SMM HOLDINGS (PVT) LTD

And

AFARAS MTAUSI GWARADZIMBA

Versus

MANYIKA SIGAUKE

IN THE HIGH COURT OF ZIMBABWE
MANGOTA J
BULAWAYO 5 JUNE & 19 SEPTEMBER 2024

Ms M. Muguti for the plaintiff
Mr B. Mahuni for the defendant

JUDGMENT

MANGOTA J

I heard the case which relates to the defendant's special pleas on 5 June, 2024. I delivered an *ex tempore* judgment in which I dismissed the special pleas with costs.

On 12 June, 2024 the defendant wrote requesting reasons for my decision. These are they:

The defendant was working for the plaintiff which allocated to him house number BB 146, Maglass Township, Zvishavane ("the property") as his condition of service. He resigned from work on 13 February, 2013. He, in terms of the plaintiff's policy, was allowed to remain in the property for ninety (90) days during which period he had to look for alternative accommodation. The grace period of ninety (90) days was reckoned from the date that he left his employment with the plaintiff. He, in view of the stated fact, should have vacated the property on or before 13 May, 2013. He did not. He, for reasons which were/are best known to himself, continued to occupy the property of the plaintiff from 14 May, 2013 to 26 March, 2024 when the plaintiff sued for his eviction from the same.

The defendant entered appearance to defend and raised two special pleas in bar of the plaintiff's action. He pleaded that:

a) the plaintiff's action has prescribed- and
b) the suit which the plaintiff filed against him was/is *lis pendens.*

The defendant's statement on the special plea of prescription is that the grace period of three (3) months to which he was entitled lapsed on 13 May, 2013. The plaintiff, he insists, had three (3) years within which it should have sued for his eviction. The three (3) years in question lapsed on 13 May, 2016, according to him. He states that, because the plaintiff did not evict him within the stated period of time, its claim became prescribed. He alleges that, when the

plaintiff served summons upon him on 26 March, 2024 its claim had prescribed by over seven (7) years. He, in the mentioned regard, places reliance on Section 15 (d) of the Prescription Act (Chapter 8:11) ("the Act") as well as on decided case authorities.

On the special plea of *lis pendens*, the defendant's statement is that HC 2719/19 which the plaintiff filed against him is currently pending at court. HC 2719/19, he claims, is, in all respects, on all fours with the present case. He moves me to stay HC 437/24 pending the determination of HC 2719/19.

The plaintiff states, in response to the special plea of prescription, that the same is without merit. It insists that the defendant is in illegal occupation of the property which it allocated to him as an employment benefit. It states that the court cannot sanction an illegality. It avers that its suit is premised on ownership of its property and that it holds real rights in the same making it impossible for the defendant to deprive it of its property. It insists that, as an owner, it cannot be deprived of its property against its will. It claims that it is, at law, entitled to recover its property from the defendant whom it describes as *mala fide* former employee. It states that ownership of immovable property is acquired after the defendant has possessed it openly and adverse to its interests for an uninterrupted period of thirty (30), and not three (3), years which the defendant is alluding to. It insists that its action of *rei vindicatio* cannot be placed under the definition of a debt as is defined in the Act. It states that no debt ever came into existence between the defendant and it in regard to the defendant's possession of its property. The defendant, it states, occupied the property in terms of a contract of employment which has since terminated. Its response to the special plea of *lis pendens* is that the summons which it issued under HC 2719/19 claiming eviction of the defendant are no longer pending at court. These, it insists, lapsed in terms of Practice Direction number 1 of 2022. It states that the lapsing of the summons shows that there is no longer any matter which is pending before the court between the defendant and it. It moves me to dismiss both special pleas with costs which are at attorney and client scale.

I propose to deal with the defendant's special pleas in the reverse order. I shall start with the defence of *lis pendens* after which I shall proceed to consider the merits, or otherwise, of the special plea of prescription.

Herbstein and Van Winsen aptly discuss the defence of *lis pendens*. They state in their *Civil Practice of the Superior Courts in South Africa*, 3rd edition, pages 269-270 that:

"If an action is already pending between parties and the plaintiff brings another action against the same defendant on the same cause of action and in respect of the same subject-matter, whether in the same or a different court, it is open to such defendant to take the objection of lis pendens, that is, another action in respect of the identical subject-matter has already been instituted whereupon the court, in its discretion, may stay the second action pending the decision in the first action".

The statement of the learned authors which the court was pleased to enunciate in *Mhungu* v *Mtindi,* 1986 (2) ZLR 171 (SC) is clear and straightforward. It offers to the court which is dealing with the plaintiff's second cause of action a discretion to refuse to hear and determine a matter which, in substance, is on all fours with the previous matter which the plaintiff or the applicant, as the case may be, filed with the court and which case is pending determination by

the court or a different court of competent jurisdiction. The condition precedent to the court's refusal to hear and determine the second case which the plaintiff or the applicant has placed before it is that the first case is still alive and is therefore pending determination by the court.

It follows, as a matter of good reason and logic, that where the first case is, for one reason or the other, no longer on the roll of the court, the defence of *lis pendens* which is also known as *lis alibi pendens* is not available to the defendant.

In casu, both the defendant and the plaintiff agree that the plaintiff instituted HC 2719/19 with a view to evicting the defendant from its property. The plaintiff insists that HC 2719/19 is no longer on the roll of the court. It states that the same was overtaken by events. It, in the mentioned regard, availed to the court and the defendant a letter which the registrar wrote to it on 23 July, 2023. The letter, it is evident from its contents, is to the effect that the summons which the plaintiff issued against the defendant in HC 2719/19 lapsed.

By stating as he did, the registrar was, in effect, advising the plaintiff that the summons which it issued against the defendant under HC 2719/19 were no longer on the roll of the court as well as that, if the plaintiff intended to persist with its suit to evict the defendant from the property, the plaintiff had to issue a second set of summons. The first set of summons, so went the advice of the registrar to the plaintiff, lapsed in terms of Direction number 1 of 2022.

The Practice Direction which the Chief Justice issued, it is needless to mention, has the force and effect of the rule of court. It offers to the registrar of the court the power and authority to remove from the roll of the court matters which, in his opinion, are dormant and are therefore serving no useful purpose other than to clog the roll of the court.

HC 2719/19 having been removed from the roll of the court on the strength of Practice Direction 1 of 2022 which, as has already been stated, confers authority upon the registrar who, in substance, is an extension of the court and the defendant's attention having been drawn to the letter of the registrar dated 23 July, 2023 counsel for the defendant, as a legal practitioner who is expected to be conversant with the rules of court as well as the meaning and import of Practice Directions should not have persisted with the special plea of *lis pendens* as he did. He professed ignorance of the existence of the registrar's letter to the plaintiff. To the extent that he was not aware of the letter, the defence of *lis pendens* which he raised on behalf of the defendant remains understandable. However, his persistence with the same defence after his attention had been drawn to the letter of the registrar remains very unreasonable. Unreasonable in the sense that he had been made aware of the fact that HC 2719/19 was no longer on the roll of the court. The naivety which counsel displayed on this aspect of the case cannot be condoned let alone accepted. His statement which is to the effect that, although he had not seen the registrar's letter of 23 July 2023, what the letter states is an administrative act by the registrar only goes to show that he has a lot to learn in regard to the rules of court, Practice Directions in particular.

It is pertinent for legal practitioners to make the effort to acquaint themselves not only with the law of Practice and Procedure but also with the rules of court as augumented by Practice Directions. It is also honourable for them to make concessions where matters which were not within their knowledge at the time that they raise specific points of law become known to them at a later stage. Unreasonable persistence with matters which they know do not lead the case

of the party whom they represent to any meaningful end-in-sight should, as a matter of course, be avoided by them.

The fact of the matter is that HC 2719/19 is no longer on the roll of the court. It lapsed on the day that the registrar wrote advising the plaintiff that the summons it issued under the case lapsed. The plaintiff was therefore within its rights to sue for the eviction of the defendant from the property as it did under HC 437/24. The defence of *lis alibi pendens* is therefore not available to the defendant. His special plea on this aspect of the case is without merit and it is dismissed without any further ado.

The defendant gives the *raison de'etre* for the existence of his first defence of prescription. The defence, he asserts, is designed to prohibit a plaintiff or an applicant who has not sued to recover what a defendant or a respondent owes to him or her within certain time-limits which are specified in the Act. The reasons for the bar which the law places against the plaintiff or the applicant who has not sued the defendant or the respondent within the times which are specified in the Act are many and varied. Amongst such reasons are that:

a) evidence may have become lost;
b) witnesses may no longer be available to testify- and/or
c) their recollection of events may have faded.

The above-stated matters are valid reasons for penalizing the plaintiff or the applicant who has not sued when he (includes she) should have sued within the time limits which are specified in the Act.

Valid as those reasons are, the question which remains without an answer is whether or not the times which are stated in the Act are applicable to a vindicatory action such as the plaintiff instituted against the defendant *in casu*. The defendant's view is that they are. The plaintiff's position on the same is to the contrary. It insists that the *actio rei vindicatio* does not fall into the equation of matters which are stipulated in the Act. I am persuaded to reason along with the view of the plaintiff on this aspect of the case.

The defendant makes a serious misconstruction of the law when he places the word *'debt'* as defined in Section 2 of the Act on an equal footing the with the phrase '*cause of action'*. Section 2 of the Act defines *'debt'* to refer to anything which may be sued for or claimed by reason of an obligation which arises from statute, contract, delict or otherwise. A debt, it is my view, relates to an obligation and this may arise from statute, contract or delict. The word debt is therefore synonymous with the word obligation. A debt or an obligation deals with personal rights as opposed to real rights which fall under the purview of the concept of ownership of a thing by a natural or juristic person.

Personal rights to which the word debt remains applicable are rights which exist between one person and another person. They exist by virtue of a relationship which the law creates between them. A near example of a personal right is the contract of employment which, until 13 February, 2013 the plaintiff and the defendant created between them. Such a contract created reciprocal rights and obligations as between the two of them. The plaintiff was, during the existence of the contract, enjoined to pay the defendant for the services which the latter offered to it as well as to offer to him for his occupation, as per its policy, the property which is the

subject of the parties' dispute in the main case. The defendant's obligation was to offer his services to the plaintiff.

The above-described relationship terminated on the date that the defendant resigned from working for the plaintiff and, by his resignation, all what was due to him from the plaintiff including his continued occupation of the property fell by the way side. The end of the contract between them ended the defendant's right to continued occupation of the property of the plaintiff. Hence the plaintiff's suit against him to recover from him its property which he cannot continue to occupy without any justification on his part.

The defendant's misconstruction of the definition of the word *'debt'* as supported by such case authorities as those of *Syfin Holdings* v *Pickering*, 1981 ZLR 344 (H); *Efrolou (Pvt) Ltd* v *Muringani*, 2013 (1) ZR 300 (H); *Denton* v *Director of Customs & Excise*, 1989 (3) ZLR 41 at 48 and *John Conradie Trust* v *The Federation Kushanda Pre-School Trust*, SC 12/17 spells doom for the law of property. It is for the mentioned reason, if for no other, that the Supreme Court, in its wisdom, had to, and did actually, over-rule all the mentioned cases upon which the defendant places reliance. It did so in *Elizabeth Chidzambwa* v *The Ministry of Local Government, Public Works and National Housing*, SC 64/22. The law, as enunciated in the *Elizabeth Chidzambwa* case, clarifies the position of the law of property to a point which requires little, if any, debate. The case states, in clear and categorical terms, that a claim of vindication is not liable to prescription. It is not liable to prescription for the simple reason that no debt arises between the parties in respect of ownership of the house.

The plaintiff states, and I agree, that in the absence of a debt which exists between the defendant and it, prescription cannot begin to run. It cannot, in short, begin to run over a non-existent debt, so to speak.

The defendant admits that the plaintiff is the owner of the property which is the subject of the dispute between the two of them. He also admits that he took occupation of the property on the basis of the contract of employment which he concluded with it. As owner of the property, therefore, the plaintiff is, at law, entitled to recover it from whosoever is in occupation of it against its will. The law protects its right in the mentioned regard in a very jealous manner. If doubt on this aspect of the matter may be entertained, the case of *Oakland Nominees* v *Gelria Mining & Investment Company Limited*, 1976 (1) Sa 441 (A) at 452 clears such. The *dictum* which the court was pleased to enunciate in the case is apposite to the circumstances of the plaintiff and the defendant, the latter's defence of prescription in particular. It reads:

"….since time immemorial and at every stage of human evolution, societies have suffered the inevitable unfortunate phenomenon of having in their midst an array of thieves, fraudsters, robbers, cut-throats, the throw-backs in evolution etc with no qualms whatsoever in employing force or chicanery to dispossess fellow human beings of ownership of their property. If the law did not jealously guard and protect the right of ownership and the correlative right of the owner to his or her property, then property would be meaningless and the law of the jungle would prevail".

All the cases which deal with ownership and the law of property, including the writings of such learned authors as Silberberg and Schoeman, state in complete unison that an owner of a thing is entitled to recover it from whoever may possess it without his or her consent. He is able to

recover it through the common law remedy of *rei vindicatio*. All he is required to do is to allege and prove, on a balance of probabilities, that:

i) he is the owner of the property;
ii) at the institution of his action or application, the property which he is vindicating is still in existence and the defendant or the respondent, as the case may be, is in possession of it- and
iii) the defendant or the respondent's possession of it is without his consent.

The misplaced argument of the defendant in which he seeks to equate the word *'debt'* with the phrase *cause of action* sets a dangerous precedent to the concept of ownership of a thing by its owner. The phrase cause of action is far wider than the definition of debt as stated in Section 2 of the Act. A cause of action is a combination of facts that are material for the plaintiff or the applicant to prove in order to succeed in his action or motion: *Mukahlera* v *Clerk of Parliament and Others*, HH 107.07.

It is clear that *cause of action* cannot be synonymous with *'debt*' as defined in the Act. The former is a genus of the latter which is a species of the phrase.

The defendant does not tell the remedy which remains available to the plaintiff if the court were to rule in his favour. He does not state that he has any justification to remain in occupation of the property of the plaintiff. He, as the plaintiff correctly states, is in illegal occupation of the property of the plaintiff. He is not, in earnest, moving me to sanction an illegality. He knows as much as anyone does that my duty, as a court, is to observe and uphold the law and not to break it.

The argument of the defendant on the special plea of prescription is totally misplaced. He advanced it on the basis of his misunderstanding of the law of *rei vindicatio* as read with the definition of the word *'debt'* which is contained in the Act. Case authorities which have since been overtaken by events appear to have misled him further. The defence of prescription does not apply to a vindicatory action such as the one which the plaintiff instituted against him. Neither acquisitive nor extinctive prescription is available to him in the instant case. His special plea of prescription is devoid of merit and it is dismissed.

The defendant failed to prove his case on a preponderance of probabilities. The special pleas which he raises are, in the result, dismissed with costs.

Chigariro Phiri & Partners, plaintiffs' legal practitioners
Scanlen & Holderness, defendant's legal practitioners