DAMIAN JOSEPH
versus
BANKER CLEMENT HINZE A
and
THE PROVINCIAL MINING DIRECTORT MASHONALAND WEST

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 21 September 2021 and 14 September 2022

Civi Trial – Judgment on Plea of Prescription

W Kamusa with *Z M Kamusasa* for plaintiff
E T Moyo with *F T Manyuchi* for 1st defendant

CHITAPI J: This matter was listed for trial. The first defendant pleaded prescription of the plaintiff's claim and prayed that the l*is* against him should be demanded with costs on that score. The plaintiff has pleaded that the *lis* has not prescribed contrary to the first defendant's claim in that regard.

It is trite that the determination of prescription as a special plea is a trial matter. It is unlike other dilatory points *in limine* which are determined on the pleadings filed, in short, on the records four corners without the need to consider extraneous evidence. The procedural law relating to prescription was revisited by GOWORA JA (as she was then) in the Supreme Court judgment of *Jennifer Nam Brooker* v *Richard Mudhanda and Registrar of Deeds* SC 5/18. The learned judge discussed s 2 and 16 of the Prescription Act as well as rule 137 of the High Court Rules, 1971 on the procedure for raising a special plea.

In the same judgment the learned judge discussed the issue of *onus* to establish the special plea of prescription. The position is settled. Where the special plea of prescription is raised by the defendant and the plaintiff does not replicate the plaintiff is taken as having admitted the fact of prescription. There would be nothing for the court to determine since it is an entrenched principle of pleading that if what is alleged against a party is not refuted or denied by that party, it is taken as admitted by that party. The plaintiff who replicates that his or her claim has not prescribed bears the *onus* to satisfy the court in terms of the replication that the claim was not

prescribed prior to the issue of summons. Reference was made to the judgment on *Yusuf* v *Banley & Ors* 1964 (4) SA 117 wherein it was stated:

> "The point therefore arises whether the *onus* lies on the defendants to establish the special plea, *viz*, that the facts are such as to entitle them to a dismissal of the action because the claim has become prescribed or whether the *onus* lies on the plaintiff to establish the allegations contained in the allegations to the special plea.
> The *onus* then being on the plaintiff to satisfy the court in terms of his replication to the special plea that his claim had not become prescribed before service of summons and as the only evidence in this regard is that of the plaintiff himself for consideration as to whether that onus had been discharged cannot be divorced from an assessment of his credibility as a witness. Consequently, no decision on the special plea could as originally suggested to be given before hearing the audience of the whole case."

> The learned judge also stated as follows in relation to a special plea generally-
> "a special plea is an objection on the basis of certain facts which do not appear in the plaintiff's declaration or particulars of claim and has the effect of either destroying or postponing the action. The various forms of special plea and the rationale underlying the procedure were set out by Gillespie J in *Doeman* (Pvt0 ltd v *Pichamark & Ors* 199 (1) ZLR 390 (H), at 396B –F in which he said-
> ------ since a special; plea involves the averment of a new fact, it is susceptible of replication and of a hearing at which evidence on this new fact alone may be led."

In this matter the parties submitted that there was no need for the court to hear evidence because the facts on which argument on prescription was premised were not in dispute. They prepared a statement of agreed facts which I shall relate to later. The point I make in that whilst it is competent for parties to agree facts and seek to argue on them to establish or defend the plea of prescription, the agreed facts should not leave unanswered questions on facts or details which anchor the basis of the prescription defence. In that regard, the facts must traverse the elements of prescription as defined in the relevant law on which reliance will have been placed. A failure to set out agreed facts which relate to the essential elements of prescription leaves the court unable to make a determination on the matter. In such event, the court may either dismiss the plea or order that the issue be traversed in oral evidence which is a power which the court has. I turn to the merit of the special plea. In the declaration which unfortunately reads like a founding affidavit in that it pleads evidence in many instances which I will not individualize save to state that the declaration must be concise and *inter-alia* state the nature, extent and grounds of the cause of action which the plaintiff bring against the first defendant, the plaintiff made material averments which in brief were to the following effect. The plaintiff and the first defendant are cousins. Their

dispute arises from a mining venture which they agreed to engage in. Its aim was to register mining claims and to exploit them on a farm on which they both have an interest. The interest arises from the fact that the farm was owned by their common grandparents. The plaintiff pleaded that he provided the money required to register the mining claims with the second respondent. The understanding was that the mining claims be registered in the joint names of the plaintiff and defendant. The plaintiff pleaded that unbeknown to the plaintiff, the defendant registered two claims on the farm in his own name and excluded the plaintiff's name. The plaintiff further pleaded that the defendant agreed to rectify the anomaly by applying for the inclusion of the plaintiff's name on the mining certificates. Plaintiff also pleaded that, having agreed on the inclusion of the plaintiff's name as aforesaid, the two agreed to enter into an interim arrangement in terms of which they executed, on 3 June, 2016, a tribute agreement which would expire on 21 May, 2019. The tribute agreement allowed the plaintiff to mine on the claims. The agreement is per custom and law was registered with the second defendant. The plaintiff pleaded that he invested on the claims by constructing improvements and continued to mine on the claims

The plaintiff pleaded that the first defendant refused to have the tribute agreement renewed upon its expiry. The plaintiff pleaded further that the first defendant made unfounded allegations to the second defendant that the plaintiff had breached the tribute agreement and sought the plaintiff's eviction from the farm on which the two claims are located. The plaintiff averred that the second defendant had consequently ordered him to leave the farm. The plaintiff also pleaded that he was entitled to rights equal to those of the first defendant in the claims. He pleaded that the first defendant had reneged on the agreement to include the plaintiff's name on the mining certificates so that the ownership is joint between the plaintiff and the first respondent and that the first defendants refusal was a result of the first defendant taking advantage of the fact that the two mining certificates were in the first defendant's name.

The plaintiff claimed relief of an order as follows-

> "(i) The first defendant be and is hereby compelled to apply for the addition of the plaintiff's names as co-owner and holder of rights to take 66 and take 67 mining claims within 5 days of this order failing which the second defendant be and is hereby ordered to register plaintiff as a part owner and holder of mining rights to take 66 and 67 mining claims.
> (ii) The second defendant be and is hereby ordered to amend its certificates and records so that plaintiff's name are added as co-holder of mining claims to take 66 and take 67 registration number 33579 and 33580 respectively in the Makonde District.
> (iii) First defendant pays costs of suit on attorney client scale."

In the plea, the first defendant denied that there was an agreement that the mining claims should be jointly owned between him and the plaintiff. In particular the first defendant denied that there was agreement in 2016 between him and the plaintiff to register the mining claims in the joint names of him and the plaintiff. Explicitly, the first defendant averred in para 4 of his plea-

> "… truth is that first defendant decided on his owner to register mining claims without any influence from plaintiff"

The first defendant denied that the plaintiff gave the defendant money to register the claims. He also denied that there was agreement to correct the alleged wrong registration by including the plaintiff's name.

The first defendant pleaded that the plaintiff ought to have raised his claim "long back" because the first tribute agreement between the parties was entered into on 22 May 2013 and expired on 21 May 2016. Since the plaintiff was claiming that the dispute over the mining claims occurred prior to the entering into of the tribute agreement aforesaid, the cause of action must be taken to have arisen prior to 2013 and that therefore the plaintiff's claim prescribed at most by 2016 due to the lapse of 3 years. The first defendant pleaded that the relationship between him and the plaintiff was contractual by reason of the tribute agreement which expired in 2016 and with it the end of the contractual relationship was sealed.

In the replication the plaintiff did not expressly refute the first defendant's allegation that because the dispute between him and the first defendant allegedly started before the execution of the tribute agreement which expired in 2016, the cause of action occurred prior to 2013 and that the plaintiff therefore delayed in instituting this application.

The plaintiff repeated his claim that the first defendant agreed or acknowledged that the claims were "erroneously registered in his name only." The plaintiff did not specify the date of the alleged acknowledgment nor the alleged promise to rectify the issue. Notably the plaintiff pleaded as follows in answer to para 4 of the first defendant's plea wherein the first defendant denied that there was agreement in 2016 to register mining claims in their joint names:

> "… the tribute agreement was merely signed to give the plaintiff access in the interim pending rectification of the erroneous mining claims registration with the second defendant. However, because of the first defendant's reluctance to rectify the issue, the plaintiff had no option but to seek renewal of the tribute agreement in order to continue mining of the claims. But due to frustration caused by the reluctance of the first defendant to rectify the issue over the years the plaintiff now seeks the intervention of this Honourable Court to resolve the issue once and for all."

The failure by the plaintiff to explicitly address the alleged date or period that the cause of action actually arose is an indication of poor or bad pleading. It is important that the reply ought to have clearly and concisely addressed the issue of delaying instituting the application. Nevertheless the issue of prescription was denied by the applicant thus necessitating determination. The parties agreed to prepare a statement of agreed facts in relation to facts relevant to prescription. I reproduce the statement of agreed facts as follows:

STATEMENT OF AGREED FACTS

1. The plaintiff allegedly entered into an agreement with the first defendant to register mining claims in both their names in 2006.
2. The plaintiff discovered that the first defendant had registered the mining claims in his sole name.
3. The plaintiff allegedly confronted the first defendant and asked him to rectify the defect.
4. However, pending the rectification, it was alleged by the plaintiff that it was agreed to give the plaintiff access to the farm for mining purposes.
5. On 22 May 2013, attribute agreement was entered into the plaintiff and first defendant.
6. It is the plaintiff's case that the purpose of entering into the tribute agreement was to secure for the plaintiff access to the mine pending the rectification of the registration of the claims.
7. The tribute agreement expired in 2016, whereupon on 3 June 2016 the plaintiff and the first defendant entered into another tribute agreement for a further three years. It is plaintiff's case that the issue of rectification of the registration, remained pending.
8. After the expiry of the second tribute agreement, the first defendant refused to have it renewed. The issue of registration of claims, remained unresolved.
9. As a consequence of the outstanding disputes, the plaintiff instituted proceedings under case; HC 5318/19 and HC 5973/19. Under HC 5973/19 an order by consent was granted, in terms of which it was resolved that the mining claims dispute in the present matter HC 6314/19, be resolved by court process and further that a new tribute agreement be entered into allowing both parties to continue on the disputed claims.

The parties counsel filed heads of argument in support of and against the other party's positions. As far as the procedural law of *onus* to prove prescription is concerned the party which invokes prescription bears the onus to prove it. See the case of *Maclead* v *Kweyiya* 2013 (6) SA (1) para 10 where the court stated,

> "10- This court has repeatedly stated that a defendant bears the full evidentiary burden to prove a plea of prescription, including the date on which a plaintiff obtained actual or constructive knowledge of the date. The burden shifts to the plaintiff only if the defendant has established a *prima facie* case."

The shifting of the burden to the plaintiff still remains an evidential one. It is never the burden of proof because the trite position remains that he who avers must prove unless by some legal exception the *onus* or burden of proof is shifted. The defence of prescription is fact based and thus evidential to which if facts are established, the law is then applied to answer the question whether the debt in issue is prescribed.

In the case of *Sunnidhew Sookai Jugwawh* v *Mobile Telephone Networks* (Pvt) Ltd 2021 ZASCA 114, the Supreme Court of South African per GORVEN JA (NAVSA AD P HUGHES JA , Kgoele and Phatshoane AJ JA concurring) the learned judge stated at para 8.

> "[8] All of this means that prescription is fact driven. The fact that a debt appears to have become due on a certain date is not the only relevant fact required to determine whether it has prescribed. The particulars of claim do not necessarily show when the date became due, whether the creditor was prevented from coming to know of the existence of the debt, when the creditor became aware of the identity of the debtor, whether the completion of prescription was interrupted or whether there was an agreement not to invoke prescription."

The judgment also makes the important point that a court shall not take judicial notice of prescription and that therefore the plaintiff is not required to anticipate the defence of prescription and/or plead that his or her claim is not prescribed.

In relation to this application the first defendant was not specific on the date that prescription began to operate or run against the plaintiff. It is material to specify the date of the onset of prescription because the period of prescription being 3 years is time specific or based in terms of s 33(d) of the Interpretation Act a year is defined as-

> "(a) a reference without qualification to a year shall be continued as a reference to a period of twelve months."

Thus, the three years prescription period should be specially pleaded as to when they commenced and ended. Additionally, the defendant should allege and establish that the prescriptive period was not interrupted in any of the ways recognized at law. The applicant would then be required to prove that the *lis* is not prescribed.

The defendant argued that prescription began to run from 22 May 2013 when the parties entered onto a tribute agreement for the plaintiff to access and exploit the disputed claims. In the statement of agreed facts, the parties agreed in para 9 that the tribute agreement was executed to secure the access by plaintiff, "pending the rectification of the registration of the claims." The tribute agreement expired on 22 May, 2016 where after it was renewed for another period which expired on21 May, 2019. The first defendant allegedly refused to renew the tribute agreement. This gave arise to the institution of this action. The first defendant further averred that prescription must have begun to run before the entering into by the parties of the tribute agreement. Prescription cannot be inferred because it must be factually proven. The 22nd May, 2013 becomes significant. The parties have accepted that the tribute agreement was entered into pending rectification of the mining certificate. The certificates could not have been pending rectification if the rectification was contested. This piece of evidence implies that the plaintiff and first defendant were agreed that the tribute agreement should govern their relationship *vis-à-vis* access to the claims and exploiting them pending rectification. The plaintiff and first defendant therefore agreed on rectification. That being, no cause of action warranting that the plaintiff should seek a declaration of the true ownership of the claims and the need to correct records would not have arisen where the parties were agreed that there be rectification.

The first defendant argued that prescription would in the alternative have run from 22 May, 2016 to 22 May, 2019 when the second tribute agreement expired. The calculation would be inaccurate. The Interpretation Act provides in s 33(6)(c) that the reference to a month in an enactment refers to a calendar month. The period of prescription would have to begin o run from the date which a calendar month should run. The period commence on 1 June, 2016 and expire on 31 May, 2019.

In the statement of agreed facts in para 7, it is stated that it is the plaintiff's case that the issue of the rectification of the registration of the claims remained pending. The first defendant's position was not stated. In para 8 of the statement of agreed facts, it was stated that the first

defendant refused to renew the tribute agreement and at that stage the issue of rectification of the registration of claims remained unsolved.

The evidence in my view shows that the plaintiff and the first defendant were agreed on the rectification of the registration of the claims. If there had been no agreement to effect rectification, there would not have been executed the tribute agreements. There was in my view no need for the plaintiff to institute proceedings in circumstances where there was an understanding that rectification of registration certificates remained pending and an interim tribute agreement concluded to allow the plaintiff access to he claims. Upon refusal by the first defendant to further renew the tribute agreement, the cause of action to force rectification through the court arose then. The cause of action in any matter arises when it is complete. The first defendant as agreed in the statement of agreed facts entered into tribute agreements pending rectification of certificates of title. The plaintiff had no reason to believe that the first defendant would not process the rectification. The complete cause of action in my view was completed upon the refusal of the first defendant to renew the tribute agreement as then it meant that the interim arrangements pending rectification which was the understanding between the plaintiff and the first defendant for the plaintiff to access the claims and mine them pending rectification had now been spurned by the first defendant.

The plaintiff and first defendant elected not to lead oral evidence and instead to depend upon a statement of agreed facts. It constitutes the admitted evidence. The admitted evidence shows that the issue of rectification was accepted to be a process under implementation. The fact that there would be no implementation was only expressed or implied upon the refusal by the first defendant to enter into another tribute agreement. The option of a filing statement of agreed facts in place of oral evidence has its pitfalls. Where material facts necessary to be proved or established are not covered in the agreed facts, the court cannot surmise or create facts for the parties where the parties have not traversed them as agreed facts. I am not able to hold that the first defendant has established the plea of prescription. On the contrary, the cause of action arose upon the refusal of the first defendant to execute another tribute agreement as such action evinced the first defendant's abrogation of the agreement to rectify the registration whilst allowing the plaintiff access to mine in the claims.

In my finding, the first defendant did not establish the plea of prescription on the balance of probabilities. The defence of the special plea of prescription is hereby dismissed with costs in the cause. The parties may arrange with the Registrar for dates for continuation of the trial on the merits.

Kamusasa Musendo, plaintiffs' legal practitioners
Scanlen Holderness, defendant's legal practitioners