CATHERINE CHIWAWA
versus
APOSTOLOS MUTZURIS
and
PANAYOTA MUTZURIS
and
GRAMMATIKI MUZTURIS
and
IRENE MUTZURIS
and
THE REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
MAKARAU JP
Harare 26, 28, 29 and 30 January and 4 February 2009.

CIVIL TRIAL

Adv H Zhou for plaintiff.
Adv R Fitches for 1st to 4th defendants.

MAKARAU JP: On 29 November 2006, the plaintiff issued summons against the defendants seeking an order compelling the defendants to pass transfer of certain immovable property to her. She also sought an order evicting the defendants and all those occupying through the defendant from the property in dispute. As the basis for her claims, the details of which appear in paragraph 7 of her declaration, the plaintiff averred that from all the defendants, second to fourth defendants being represented by the first defendant under a general power of attorney, she had purchased the property in dispute in July 2003 under a written agreement of sale. She further averred that she had paid all the amounts necessary to obtain rates clearance and tax clearance certificates in respect of the property.

The suit was defended. The defendants denied having sold the property to the plaintiff and disputed the signatures appearing on the agreement of sale as theirs. Further, they averred that after the plaintiff had realized that there were problems attendant upon the alleged sale of the property, she sought and was refunded the amount she had paid as the purchase price for the property, thus compromising her claims under the agreement of sale. Finally and in the alternative, the defendants pleaded that the plaintiff's claim had prescribed by the date she issued summons in the matter.

The defendants also filed a counterclaim in which they sought an order declaring invalid the agreement of sale between the parties.

At the pre-trial conference of the matter, four issues were identified as being the issues for trial. These were:

1. whether the plaintiff's claim has prescribed;
2. whether or not an agreement of sale was entered into between the plaintiff and the defendants;
3. whether the agreement of sale, if any cancelled by reason of the plaintiff accepting a refund of the purchase price; and
4. whether the immovable property should be transferred to the plaintiff.

The plaintiff gave evidence at the trial of the matter. Her evidence in chief was to the following effect.

She is a businesswoman, specializing in the retail of ink and/or computer cartridges. In or about 2002, she went to the offices of the defendants' legal practitioners, intending to have a Will drafted for her. She gave instructions for the drafting of the Will to a secretary, one Evelyn Saidi, "Evelyn". After this had been done, she told Evelyn that she was looking for property to buy. At the time she made the inquiry, the first defendant was present at the lawyers' offices. He had a property to sell. He gave the address of the property to Evelyn who in turn passed it to the plaintiff. The first defendant gave her directions to the property. She viewed the property and liked it. She returned to the offices of the legal practitioners and found the first defendant still present. She inquired as to the purchase price and the first defendant indicated that the sellers wanted twenty-five thousand pounds. Evelyn then cross rated the figure and advised her that it equated to Z$15 million. She indicated then in the presence of the first defendant that she would bring the $Z15 million the following day.

The following day, the plaintiff gave the sum of Z$15 million cash to Evelyn. Evelyn was going to change the money into pounds. On the day, she did not get a receipt for the payment she had made. When she asked for a receipt, she was told that the other secretary, presumably who was responsible for issuing receipts, was not in the office on the day. She went back the following day and was asked to come back the following week. It was only on 26 March 2003 that she was given an old receipt bearing not her name but her husband's and recording a different transaction to the one in respect of which she had made the payment. The receipt was dated 26 March 2003, the date when it was issued and not the date on which she made the payment. When she showed the receipt to her husband, he was of the opinion that it was insufficient to prove that she had purchased a property and advised her to request for an

agreement of sale in addition. It took some time to have the agreement of sale prepared. Later she was called in to sign the agreement. She signed the agreement on 3 July 2003. A few days later, she was called in to collect her copy. The agreement had been signed and witnessed on behalf of the first defendant. When she asked to move into the property purchased, she was informed that she could not do so before transfer was effected. To facilitate the transfer, she was asked to clear the rates and obtain a rates clearance certificate and a tax certificate in respect of the property, which she proceeded to do. By 27 July 2003, she had made all the relevant payments and had given the rates and tax clearance certificates to Evelyn.

On one occasion when transfer was taking long, she went to the lawyers' offices with someone from the Office of the President and Cabinet, who during the course of talking to Evelyn, managed to get into his possession the deed of transfer in respect of the property and advised Evelyn that he would not give this back as the plaintiff was entitled to transfer of the property.

She took the matter to a lawyer and instructed the lawyer to demand transfer of the property. The lawyer also used to do debt collection on her behalf as she was then in the money-lending business. She did receive a cheque from the lawyer in the sum of $15 million but this could not have been a refund of the purchase price as she had not instructed the lawyer to demand or accept the refund.

Under cross-examination, the plaintiff testified that sometime in 2004, she filed a court application with this court for an order compelling transfer from the four defendants. The application, which was defended, was dismissed on 26 May 2005. She also testified that she was unaware that Evelyn had been charged with fraud and has absconded after being granted bail.

After giving evidence, the plaintiff closed her case without calling any other witness. This prompted *Advocate Fitches* for the defendants to apply for absolution from the instance, relying on the long accepted test employed by our courts in such matters and as discussed in such cases as *Supreme Service Station (Pvt) Ltd v Fox & Goodridge (Pvt)Ltd* 1971 (1) ZLR 1. *Advocate Fitches* submitted that taking the evidence of the plaintiff in totality, there was no evidence before me upon which I could make a reasonable mistake and give judgment for the plaintiff. In particular, he submitted that there was no evidence that the first defendant had signed the agreement of sale relied upon by the plaintiff. Secondly, he submitted that the agreement of sale relied upon by the plaintiff was tainted with illegality in that the asking price

was fixed in currency other than Zimbabwean currency. Finally, he submitted that on the evidence of the plaintiff, the plaintiff's claim, being a debt in terms of the Prescription Act [Chapter 8.11], (" the Act"), had been extinguished by prescription in that a period exceeding three years had lapsed between the date the plaintiff's cause of action arose and the date summons were issued in the matter.

In response, *Advocate Zhou* submitted that the matter before me was not a proper matter in which to grant absolution from the instance as it involved a counterclaim by the defendants. He also urged me to find that there was an oral agreement between the parties, concluded when they met in the offices of the defendants' legal practitioners. In his submission, the oral agreement constituted *prima facie* evidence of an agreement of sale between the parties upon which I can make a reasonable mistake in favour of the plaintiff. I understood this submission to be an acknowledgment on his part that there may be difficulties in the cogency of the evidence led by the plaintiff in respect of the written agreement of sale.

As his third submission, *Advocate Zhou* argued that the plaintiff's claim has not prescribed as prescription was judicially interrupted by the issuance of process in 2004 in the form of the court application, which was filed on 11 June 2004 and was dismissed on 26 May 2005.

It is my intention to deal with his last submission first for in my view, I can dispose of this matter on this issue alone.

The plaintiff has approached this court on the basis that she has a valid contract of sale with the defendants. In her pleadings, she alleges that the parties had a written agreement. She further pleads that the agreement of sale was concluded on 26 March 2003 when she was issued with a receipt for $Z15 million by Evelyn even though she had paid the sum in or about November 2002. Thus, according to the plaintiff, there are three possible dates as to when the parties concluded the agreement of sale. It could be in November 2002 as argued by *Advocate Zhou.* It could be on 26 March 2003 when she was issued with a receipt for the payment of the purchase price or finally, it could be 9 July 2003 when the first plaintiff purportedly signed the agreement of sale.

At this stage I wish to point out that I agree with the observation by *Advocate Zhou* that at this stage in the trial, I may not make recourse to any findings I may have made on the credibility of the plaintiff as a witness. I also cannot determine the application for absolution on the basis of probabilities as I cannot justly arrive at these without hearing the other side. I

take the view that the exercise I have to undertake at this stage is to simply but critically analyze the evidence adduced by the plaintiff and assess whether on the basis of such, without passing a judgment on whether I believe it or not, I can make a reasonable mistake and pass judgment in her favour.

Advocate Zhou has submitted that the plaintiff's cause of action against the defendants arose when she obtained the last clearance certificate to facilitate transfer as she had assumed these obligations in terms of the agreement between the parties.

With respect, I cannot agree.

It may be pertinent at this stage to observe that the term "cause of action" as used by *Advocate Zhou* above has been the subject of many court decisions. 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).

Applying the above to the facts before me, it is my view that the plaintiff's cause of action arose when she concluded the agreement of sale with the first defendant. It is at that stage that she at law became entitled to receive transfer from the defendants against payment of whatever was due from her in terms of the agreement of sale. As indicated above, this could have been as early as November 2002 or at the latest, on 9 July 2003 when the written agreement of sale was allegedly signed.

It is my further view, that using all the possible dates upon which the agreement of sale could have been concluded, I am coming to the same conclusion, that by the time summons were issued in this matter, a period in excess of three years had lapsed from such date.

Accepting therefore the submission by Advocate Zhou, but without determining the probabilities of the matter that the plaintiff became aware that she had a cause of action against the defendants after she had paid for the rates and tax clearance certificate, I would hold that the plaintiff's claim had been extinguished by prescription at the time she issued summons in the matter. The plaintiff adduced evidence to the effect that she obtained the tax clearance certificate last and that this is dated 27 July 2003. She only issued summons in this case on 29 November 2006. A period in excess of three years had clearly elapsed.

The period stipulated in the Act for the extinction of debts is peremptory. It cannot be waived. It is neither fixed in the discretion of court nor can the court extend the period for good cause shown. Like the sword of Damocles, it falls on all uncollected debts and falls on a pre-determined date.

Advocate Zhou argued that the filing of the court application in June 2004 had the effect of not only judicially interrupting prescription but of suspending the running of prescription as does the death of a party to litigation pending the appointment of an administrator to the deceased's estate. His argument was that after the plaintiff filed the court application on 11 June 2004, prescription stopped running up to 26 May 2005 when judgment in the application was handed down. Prescription then continued to run after 27 May 2006 such that by the time summons were issued in November 2006, the claim was still within the prescription period.

Again with respect, I am unable to agree.

Civil action in this court may be commenced by the filing of a court application and, in the absence of an appeal, it is finally brought to a conclusion by the judgment of the court on that application. One of the judgments which this court can return on an application is a dismissal of that application because it raises a dispute of fact that cannot be resolved on the basis of the affidavits filed of record. Such a ruling is a judgment disposing of the application filed but not of the matter between the parties. It follows that when the court dismisses an application on account of dispute of facts arising, it finally disposed of that application and, although the applicant may be entitled to issue fresh process, the first action filed with the court is at an end and at an unsuccessful end for that. Whether or not an applicant who would have unsuccessfully prosecuted the first application is able to issue fresh process in the matter depends in my view on whether the new action can be commenced within three years of the date the cause of action arose. The unsuccessful application has no bearing on the prescription of the debt and will act as if the applicant did nothing in the matter. (See *Minister of Police and Another v Gasa* 1980 (3) SA 387 (N)); *Van der Merwe v Protea Ins Co* 1982 (1) 770 (ECD) and *Savanhu v PTC* SC 124/97).

Advocate Zhou has referred me to the authority of *Van Vuuren v Boshoff* 1964 (1) SA 395 (TPD) as authority for the submission he made in the matter to the effect the service on the debtor of an unsuccessfully prosecuted process has the effect of delaying the completion of

prescription. In that matter, the learned judge had to deal with a provision of the then Prescription Act, 18 of 1943 whose section 6 provided that:

> 'extinctive prescription shall be interrupted by…..
> (b) service on the debtor of any process whereby action is instituted…. and shall begin to run **de novo from the date of when the interruption occurred**." (The emphasis is mine).

In that case, the learned judge came to the conclusion that the plaintiff's claim had not prescribed because firstly, the plaintiff's cause of action was not complete when it is alleged that prescription had commenced to run and secondly, on the fact that on the construction of the statute that was governing prescription in the matter before him, the process issued in the matter prior was invalid but not fatally defective and prescription started running *de novo* from the date of service on the debtor of such process.

With respect, the wording of the statute under consideration in the *Van Vuuren* matter and section 19 of the Prescription Act are different and the obiter in that case cannot bind me in the circumstances.

I also note that the case was not followed in any of the other divisions in South Africa and that later decisions construing relevant provisions of the South African prescription legislation that are similar to the provisions of our current legislation have not come to the same conclusion as was reached in the *Van Vuuren* matter.

Further, it is my view that if the legislature intended to provide that the filing of court process would have the effect of delaying the completion of prescription, it would have provided for this in clear language as it did in section 17 of the Act where a list of circumstances delaying the completion of prescription are provided for. It would have provided as was specifically provided for in the South African Act of 1943 that prescription would commence to run **de novo** from the date of the interruption or that it would continue to run after the interruption had ended.

Section 19 (2) and (3) of the Act reads:

"(2) The running of prescription shall, subject to subsection (3), be interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt.
(3) Unless the debtor acknowledges liability, the interruption of prescription in terms of subsection (2) shall lapse and the running of prescription shall not be deemed to have been interrupted, if the creditor—
(*a*) does not successfully prosecute his claim under the process in question to final judgment; or
(*b*) successfully prosecutes his claim under the process in question to final judgment, but abandons the judgment or the judgment is set aside."

In my view, the language used in the section is quite clear. It provides that the running of prescription may be interrupted by the service on the debtor of process. This is trite. It then provides that unless the debtor acknowledges liability, the interruption of prescription will lapse and the running of prescription shall not be deemed to have been interrupted if the creditor does not successfully prosecute his or her claim to final judgment. I understand this to mean that the creditor has to obtain judgment in his favour on the process issued under subsection (2). Any other meaning would lead to an absurd result for there would be no finality to litigation and the limitation imposed by the statute would be rendered nugatory if a litigant who loses a case can arrest prescription indefinitely by bringing suits within three years of each unfavourable judgment as long as he can avoid the plea of *res judicata*.

In *casu,* it is common cause that the plaintiff was unsuccessful in the earlier proceedings.

There is no evidence that the defendants acknowledged liability at any stage and thus the interruption of prescription by the filing of the court application lapsed and the running of prescription should not be deemed to have been interrupted as the plaintiff did not succeed in her prosecution of the claim in the court application proceedings. Thus on her own evidence, the plaintiff brought the current action outside the three year period from the date when her cause of action against the defendants arose.

It is my view that I do not have any *prima facie* evidence before me that the plaintiff's claim is still extant and has not been extinguished by prescription.

In view of the conclusion that I have arrived on prescription, it is not necessary in my view that I consider the rest of the submissions made by counsel.

There is one other administrative issue that remains outstanding. It is the disposal of the original deed of transfer that was adduced into evidence by the plaintiff. Without in any way commenting on the manner in which she obtained the deed, it is my order that the Deed be returned to the Deeds Registry as the legal custodian of all original copies of such documents. It is from this office that the parties may seek for copies in accordance with the law and after having set out their respective rights to copies of the deed.

In the result, I make the following order:

1. The defendant is absolved from the instance.
2. The plaintiff shall bear the defendants' costs of suit.

3. The Registrar of this court is hereby directed to return into the safe custody of the Deeds Registry, Exhibit No 3 being the original deed of transfer No4530/76 in respect of Stand 12886 Salisbury Township of Salisbury Township Lands.

B Nyamusamba & Partners, plaintiff's legal practitioners.

Granger & Harvey, defendants' legal practitioners.