JASPER DHLIWAYO
and
FUNGAI DHLIWAYO
and
COLLIE MANYANDURE
and
GREATER NYEMUDZAI
and
ABBIE MANYANDURE
and
MEMORY MANYANDURE
and
RUDO MANYANDURE
versus
TINOZIVA BERE N.O
(In his capacity as Executor of ESTATE LATE
TAWORAMWOYO NELSON DHLIWAYO)
and
LORAH LORRAINE KATOMBO
and
MASTER OF THE HIGH COURT

HIGH COURT OF ZIMABBWE
TSANGA J
HARARE; 9, 13, 14, February & 3 May 2024

Special Plea

O Kondongwe, for the Plaintiff
J Zviuya, for the1st & 2nd Defendants

TSANGA J

This matter came before me came as a special plea for prescription when the sole issue for determination at plaintiff's behest became whether or not a claim for declaratory relief is subject to the prescriptive periods in the Prescription Act [*Chapter 8:11*]. This was upon plaintiffs' admission that three years had lapsed but that the nature of their claim is not subject to prescription.

This question was raised against the backdrop of the following facts. The plaintiffs being children of the late Taworamwoyo Nelson Dhliwayo, who died on 10 June 2016, issued summons against the defendants in February 2023, for an order declaring null and void, a will which the late executed on 8 June 2012. That Will excluded as beneficiaries the plaintiffs who are all his children.

In their summons, they challenged the Will on the basis that it was invalid as the now deceased, at the time of the Will's execution, was said to have not been in a mental state to execute a valid will because he suffered from senile dementia. In addition, he had also suffered a stroke. According to them, his incapacity was such that it had afforded no moments of lucidity. As such their claim was that the Will would have to have been written for him. Moreover, during his lifetime he was said to have made an undertaking that each child would inherit at least 35 hectares of his land.

The plaintiffs had further submitted in their declaration that they had only become aware of the Will when the executor, Tinoziva Bere, who is the first defendant herein, had begun disposing of some of the immovable assets of the estate. They also said they had only been invited once to a pre- edict meeting after registration of the estate. The second defendant, Lorah Lorraine Katombo, is the deceased's second wife whilst the third defendant is the Master of the High Court cited in his nominal capacity. Plaintiffs also pointed out that the winding of the estate is ongoing and the matter cannot be said to have been finalised. What they want is for the will to be declared null and void, and for the appointment of the executor to be also so declared. Their ultimate coercive quest is that the estate be wound up as intestate. As for costs, they seek costs on a higher scale.

In their plea the first and second defendants had pleaded that there was another pending matter on same facts but primarily they had pleaded prescription on the basis that the plaintiff's cause of action arose in 2016 when they had knowledge of the will after being informed by the duly appointed executor. They also highlighted that the estate had been advertised in the Government Gazette and in a newspaper, the *Manica Post* in April 2017. As such, the claim was said to have prescribed in June 2019 since it was in the nature of a debt with a three-year prescriptive period according to s 15 (d) of the Prescription Act. Also stressed in the plea was that a will is not invalid just because children have been disinherited. Further divulged in answer to the claim was that the plaintiffs were involved in ongoing legal wrangles with their father over his assets during his life time and that they therefore ought not to have been surprised that they were left out of his Will. If indeed they had been promised 35 hectares of

land each during his life time, the deceased was said to have changed his mind as he was legally entitled to.

According to the defendants, the deceased had also not shown any abnormalities when he executed the Will at the offices of his lawyers. His signature had also not been challenged. With regards to prescription, underlined was that the plaintiffs summons having been issued in February 2023, they were bringing their action more than seven years after the cause of action arose. As for the anticipated edict meeting, there had been no need for it as the Will which they had been appraised of had appointed an executor. More over the Will had been accepted by the Master and complied with all the necessary formalities for a valid will, so the defendants had answered.

At the hearing of the special plea on prescription, the plaintiffs conceded immediately that by 17 May 2017 at the very latest they were most certainly aware of the Will's existence and its contents. They conceded therefore that indeed three years had lapsed without taking any action as the summons were only issued in 2023. Being that as it may, their lawyer, Mr Kondongwe, argued that a plea of prescription is not applicable to a case in which one seeks declaratory relief. Mr *Zviuya* for the defendants disagreed. I asked both counsel to file their supplementary heads of argument on this point which they did.

The submissions

Mr *Kondongw*e drew strength from *Ndlovu* v *Ndlovu & Anor* 2013 (1) ZLR 110 in which Ndou J found that it is only a debt as defined in the Prescription Act which prescribes. A declaratory order, being a remedy to secure the public interest of certainty or correct legal position was said not to prescribe. In that case applicant had sought a declaratur that the purported sale of his house by his son using a forged power of attorney, was unlawful and void. The son had indeed been arrested for the fraud but died in prison before his case could be finalised.

The court indeed found that the claim did not to arise from a debt but on the alleged nullity of a sale transaction and prescription was therefore held to be inapplicable in that case. The court also emphasised that the sale was null and void from the beginning and that nothing could stand on it. In other words, the facts were important in reaching that decision that a declaratur could be issued as the case did not at all involve an obligation which amounted to a debt. In his reasoning, NDOU J drew particularly on the South African case of *Oertel & Ors* v *Director of Local Government* 1981 2 SA 477 T at 492 in which it was reasoned that:

> "Public rights are excluded from the operation of the Prescription Act…and "debt" in the Act must be necessarily restricted to such claims as have arisen in the field of private law. Whilst every debt encompasses an obligation not every obligation constitutes a debt for the purposes of the Prescription Act."

The principle stated in *Ndhlovu's* case that a declaratur does not prescribe was also cited with approval in *Ashley Kadira N.O* v *Claudius Nhema N.O & Ors* HH 592/22, which application was also based on sale of property being null and void for reasons spelt out in the application.

The gist of the plaintiffs' arguments were therefore similarly, as in the above cases that not every obligation amounts to a debt and that this is a matter where the applicants are seeking the declaration of the correct legal position in so far as the Will is concerned which Will they consider to have been a nullity. The plaintiffs were also said not be challenging the decision of the Master as per the Wills Act [*Chapter 6: 06*] but are rather seeking a relief which is not provided for in the Wills Act being that of a declaratory order. As such, Mr *Kondongwe* argued that the special plea has been taken without merit and that it ought to be dismissed with costs on an attorney client scale.

Mr *Zviuya*, in contrast, drew on *Catherine Nguluwe & Anor* v *Doris Dewa (Nee Nguluwe) & 4 Ors HH 387/23* to counter argue that a declaratur does have a prescription period. Reference was also made to *Tryphine Sibanda* v *Moyo & ORS HB51/21* that a challenge to a distribution account must be made within three years. These two cases being later decisions than *Ndlovu* case, he argued that I should not be bound by this earlier decision. Furthermore, since this matter was by way of summons or action as opposed to an application, he underlined the need for it to have been brought before the courts within the stipulated prescriptive periods.

Also placed before the court in argument was that plaintiffs have previously brought similar claims before the Mutare High Court which they later withdrew. (HC 160/22 and HC 314/22). Moreover, reference to the *Ortel* case upon which the judge in the *Ndlovu* case based his decision was said not to help their case. This is because the reference in the *Ortel* case was to public rights whereas the law of wills addresses private rights. Also, the issue of a validity of a private will was said not to secure the public interest of certainty in any way. Mr *Zviuya* emphasised in his submissions that the plaintiffs had instead sat on their laurels and no public interest would be served in allowing them to pursue an action which they could have pursued at the requisite time when they had knowledge of the will. Additionally the Wills Act in s 8 (6) allowed them to challenge such will within the stipulated time frame of 30 days after its

acceptance by the Master. Also underscored was that changes to the final liquidation and distribution account must also be brought within a stipulated time frame which is three years. Had the will been challenged timeously, the estate could have been dealt with as intestate. Mr *Zviuya* also motivated for costs on a higher scale on the basis that the arguments that the plaintiffs now sought to make had not been made in their pleadings.

Analysis

In *Syfin Holdings Ltd* v *Pickering* 1982 (1) ZLR 10 (SC), a Supreme Court case, GEORGES JA examined the definition of debt in the Prescription Act which in essence is "anything which may be sued for or claimed by reason of an obligation arising from statute, contract, delict or otherwise". Importantly, he remarked that this definition is "clearly broad enough to include claims for specific performance **or for declarations of rights in relation to any given set of circumstances**". *Syfin's* case regarding prescription encompassing declarations was cited with approval in *Gregory Mapfumo Mupfumira v Infrastructure Development Bank of Zimbabwe* HH 353/19.

Whether prescription applies to any given set of circumstances is a question of fact. In this case I do not think that it makes a difference that a declaration of rights on the validity of the deceased's Will is what the plaintiffs want. Significantly, a declaration of rights is subject to prescription when examined against the backdrop of a claim which is itself subject to prescribed time limits. The challenge to the validity of a will that has been accepted by the Master is itself time bound in terms of s 8 (6) of the Wills Act.

Put differently, the substance of the claim that gives rise to the quest for a declaratur is a necessary starting point in determining whether the quest for a declaratur has also prescribed. If upon examining the nature of the claim, it emerges from its holistic substance that it is one which ought to have been and could have resolved through prescribed channels, then if the time limit for pursuing the matter through those channels has prescribed so would the quest for a declaratur. The quest for a declaratur cannot, simply put, be divorced from the causa as to do so would indeed create a situation where those who have done nothing about their claim resort to using the declaratur as a back door to seeking coercive relief which they could have sought within the prescribed time limits. Different factual aspects of the case may have prescribed at different times.

Also, if as plaintiffs stated in their declaration, they ultimately want the estate to be dealt with as intestate this being against a backdrop of assertions that the deceased had indicated that they would inherit some land, then there is absolutely no doubt that their claim is

intrinsically in the nature of debt and would be subject to prescription in terms of s 15(d) of the Prescription Act. It matters not that they seek a declaratur when it is against a backdrop of what amounts to a debt which is subject to prescription and when there are prescribed time limits in the relevant Acts for taking action with respect to their actual grievance.

In this case, the claim of untimeliness holds merit. It boggles the mind why if indeed the deceased was so incapacitated at they allege, they did not act immediately upon learning of his will. With no timely steps having been taken, the plaintiffs cannot surely seek to do so years after the horse has bolted.

Also a will is indeed valid until set side. Disinheriting one's offspring, however unsavoury it might seem to a child, is not a veiled sign of mental incapacity or lack of thought to detail. After all as an African proverb says:

> "We desire to bequeath two things to our children. The first one is roots, the other one is wings".

That in real terms is what he left them under the circumstances of their relationship. As for fighting with their father over his earthly possessions whilst he was alive as alleged, the action he took is aptly summarised by another African proverb:

> "You do not tell a child not to touch a hot lamp, the lamp will tell him"

He was in essence that lamp.

Turning to the issue of costs and plaintiffs raising the non-prescription of a declaratur for the first time at the actual hearing and in their supplementary heads of argument, this has indeed put the defendants to costs in further defending the claim. However, the fact that there have indeed been some contrasting precedents in the High Court that have dealt with the issue of the prescription of a declaratur cannot be ignored. The plaintiffs were entitled to pursue the argument for further engagement. Further, the issue was not entirely divorced from the main argument of prescription and for that reason I do not think it will be fair to lumber them with costs on a higher scale.

The special plea of prescription in the main and that of the quest for a declaratur being also prescribed is therefore upheld with costs on an ordinary scale.

Dube Manikai & Hwacha, plaintiff's legal practitioners
Bere Brothers Legal Practitioners, first and second defendant's legal practitioners