *rei vindicatio* is based on the fact that an owner cannot be deprived of his property against his will and that he is entitled to recover it from any person who retains possession of it without his consent.

[28] Considering the above requirements for a vindicatory claim, the full set of facts essential to establish the claim and succeed (the cause of action) were within the full knowledge of the applicant on 13 April 1995. The facts are that the applicant was the owner and as confirmed from the letter of demand read together with para(s) 5 and 11 of the applicant's founding affidavit, the applicant was from that same date aware that the respondent and her husband were in occupation of the property and that the possession was without its consent. As put by Mr *Mangwiro*, counsel for the applicant, there was simply no arrangement for the respondent or her late husband to retain possession or occupy the applicant's property. All these facts created the cause of action or entitled the applicant to demand and sue for possession as of 13 April 1995.

[29] The applicant, therefore, had three years from 13 April 1995 to institute this claim for *rei vindicatio*. The "debt" became due on 13 April 1995. Prescription began to run from the said date as it was the date the cause of action arose. See *Van Brooker* v *Mudhanda & Anor AND Pierce* v *Mudhanda & Anor* SC 5/18. I agree with Mr *Choga*'s argument that the

period within which the applicant could lawfully claim the property from the respondent or even her late husband who died in 2009 lapsed on 12 April 1998. Thereafter and in particular when the letter of demand as well as this suit was launched, the claim or cause of action had long prescribed. This matter is no longer legally sustainable. I fully associate myself with the words of DEME J in *Merreta* v *Kanyongo & Anor* HC 1049/22 *(*cited in *Musindo* v *Kazambara & Anor* HH 234/24*)*, as to the primary purpose of prescription when he said:

> "The law of prescription may be described as a case management mechanism meant to ensure that there should be a definitive period within which litigation must be instituted. Litigation must never be an eternal right without regulated time frames. Failure to have such cut off time frames will result in endless suits. This law warrants that the person likely to be dragged before the courts may not limitlessly labour under perpetual fear of potential litigation. The law of prescription also makes litigation predictable."

[30] I do not agree with Mr *Mangwiro*'s submission that the letter of demand dated 20 April 2023 was required to create the cause of action or that the respondent had to be placed in *mora*. The issue of one being placed in *mora* can only arise from a situation where there was an agreement or contract for the respondent and her late husband to occupy the property. That contract would also not have provided a specific date of performance or the date to surrender possession thereof thereby requiring the applicant to place the defaulting party in *mora* to create the basis for cancellation of the contract and an eviction order.

[31] There was, in other words, no contract requiring the payment of any debt for the principle of *mora debitoris* to even arise. The principle relating to when the debtor can be placed in *mora* and when that is required for the debt to be due was fully explained in *Rolen Trading (Pvt) Ltd* v *Parkside Holdings (Pvt) Ltd* SC 106/22. At pp 10-12 GOWORA JA (as she then was) put the position of the law as follows:

> "Generally, as in this case, the payment of rent for leased premises must be effected within a stipulated time frame. Where the parties have fixed a time for performance, and the debtor does not perform accordingly, the debtor is *in mora.* In this scenario, the creditor does not need to demand performance from the debtor. In legal terms, this is said to be *in mora ex re*, that is, *mora* from the transaction itself. Reliance for this proposition may be found in a paragraph to that effect by the learned authors Hutchinson, Van Heerden, Visser & Van Der Merwe in their book *Willes Principles of South African Law* to the following effect:..

> "If the time for performance has been fixed, performance must be made by the time agreed upon. If the debtor has culpably failed to perform his obligations by such time, he is automatically in default or *in mora (debitoris)*. *Mora*, in this case, is known as *mora ex re* for no notice to the debtor is necessary, the rule being *dies interpellatio pro homine*.
> Where the time for performance has not been fixed by the contract, the general rule applies; namely, that performance may be demanded immediately or within a reasonable time depending on the nature of the obligation and the surrounding circumstances, provided, of course, that the party making the demand is himself able and willing to perform his own obligations. Although the performance may be due and claimable forthwith, the debtor need not perform until he is called upon by the creditor to do so. Only when a specific time for performance has been set can the debtor's default possibly constitute a breach of contract. Thus the creditor must make a demand calling upon the debtor to perform by a date reasonable in the circumstances, and if the debtor fails to comply with the demand by the specified date, he will fall into *mora*…
>
> It is settled therefore that where the contract itself does not fix the time for performance, a creditor may fix the time for performance by making demand for the due performance of the obligation by the debtor by a certain date, the demand in this particular instance being *interpellatio.* If the debtor fails to perform once demand has been made, the debtor is *in mora*, justifying cancellation." (Emphasis added)

[32] It is clear, therefore, that the concept of *mora debitoris* arises from a contractual relationship. It is a principle of the law of contract, in particular, it is a form of breach of contract. It is thus required that the debtor be placed in *mora* where no specific time of performance has been agreed by the contracting parties. This does not arise in this case. The applicant and the respondent or her late husband were never in any contractual relationship. The applicant confirmed in its pleadings and its counsel also restated the same position in oral argument that there was no agreement or arrangement for the respondent and her late husband to occupy or possess the property from 13 April 1995, the date the applicant obtained ownership of the property. As the applicant puts it "it was simply a situation where there was no demand for their vacation at the time despite knowledge of the respondent's occupation". The applicant was aware of the respondent's occupation of the property without its consent since the date the deed of grant was issued. If there was an agreement allowing the respondent to possess the property and if such a contract was silent on the date of performance it would have created the legal duty for the applicant to demand first that the respondent give up possession within a particular time or by a certain date to place her in *mora*.

[33] In this case, the letter of demand issued on 20 April 2023 came late as the claim had already prescribed upon the lapse of three years on 12 April 1998. The demand did not place anyone in *mora* as that principle is inapplicable *in casu*. The said letter accordingly has no effect as it cannot revive a debt that had been extinguished by operation of the law. The applicant forfeited its right to vindicate the disputed property from the respondent notwithstanding that it may have a good claim on the merits against the respondent. I also find it a bit outlandish that the applicant would acquire a property and then not claim possession for over twenty-eight years while knowing that it had not authorised or consented to the respondent or her late husband occupying it during that long period. It then came to court twenty-nine years later. Surely the applicant has no one else to blame. It made its bed of thorns and must lie on it.

[34] It is trite that the defence of prescription has nothing to do with the merits. If successful it allows a party even at fault to keep his or her ill-gotten gains. The Supreme Court in *John Conradie Trust supra* endorsed this legal position when it held 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. Thus an owner forfeits his right to vindicate his property once prescription has run its full course as happened in this case. The nature of the defence is that it even allows a litigant at fault to keep his ill-gotten gains.
> Prescription does not deal with the merits. It simply seeks to extinguish old stale debts not claimed within the prescribed time limits. The rationale for prescription was amply captured by the learned trial judge where he quotes Wessels in *The Law of Contracts in South Africa*, Vol. II para 2766 where the learned author says:
>
> > "Creditors should not be allowed to permit claims to grow stale because thereby they embarrass the debtor in his proof of payment and because it is upsetting to the social order that the financial relations of the debtor towards third parties should suddenly be disturbed by the demanding from him payment of forgotten claims."

DISPOSITION

[35] Based on the above reasons, I found the applicant's claim for *rei vindicatio* to have prescribed by operation of the law. It became unnecessary for me to consider the second point in *limine* that there were material disputes of fact incapable of resolution on the

papers. Consequently, I upheld the point *in limine* raised by the respondent and dismissed this application with costs.

[36] The costs must follow the cause. During the hearing, Mr *Choga* did not insist on punitive costs. I noted, however, that the respondent had prayed for such punitive costs in her opposing affidavit. There were no exceptional circumstances brought to my attention to justify such costs. I did not find any reason to mulct the applicant with costs on a legal practitioner and client scale. Costs on an ordinary scale would meet the justices of this case.

DEMBURE J: ……..

M B Narotam & Associates, applicant's legal practitioners
Choga & Associates, the respondent's legal practitioners.