

RICHARD MUDHANDA
versus
ADRIENNE STALEY PEARCE
and
REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 24 June 2015 & 29 July 2015

Opposed application

N Chikono, for the plaintiff
D Ochieng, for the 1st defendant

MUREMBA J: In the summons issued on 25 November 2014, the plaintiff Richard Mundanda makes a claim for an order compelling the first defendant to sign papers for the transfer of stands 296 and 297 Colne Valley Township held under Deeds of Transfer numbers 1597/69 and 1602/69. The plaintiff also wants an order directing the second defendant to process the transfer.

It is the plaintiff's averment that on 4 May 2002 he entered into a sale agreement with the first defendant and bought the two stands from her, but she is now refusing to transfer ownership of the two stands to him.

After entering an appearance to defend the first defendant filed a special plea of prescription. She stated that she disputes having entered into an agreement of sale in respect of these stands with the plaintiff. She said that however, even assuming for a moment that she entered into an agreement of sale with the plaintiff, the plaintiff's claim is now prescribed. She said that in terms of s 14 and 15 of the Prescription Act [*Chapter 8:11*] the plaintiff's claim prescribed after 3 years of the agreement of sale having been signed on 4 May 2002. She therefore made a prayer for the dismissal of the plaintiff's claim.

In terms of s 15 of the Prescription Act it is indeed correct that a debt of the plaintiff's nature prescribes after 3 years. In terms of s 16 (1) of the said Act prescription begins to run as soon as a debt is due. In the present case it is therefore crucial to examine when the debt

became due.

In answering the question of when did the debt become due I will distinguish between an agreement of sale and an agreement to transfer ownership. These are separate agreements. For an agreement of sale to suffice there are three essential elements that have to exist. These are (i) an agreement, (ii) the thing to be sold and (iii) the price to be paid. Delivery of the thing sold and payment of the purchase price are not necessary for the creation of an agreement or contract of sale. A contract of sale only obliges the seller to pass *vacuo possessio* of the property not transfer of ownership. See Mackeurtan *Sale of Goods in South Africa* at p 1. This is why even a person who is not the owner of a property can actually enter into a valid agreement of sale. It therefore means that when parties enter into an agreement of sale it should not be taken to mean that they have automatically agreed to transfer ownership of the property. The issue of transfer of ownership is a separate issue which ought to be agreed upon by the parties for prescription to begin to run.

If the contracting parties do not agree on the time for transfer of ownership the purchaser should demand transfer of the property from the seller by a specified date. If the seller fails to effect transfer by the specified date then he falls into *mora* and prescription begins to run from the date he or she should have effected transfer. In *Asharia v Patel and Others* 1991 (2) ZLR 276 (SC) at 280 GUBBAY CJ said,

“The general applicable rule is that where time for performance has not been agreed upon by the parties, performance is due immediately on conclusion of their contract or as soon thereafter as is reasonably possible in the circumstances. But the debtor does not fall into *mora ipso facto* if he fails to perform forthwith or within a reasonable time. He must know that he has to perform. This form of *mora*, known as *mora ex persona*, only arises if, after a demand has been made calling upon the debtor to perform by a specified date, he is still in default. The demand, or *interpellatio*, may be made either judicially by means of a summons or extra-judicially by means of a letter of demand or even orally; and to be valid it must allow the debtor a reasonable opportunity to perform by stipulating a period for performance which is not unreasonable. If unreasonable, the demand is ineffective.”

In casu the agreement of sale which the plaintiff is relying on is silent on the date of transfer of ownership. In the clause dealing with the issue of *vacuo possessio* it is simply stated that, “The seller shall give vacant possession of the property on or before the date of transfer. Risk and profit shall pass on to the purchase on the date of occupation or transfer whichever is the earlier.” This clause does not say when transfer of ownership should be effected. In the absence of an agreed date of transfer, the plaintiff (purchaser) was therefore supposed to demand transfer from the first defendant in order to place her in *mora* first before

prescription could begin to run. In the absence of a demand for transfer prescription cannot begin to run. It is erroneous to start counting the prescription period from the date the agreement of sale was signed.

It is not in dispute that sometime in 2009 the plaintiff had the two stands registered in the name of his company Prototel Enterprises (Pvt) Ltd. The plaintiff avers that the transfer of ownership or registration of the stands into his company's name was a mistake common to both parties which was later reversed by an order of this court in 2014. He said that he is now seeking to have the stands registered in his own name as an individual. He argues that since the registration of the properties or stands was a mistake, the period during which the properties were wrongly registered should be considered to have interrupted the running of prescription. He argues that prescription started running on 28 October 2014 which is the date when the transfers to Prototel Enterprises (Pvt) Ltd were cancelled.

It is a fact that the transfers which had been effected in favour of Prototel Enterprises (Pvt) Ltd were cancelled by this court on 28 October 2014. However, the correct position is that the transfers were cancelled not because they had been done to a wrong person, Prototel Enterprises (Pvt) Ltd, but because they had been done fraudulently. For the cancellation of the transfers to be made, the first defendant had made an application in this court under case number HC6908/11. A perusal of that file shows that the first defendant in her founding affidavit averred that the transfers had been done without her knowledge and consent. She further averred that the power of attorney which had been used by the plaintiff in effecting these transfers had been forged. She said that she had not signed any power of attorney authorising the plaintiff to represent her in having the transfers effected.

It is common cause that initially the plaintiff filed a notice of opposition and opposing affidavit arguing that the transfers had been done with the knowledge and consent of the first defendant. He also disputed having forged the power of attorney. However, at the hearing he abandoned his opposition of the application and the first defendant obtained judgment unopposed. This means therefore that the plaintiff conceded that he had effected the transfers of the stands to Prototel Enterprises (Pvt) Ltd fraudulently. No wonder why in its order the court ordered that the matter be transmitted by the Registrar of this court to the Prosecutor General in order that he may decide whether or not there should be a criminal investigation into the matter.

When Mr *Chikono* argued that the transfers had been set aside because the stands had

been wrongly registered in the name of Prototel Enterprises (Pvt) Ltd he was misleading the court. If the transfers which happened in 2009 were made fraudulently, the period during the transfers were effective cannot be said to have interrupted the running of prescription. That period cannot be recognised at law as it is a non-event. The courts cannot sanction things that are illegal.

The problem that I am faced with is that I cannot tell from the papers when the plaintiff demanded transfer of ownership of the stands following the agreement of sale. The plaintiff simply said that when he demanded transfer of ownership the first defendant refused to effect it. However, he does not say when he demanded transfer. On the other hand the defendant disputes that the parties ever entered into an agreement of sale *vis-à-vis* the two stands. So under such circumstances there is no way the plaintiff could ever have demanded transfer of ownership from the defendant. What this simply means is that the first defendant is saying that she was never placed *in mora*. If I go by the plaintiff's submissions all I can say is that although demand for transfer was made thereby placing the first defendant *in mora*, the date which transfer should have been effected is not stated and therefore it is unknown. Under such circumstances I cannot tell when prescription should have begun to run. For these reasons it cannot be said that the plaintiff's claim is prescribed.

Mr *Ochieng* also made argument to the effect that the agreement of sale the plaintiff is relying on is fraudulent. Let me hasten to point out that it is not my place to make a determination on this issue as it is not the issue that I am dealing with. My mandate in these proceedings is to deal with the special plea of prescription only. The court order which cancelled the transfers which had been done in favour of Prototel Enterprises (Pvt) Ltd did not nullify the purported agreement of sale. The court which will deal with the issue of the transfers is the one which will determine the validity or otherwise of the purported agreement of sale.

In the result it be and is hereby ordered that:

- 1) The special plea of prescription raised by the first defendant is dismissed.
- 2) The first defendant is to pay costs.

Ngarava, Moyo, Chikono, plaintiff's legal practitioners
Wintertons, 1st defendant's legal practitioners