GEORGINA GOMBERA
versus
CHITUNGWIZA MUNICIPALITY

HIGH COURT OF ZIMBABWE
MUNGWARI J
HARARE, 2 November 2021 and 30 March 2022

Special Plea in Bar

H Tsara, for the Plaintiff
T Kabwa, for the Defendant

MUNGWARI J: On the 2nd of September 2021 the plaintiff, a senior resident of Chitungwiza issued summons against the Municipality of Chitungwiza seeking the following relief:

a. An order compelling the defendant to allocate a fully serviced commercial stand measuring one thousand square metres complete with title to the plaintiff being compensation/replacement of stand number 19697, Unit N, Seke, Chitungwiza which was wrongfully and unlawfully repossessed by the defendant from plaintiff in 1993.
b. An order compelling the defendant to meet the costs of plan drawing according to plaintiff's specifications, site clearance, excavation works, water and sewerage connections at the replacement stand to be allocated to the plaintiff by the defendant.
c. The defendant shall pay the plaintiff's costs of suit on the legal practitioner and client scale.

Alternatively

a. Payment of the sum of USD $50 000.00 or its equivalent in Zimbabwean dollars at the prevailing interbank rate being the replacement cost of Stand No. 19697, Unit N, Seke, Chitungwiza and all the improvements made by the plaintiff on the stand.
b. The defendant shall pay costs of suit on the legal practitioner and client scale.

In summary the important facts of the matter are the following:

The plaintiff purchased stand number 19697 Unit K Seke Chitungwiza from the defendant in 1993. Some years later, in error and unlawfully the defendant repossessed the

stand from her. The plaintiff successfully challenged the defendant's decision to repossess the stand. After conceding its error the defendant allocated stand No. 4921 Nyatsime, Chitungwiza (herein after the stand) to the plaintiff by letter dated 20 January 2015.

I can do no better than to reproduce the pertinent portion of the letter which appears as annexure A to plaintiff's papers. It read:

> "Georgina Gombera be replaced her repossessed stand number 19697 Unit N with stand number 4921 Commercial stand with a stand in Nyatsime area. Stand number 4921 measures approximately 1 000 square metres."

After that notification, the plaintiff subsequently paid site visit fees. She made several follow ups with the defendant to tie down an arrangement for her and the defendant's officials to go and physically inspect the stand. On the 24th of February 2020 the plaintiff wrote a letter to the defendant expressing her exasperation at not having been shown the new stand offered *in lieu* of 19697 Unit N. Feeling the heat, the defendant's staff subsequently held a meeting. The extract of the minutes reproduced below is particularly disconcerting. It shows that at the meeting the defendant's official named Mr Chinganga undertook to look more closely:

> "into the stand in Nyatsime in terms of (a) availability of documentary evidence that the stand is in actual existence and allocated to Mbuya Gombera (b) physical loco-instruction of the site at which the stand is in company of his colleagues present in the meeting (c) draw a lease agreement with a view to, address the concerns raised by Mbuya Gombera (d) to call for a feedback meeting within a week."

The plaintiff further alleged that even in the face of this undertaking the defendant remained evasive. The defendant's officials kept on assuring her that it was unnecessary to have a site visit because the stand existed. She believed them. She however persisted in her request and eventually in July 2020 the defendant's staff relented. Together with the plaintiff they undertook the site visit. That visit yielded nothing. It only served to reveal that the so-called allocation was a complete hoax. The inescapable conclusion for the team was that stand number 4921 Nyatsime did not exist.

On the 22nd of July 2020 the plaintiff's representatives wrote to the defendant. The letter restated that a team comprising representatives of both parties had undertaken a site visit to the stand. The team included one Gundani from the defendant's employ. During the visit it was established that the stand did not exist. The dispute raged on until the plaintiff sued out summons against the defendant claiming the relief already indicated.

In response the defendant denied liability arguing that the plaintiff's claim is prescribed. Its argument is that the plaintiff's cause of action arose in 2015 when she was allocated the

stand. By the time the plaintiff sued the present summons in September 2021 and served it, the claim had in terms of the Prescription Act [*Chapter8:11*] (herein after the Act), already prescribed.

In her response to the special plea the plaintiff contended that her cause of action only arose in July 2020 when she realized that the stand she had been allocated did not exist. It was at that time that even the defendant's employees confirmed that the stand was non-existent. Given that, so she argued, the question of prescription could not have arisen on 3 September 2021 when she instituted this claim.

Question

The only issue for determination in this case is whether or not the plaintiff's claim has prescribed. The issue is determinable by the court ascertaining when the cause of action arose.

Legal position and application to the facts

Prescription is a special plea. A special plea in turn is an objection which a defendant raises on the basis of facts that do not appear on the face of the plaintiff's declaration. Its effect is to extinguish the plaintiff's claim. Prescription allows a litigant to obtain a fast resolution to the dispute between the parties because it has the capacity to entirely quash the claim. It is a defence. It needs no emphasis therefore that it is a matter of substance. It can only be dealt with by hearing evidence. In the case of *Jeniffer Brooker* v *Mudhanda and Ors* SC 5/18 the Supreme Court emphasised the point that prescription amongst other special pleas has to be established by way of evidence. It is settled law that evidence can only be adduced through either *viva voce* evidence or affidavit and not through submissions or heads of argument.

Whilst the above rule is unequivocal, I do not read it to say that it does not accept of exceptions. My understanding of the term evidence is that it means facts or information indicating whether a belief or proposition is true. Usually it is the facts that are in dispute and evidence would be required to prove the truthfulness of one set of facts over the other. It is in such cases that evidence must be adduced without deviation. In instances where the facts are common cause and the point of departure is simply the interpretation of those facts, it cannot be a requirement that *viva voce* or affidavit evidence be adduced because the evidence is there for the court. The rule can therefore be modified to entail that where the special plea of prescription is raised and there are no factual disputes the adduction of *viva voce* or affidavit evidence is not an absolute requirement. The interpretation of the law and the assessment of common cause facts is the domain of the court and not any of the parties. As already indicated, the parties in this case agree that when the plaintiff's stand was unprocedurally repossessed,

the defendant municipality, in 2015, agreed to allocate the plaintiff another stand in lieu of the original one. The plaintiff genuinely thought she had been allocated a replacement stand. There is no argument that it was only in 2020 that both the plaintiff and the defendant's staffers realised that the new stand allocated to the plaintiff did not exist. It is from those facts that the question of whether prescription started to run in 2015 when the phantom stand was allocated or in 2020 when the parties became aware that the stand did not exist arises.

Section 16 (1) of the Prescription Act [*Chapter 8:11*] (herein after the Act) provides that:

> "Subject to subsections (2) and (3) prescription shall start to run as soon as a debt is due."

Section 2 of the Act in turn defines a debt to mean:

> "a debt, without limiting the meaning of the term, includes anything which may be sued for or claimed by reason of an obligation arising from statute, contract, delict or otherwise."

From the statutory definition of "debt" it is clear that the suit or claim must emanate by reason of obligation on the part of the debtor arising from the stated basis. The mischief which the legislature intended to deal with when it enacted the Prescription Act was to avoid the inconveniencing of debtors by creditors who bring into existence older debts. In the instant case, there was no reason for the plaintiff to sue the defendant in 2015. She genuinely believed that the defendant had discharged the obligation on it when it allocated her a replacement stand. The letter of allocation indicated that position in no uncertain terms. As shown by her constant demands to the defendant she sought to be physically shown the stand. The defendant's officials charged with that responsibility also genuinely believed that the dispute between the parties had been resolved. When the plaintiff finally realised that the replacement stand was nothing but a decoy intended to pacify her and contain her demands she sought protection of the courts. Before that realisation, the plaintiff had no cause of action.

In the case of *Abrahamse & Sons v SA Railways & Harbours* 1933 CPD 626 at 637 WATERMEYER sought to explain what constitutes a cause of action when he held that:

> "The proper meaning of the expression 'cause of action' is the entire set of facts which gives rise to an enforceable claim and includes every act which is material to be proved to entitle a plaintiff to succeed his claim. It 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 such fact and consequently the last of such facts is sometimes loosely spoken of as the cause of action."

From that holding the plaintiff's cause of action could not have arisen in 2015. It was not complete then. The set of facts was not complete. The cause of action could not arise until the occurrence of the last such fact. That last fact was the discovery that the stand she had been

allocated was non-existent. That was in July 2020. See also the cases of *Patel* v *Controller of Customs and Excise* 1982 (2) ZLR 82 (H) at 85; *Peebles* v *Dairiboard Zimbabwe (Pvt) Ltd* 1999 (1) ZLR 41 (H) at 45 D.

The above conception of cause of action has been consistently applied in this jurisdiction. See *Murphy* v *Director of Customs & Excise* 1992 (1) ZLR 28 (H) at 33D-E; *Dube v Banana* 1998 (2) ZLR 92 (H).

To put the instant case into context, it requires the court to briefly retrace the dispute. The set of facts begins from 1993 when the plaintiff purchased commercial stand number 19697, Unit N, Seke Chitungwiza. It transcends into the period when the stand was wrongfully repossessed by the defendant. The second phase goes into 2015 when a replacement for the erroneous repossession was deemed to have been done by the defendant. The subsequent demands by the plaintiff to the defendant for a physical site visit to stand 4921 equally form part of the transaction. The purpose of the physical site visit was to complete the allocation. It was then that it was noted that the stand never existed. It was never there to begin with. For defendant to then allege that it availed a stand which did not exist is to be fraudulent. As already said, the purpose of prescription is to protect debtors from creditors who for inordinately long periods do not do anything to claim what they are owed only to surface years later and file suits. More importantly, the Act was never meant to mask fraudulent activities. The defendant cannot expect to extinguish its indebtedness to the plaintiff by pleading prescription in a scenario where it lied to her that it had allocated her a stand when in reality that was untrue. It cannot therefore start to count prescription from a nullity. If any argument about prescription had to be made it would have been about the initial obligation which arose in 1993 when the original stand was repossessed. The defendant was however well aware that it was unsustainable because the issue here relates to the new obligation which came into existence in 2015 after the allocation of the Nyatsime stand.

Section 16 (3) further provides the following:

> "(3) A debt shall not be deemed to be due until the creditor becomes aware of the identity of the debtor and of all the facts from which the debt arises.
> Provided that a creditor shall be deemed to have become aware of such facts if he could have acquired knowledge thereof by exercising reasonable care."

The question which arises is whether the plaintiff could be deemed to have become aware of the non-existence of the stand earlier than July 2020 by exercising reasonable care. She is an old woman aged 89 years and is of ill-health. She is wheel-chair bound and relies on

other people for her daily survival. Despite these handicaps, she constantly demanded to be shown her piece of land by the defendant. More importantly she sent emissaries to meet with defendant's representatives and also instructed her lawyers to write letters requesting a site visit. In turn, she was assured by persons in authority and in the employ of the defendant that her stand was there. She had no reason to disbelieve them. Any reasonable person would have had no reason to disbelieve the officials. The defendant owns virtually all the land under its jurisdiction in Chitungwiza. An old woman would be forgiven for being excited that she had been given a mere 1

000 square metres out of the vast tracts of land owned by the defendant. From the above, any ordinary woman in her circumstances could have done less. The plaintiff in this case did more than was reasonable to acquire knowledge of the existence of the stand allegedly allocated to her.

Disposition

In the end there can be no doubt that the cause of action in this case arose in July 2020 when the plaintiff discovered that the stand which the defendant municipality had allocated to her was non-existent. Prescription could only start running from that date. The special plea raised by the defendant is therefore unsustainable. It is ordered that it be and is hereby dismissed with costs.

Tsara and Associates, Plaintiff's legal practitioners
Matsikidze-Attorneys-At-Law, Defendant's legal practitioners