VIMBAI MUKARO
versus
AMALGAMATED HEALTH SERVICES (PVT) LTD
t/a MORTACAMP INVESTMENTS (PVT) LTD
DAVID MUKARO
versus
AMALGAMATED HEALTH SERVICES (PVT) LTD
t/a MORTACAMP INVESTMENTS (PVT) LTD

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
HARARE 19 November 2024 & 26 November 2024

Special plea of prescription and exception

T Chakabva for the plaintiff
D Chiromo for the defendant

DUBE-BANDA J:

[1] This is a special plea filed in terms of r 42 of the High Court Rules, 2021. The defendant seeks the dismissal of the plaintiffs' claims without going into the merits of the cases.

[2] There are two matters before court, i.e., David Mukaro v Amalgamated health Services (Pvt) Ltd t/a Mortacamp Investments (Pvt) Ltd HC 5759/20 (David) and Vimbai Mukaro Amalgamated health Services (Pvt) Ltd t/a Mortacamp Investments (Pvt) Ltd HC 5759/21 (Vimbai). On 10 October 2024 the parties applied for a consolidation of the two matters. I considered it convenient to order a consolidation because the issues in the two matters are essentially the same; the plaintiffs in both matters are represented by the same legal practitioner; and in both matters the defendant is represented by the same legal practitioner. I such a case it would be appropriate and convenient to order a consolidation. See *Minister of Agriculture v Tongaat Group Ltd* 1976 (2) Sa 357 (D); *Spencer's Creek (Private) Ltd v Zimnat General Insurance* HB 23/24. In the circumstances, I ordered that the two matters be consolidated in terms r 34 of the High Court Rules, 2021.

[3] The background to these matters is as follows. In both matters the plaintiffs seek identical relief couched in the following terms:

a. An order directing the defendant to transfer of cause the transfer of rights and interest in respect of (Vimbai case) stand 18760 of stand 18657, (David case) stand 18768 of stand 18657 Harare Township Lands situate in the District of Salisbury to the plaintiff

within seven (7) days of this order failing which the Sheriff is authorised to so act in defendant's place and stead,

b. Alternatively, should specific performance be not possible as per clause 1above, or if it is declined by the court, an order directing the defendant to pay the plaintiff replacement value for the stand being the local currency equivalent of the sum of USD$25 000.00 at the auction rate as at the date of judgment, together with interest thereon at the prescribed rate.

c. Costs of suit on the legal practitioner and client scale.

[4] The plaintiffs aver that they entered into written agreements with the defendant in respect to vacant stands; they have paid the purchase price in full; and that in terms of the agreement the defendant was obliged to do everything necessary to ensure that the stands are in a position to be transferred to them. In addition, it is averred that on numerous occasions, the last of which was on 24 May 2018 the defendant through its representatives or agents made an undertaking to either transfer the stands or compensate the plaintiffs the replacement value of the stands. In the circumstances, the plaintiffs are seeking an order for specific performance, and in the alternative an order for damages in the sum of USD$25 000,00.

[5] The defendant raised the following special pleas; prescription; impossibility of performance; and non-joinder of all interested parties. At the hearing, the defendant abandoned the pleas of non-joinder and impossibility of performance, and no further reference shall be made to these pleas.

PRESCRIPTION

[6] For completeness and clarity, I reproduce the grounds of defendant's special plea on prescription as it appears in the notices:

i. Plaintiff's claims has (*sic*) prescribed. The plaintiff failed to institute the proceedings within three (3) years from the time the cause of action arose. The matter must be dismissed without hearing the merits.

ii. The defendant was specified in 2004 under the Prevention of Corruption Act [Chapter 9:16]. The plaintiff was supposed to claim from the appointed Curator of the defendant within the prescribed time. The plaintiff has no basis at law or otherwise to claim from the defendant more than 20 years after its placement on curatorship. There was no reason for plaintiff to fail to claim from the defendant's curator / liquidator / investigator as the defendant's specification was gazetted and well circulated in both

print and electronic media. The plaintiff has to suffer from its own sluggish behaviour and the claim ought to be dismissed with costs.

[7] In their replications, the plaintiffs averred that prescription was interrupted in that the defendant's agents, Hartman Properties wrote a letter on 28 May 2018 acknowledging the debt and agreed to pay compensation.

[8] It was argued on behalf of the defendant that the cause action is the defendant's failure to transfer the properties in terms of the time frames stated in the agreements of sale. In addition, it was argued that the plaintiffs' cause of action arose in 2002, and three years lapsed in December 2006. The summonses in these matters were issued on 14 May 2021. On the abovementioned basis it is the defendant's case that all the claims against the defendant have become prescribed.

[9] In their heads of argument the plaintiffs argued that prescription was interrupted by the defendant's tacit acknowledgement of liability. In that by letter dated 28 May 2018 it offered either to deliver the stands or pay compensation. In oral submissions Mr *Chikabva* counsel for the plaintiffs argued that in the readding of Paragraph 5.1 of the Agreements the cause of action did not arise in 2002, in that at that time all the conditions precedent to the transfers had not been complied with. Regarding the alleged specification of the defendant, the plaintiff argued that there is no evidence of this on record. The plaintiffs argued that the special plea of prescription be dismissed with costs.

THE LAW AND THE FACTS

[10] In terms of s15 of the Prescription Act, [Chapter 8: 11] ("Act"), a debt other than one secured by a mortgage bond, or a judgment debt, or a tax debt under an enactment or one owed to the State in the circumstances prescribed by that section, or a debt arising from a bill of exchange, becomes prescribed after the lapse of a period of three years. In terms of s16 of the Act, prescription begins to run as soon as the debt is due. The term "debt" is defined in s 2 to include anything which may be sued for or claimed by reason of an obligation arising from statute, contract, delict or otherwise. Therefore, in *casu* the seeking of transfers or damages constitutes a debt as envisaged in s 2 of the Act. In the circumstances, the ordinary period of prescription of three years prescribed in 15(d) applies.

[11] It is trite that the burden of proof is on the defendant to show that the claims have prescribed according to the requirements of the law, but if the plaintiff alleges that prescription was interrupted or waived, the burden of proof would be on the plaintiff to show that it was so

interrupted or waived. See *Cassim v Kadir* 1962(2) 473 (NPD), at 475H-C; *Pillay v Krishma* 1946 AD 946 @ 952-3. To discharge the burden of proof a litigant must adduce evidence before court. In *Van Brooker v Mudhanda & Another AND Pierce v Mudhanda & Another* SC 5 / 2018 the court stated thus:

> "It can therefore be accepted as settled that evidence is necessary when disposing of a matter in which a special plea of prescription is raised. The rationale behind this is that where a party raises a special plea as a defence, new facts arise and because of the introduction of fresh facts which did not appear in the declaration, there is need for a court to hear the evidence of the parties where facts are disputed before making a ruling on the plea."

[12] The 'debt' is this matter would be due when the cause of action arose. In is important therefore to look closely as to when the cause of action arose, and implicit in this issue is the question as to what is the plaintiffs' cause of action. In *Silonda v Nkomo* SC 6/22 the court stated that the law on what constitutes a cause of action is settled. A cause of action is simply a factual conspectus, the existence of which entitles one person to obtain from the court a remedy against another person. In other words, it is an entire set of facts upon which the relief sought stands. In *Abrahamse & Sons v SA Railways and Harbours* 1933 CPD 626, the court stated at 637 that:

> "The proper legal meaning of the expression 'cause of action' is the entire set of facts which gives rise to an enforceable claim and includes every fact which is material to be proved to entitle a plaintiff to succeed in his claim. In includes all that a plaintiff must set out in his declaration in order to disclose a cause of action. Such cause of action does not 'arise' or 'accrue' until the occurrence of the last of such facts and consequently the last of such facts is something loosely spoken of as the cause of action."

See *Matipano v Gold Driven Investments (Pvt) Ltd* 2014 (1) 344 (S); *Peebles v Dairiboard (Private) Limited* 1999 (1) ZLR 41 (H) at 54E-F; *Nkala v Nkala & Anor* 2020 (1) ZLR 1224 (H).

[13] In the context of this dispute, the cause of action would constitute 'the right to have the stands transferred' into the plaintiffs' names. In other words, the running of prescription would be triggered 'at the time the plaintiffs could lawfully seek transfer' of the stands into their names. In the reading of s 16 of the Act, that is when the 'debt' would have become due.

[14] In determining the point as to when the cause of action arose, in other words when the 'debt' became due the point of departure is Paragraph 5.1. of the Agreements. It states thus:

> "The seller will not be required to tender transfer of the stand to the purchaser until all payments have been received from the purchaser in respect of the purchase price and the City of Harare as (*sic*) issued all the certificates referred to in paragraph 6a below."

[1] Paragraph 6a of the Agreement says:

> "The seller hereby agrees and undertakes to service the stand to the satisfaction of the Director of Works of the City of Harare, in terms of the Town Planning Permit and to obtain a Certificate of Compliance from the City Engineer and a Dispensation Certificate from the Surveyor General prior to tendering transfer.
> However, should any damage to the roads or other services be caused by the purchaser or his agents, contractors or employees in the course of the purchaser developing the stand, making improvements, erecting buildings or otherwise, then the cost of repairing or making good any such damage to such roads or other services shall be for the account of the purchaser for as long as the seller is responsible for such services to the City of Harare."

[15] The conditions precedent to transfer are stated in clear and unambiguous language in Paragraph 5.1 of the Agreement. The first is that the purchase price must be paid in full, and the second is that the seller must have serviced the stands to the satisfaction of the Director of Works of the City of Harare, and the seller must have obtained all the certificates referred to in Paragraph 6a. The certificates referred in Paragraph 6a are these: a Certificate of Compliance from the City Engineer and a Dispensation Certificate from the Surveyor General.

[16] To prove its case it was for the defendant to adduce evidence that indeed the plaintiffs' claims have prescribed. In general, civil litigation is litigant driven, it was therefore for the defendant to adduce evidence before court, i.e., whether by affidavits or by a mini trial to show that the plaintiffs' claims have prescribed. See *Mabhena v Chipwanyira & Ors* HH 159/24. No evidence was adduced.

[17] In *casu* the issue of payment of the purchase price as per Paragraph 5.1 does not present any challenges for the defendant. I say so because it is the plaintiffs' case that full purchase price was made in terms of the agreements of sale. It is clear that in both cases the purchase price was paid in full in 2002. The admission of payment of the purchase price relieved the defendant of the necessity of proving that the first condition precedent in Paragraph 5.1 had been met.

[18] It is the second condition precedent in Paragraph 5.1 that I now turn, i.e., whether the City of Harare issued all the certificates referred to in Paragraph 6a of the agreements. In this regard there is no aorta of evidence that the seller has serviced the stands to the satisfaction of the Director of Works of the City of Harare. There is no evidence that a Certificate of Compliance from the City Engineer and a Dispensation Certificate from the Surveyor General have been issued. Therefore, it is incorrect and not supported by any evidence that the cause of action, i.e., the entire set of facts which the plaintiffs required to enforce their claims arose in

2002. See *Chirinda v Van der Merwe & Anor* HH 51/13. In the circumstances, at the time the summonses were issued on 14 May 2021, the plaintiffs' claims had not prescribed in terms of the law.

[19] In addition, there is no aorta of evidence that the defendant was specified in 2004 under the Prevention of Corruption Act [*Chapter* 9:16]. No affidavit, no oral evidence, no documentation, absolutely nothing was placed before court to show that the defendant was specified. In fact, Mr *Chiromo* counsel for the defendant conceded that there was no such evidence to prove specification, but merely persisted with the contention for no good measure. Without evidence, the court cannot even start to engage with the issue whether the plaintiffs' claims are prescribed by virtue of failure to claim from the curator within the prescribed time-line.

[20] The jurisprudence is clear that a litigant intending to defeat another party's claim on the basis of prescription must adduce evidence to prove that the claim has prescribed. See *Van Brooker v Mudhanda & Another AND Pierce v Mudhanda & Another* SC 5 / 2018; *Mabhena v Chipwanyira & Ors* HH 159/24; *Norris Trust v Muzondiwa* HB 166/24. In *casu* no aorta of evidence was adduced to prove prescription. It is for these reasons that the special plea of prescription cannot succeed. In the light of the conclusion that I have reached, it is unnecessary to consider the argument i.e., whether the letter of 28 May 2018 interrupted prescription.

EXCEPTION

[21] For completeness, I have to deal with the exception raised by the defendant in its heads of argument. It was argued that the plaintiffs' claims are vague and embarrassing. This amounts to an objection to the pleadings. It is a contention that the pleadings do not disclose a cause of action. It is trite that an exception may only be taken when the defect in the pleadings appears *ex facie* the pleading, since no facts may be adduced to show that the pleading is excipiable. In other words, in determining whether a pleading is exceptionable the court looks to that pleading alone. See *Hickey v DMC Holdings (Pvt) Ltd and Others* HH-137-17. In *Streak v Mukuhlani* 2018 (2) ZLR 628 (H) the court said in dealing with matters of exception, if evidence can be led which could disclose a cause of action alleged in the pleadings, that particular pleading is not excipiable. A pleading is only excipiable on the basis that no possible evidence led on the pleading can disclose a cause of action.

[22] In *casu,* the basis of the exception is that no basis has been laid out for the United States dollars damages of US$25 000.00 in respect of a debased and non-existent currency that was used in 2002 when the parties entered into the sale agreements. This exception has no merit

because it cannot defeat the main claim which is for specific performance, i.e., transfer of the stands into the name of the plaintiffs. In respect of the alternative claim for damages, the currency used in the agreements of sale is of no relevancy. The plaintiffs are contending that they suffered loss in the amounts of the values of the stands, which is USD$25 000.00, it cannot be said that the claim for damages is vague and embarrassing. They will adduce evidence to prove their damages. This exception cannot succeed. See *Kahn v Stuart & Ors* 1942 CPD 386 at 391-392.

COSTS

[23] The general rule in matters of costs is that the successful party should be given its costs, and this rule should not be departed from except where there are good grounds for doing so. I can think of no reason why I should deviate from this general rule. Plaintiff sought costs on a legal practitioner and client scale. No case has been made for such an order of costs. See *Kangai v Netone Cellular (Pvt) Ltd* 2020 (1) ZLR 660 (H). I therefore intend awarding costs against the defendant on a party and party scale.

In the result, the special plea of prescription and the exception are dismissed with costs on a party and party scale.

Kwenda and Chagwiza, plaintiffs' legal practitioners
Mapaya and Partners, defendant's legal practitioners