**REPORTABLE (54)**

**ELIZABETH CHIDZAMBWA**
**v**
**MINISTER OF LOCAL GOVERNMENT PUBLIC WORKS AND NATIONAL HOUSING**

**SUPREME COURT OF ZIMBABWE**
**BHUNU JA, MATHONSI JA & KUDYA JA**
**HARARE: 10 MAY 2021 & 9 JUNE 2022**

*L. Ziro,* for the appellant

*A. Magunde,* for the respondent

**BHUNU JA:**

**Introduction**

[1] This is an appeal against the whole judgment of the High Court (the court *a quo*) delivered at Harare on 14 October 2020 under judgment number HH – 637/20. The appeal originates from a judgment of the Magistrates Court which upheld the respondent's claim for eviction and holding over damages against the appellant. The appellant appealed to the court *a quo* without success. She now appeals to this Court for relief.

**The parties**

[2] The respondent is a government Minister with authority to administer and control all government houses. In that capacity it has authority to sue on its own behalf in terms of the State Liabilities Act [*Chapter 8:14*]. It is also the administrator of a certain government immovable property known as House No. 6, 26th Avenue Malbereign. The disputed property

is one of the institutional government pool houses. The appellant is a former government employee in the Civil Service Commission. She was allocated the house by virtue of her employment in the Civil Service.

**Brief summary of the case**

[3] On 9 November 2000 the parties concluded a written lease agreement in which the respondent agreed to lease its property to the appellant on agreed terms and conditions stipulated in the written lease agreement.

[4] On 15 August 2019, the respondent issued summons commencing action against the appellant in the Magistrates Court claiming the following relief:

(a) Eviction of the defendant (appellant) and all those occupying through her from government house number 6, 26th Avenue, Malbereign, Harare.

(b) Payment of the sum of ZWL $21 600.00 as damages for holding over.

(c) Interest on the total sum claimed at the prescribed rate from the date of issue of summons to date of full and final payment.

[5] In its particulars of claim the respondent stated that it had leased the house to the appellant in terms of clause 2 (b) of the written lease agreement under which she qualified to occupy the house as a serving civil servant.

[6] When the appellant ceased to be an employee of the Civil Service Commission the respondent offered to sell the house to her as the sitting tenant. She however failed to render a valid acceptance of the offer. As a result since December 2003 she allegedly has been unlawfully occupying the disputed house without a valid lease agreement.

[7] It was the respondent's case that the appellant failed to accept the offer within the stipulated 21 days period. Having failed to accept the initial offer she was gifted with a second chance. On 4 July 2004 she was given another offer to purchase the house for $43 394 550.00. She was required to accept the offer within 21 days and to pay a deposit of 50 per cent of the purchase price. The offer was valid for 6 months.

[8] The appellant again failed to accept the offer in accordance with the given new terms and conditions. Instead of accepting the offer, on 1 March 2005 she wrote to the respondent expressing her inability to pay the 50 per cent deposit within the stipulated 6 months period. In consequence thereof the respondent subsequently issued the appellant with a notice of eviction on 10 November 2016 in terms of the relief specified above.

[9] The respondent's claim was founded on vindication on account that the appellant was in unlawful occupation of its property without a valid lease agreement and was refusing to vacate the property despite demand.

[10] In her pleadings the appellant raised two special pleas of *lis pendens* and prescription. On the merits she denied that she was in unlawful occupation of the house in dispute. She pleaded that she was in lawful occupation of the disputed property as she had lawfully purchased the house from the respondent. She averred that on 30 November 2000 the respondent offered to sell the house to her for $806 897.25. She accepted the offer and has since paid the full purchase price. As evidence thereof she tendered some receipts showing payment of some deposits to the respondent. The receipts she tendered in evidence do not amount to the full purchase price at all.

[11] It was her testimony that after 30 November 2000 she occupied the house in dispute as owner and not tenant. Her defence is essentially that the applicant cannot evict her for any reason whatsoever from her own house.

**Determination of the Special pleas**

[12] *Lis pendens*

In her summary of evidence the applicant did not refer to any pending litigation between the same parties over the same cause of action. She only referred to case number 1521/19 in which the respondent sued her for eviction but withdrew the case against her before trial. Consequently seeing no merit in this plea, the appellant abandoned the special plea of *lis pendens.* That being the case, this special plea in bar needs no further consideration for the reason that it has been abandoned.

[13] *Prescription.*

The appellant submitted that the respondent's claim had prescribed in terms of s 15 (c) as read with ss 16 (1) and 16 (3) of the Prescription Act [*Chapter 8:11*]. Section 15 (c) decrees that a debt owed to the State shall prescribe after 6 years whereas s 16 (1) prescribes that the prescription period shall begin to run as soon as a debt is due. The trial magistrate overruled the plea in bar on the basis that the running of prescription had been validly interrupted by the several demands and engagements between the parties.

[14] The appellant relied heavily on the case of *John Conradie Trust v The Federation of Kushanda Preschools Trust and Others*[1] where a single judge sitting in chambers dismissed an application for condonation of late noting of an appeal upon remarking that vindication was a

[1] Judgment No. SC 12/2017

debt that could be sued for. By parity of reasoning the appellant now argues that since the respondent's claim is founded on vindication it is liable to prescription, a submission which is disputed by the respondent.

**Issues for determination in the Magistrates Court**

[15] In the Magistrates Court the following 8 issues were identified at the pre-trial conference for determination by the court:

1. Whether or not the Defendant (appellant) has lawful authority to occupy house number 6, 26th Avenue, Malbereign?
2. Whether or not the plaintiff (respondent) has the right to evict the defendant from occupying (the) government house?
3. Did the defendant validly accept an offer letter to purchase the stand thus government house on 30 November 2000?
4. Whether or not an agreement of sale for the government house exist between the plaintiff and the defendant?
5. Whether or not the defendant paid the full purchase price for the government house.
6. Whether or not the plaintiff is entitled to holding over damages?
7. If so, what is the quantum of damages?
8 The scale of costs if any?

[16] In simple terms, the primary issue for determination was whether on the proven facts of this case the appellant has become the owner of the house in dispute. Once that cardinal issue is determined everything else will fall into place.

**The evidence**

[17] The respondent relied on the evidence of Owen Nero the Principal Estates Officer in the Ministry of Local Government, Department of Estates Evaluation and Josphat Munemo an employee in the Ministry's Finance Department. They both testified that the appellant failed to accept the offer to purchase the house in dispute on the given terms.

[18] It also placed reliance on the appellant's letter dated 1 March 2005 in which she confessed incapacity to pay the full purchase price in terms of the offer. She then made a counter offer to pay in instalments. The counter offer was never accepted. She produced no evidence of any acceptance of the counter offer. Instead it is common cause that she wrote a letter to the respondent confessing her incapacity to pay and making a counter offer in the process. She also acknowledged her liability to continue paying rent until a new valuation of the property had been done.

[19] The letter was addressed to the respondent's District Housing Officer and it reads:

> "Re: Purchasing of 6 – 26th Ave Malbereign, Harare
> Dear Sir/Madam
> **I hereby apply to have the above property revalued. My offer to purchase the above property has since expired** but I am still interested in purchasing the above property. I failed to pay the required deposit within 6 months as I was relying on my pension which was too little to make any meaningful payment but I can now commit myself to pay three million every month towards deposit as I am now employed by the National Arts Council of Zimbabwe.
>
> **I am also requesting to make part payment towards the deposit and I also understand that I have to keep my rent up-to-date until I receive the new valuation and I have raised the full deposit.** *(My emphasis)*
>
> Yours faithfully
> Elizabeth Chidzambwa (Mrs)
>
> P/s Today, 1st March I wish to make part payment of four million dollars towards the deposit"

[20] The respondent further placed reliance on a journal of payments made by the appellant from 5 May 2003 to 1 October 2019. During that period the appellant made about 212 payments on different dates. The reason or description for the payments is endorsed as "RENT".

[21] At page 162 of the record of proceedings the appellant filed a copy of the written offer she accepted for the purchase of the house. She averred that she purchased the house in terms of that offer. She signed the document on 30 November 2000.

[22] At pages 159 and 161 of the record of proceedings the appellant proffered a receipt as evidence of payment of $4 000 000.00 deposit. She further provided a receipt of $4345.00 as proof of payment for the deposit.

[23] The offer is for the purchase of Stand No. 646 Malbereign. The property she claims to have bought is designated as 6 - 26th Avenue Malbereign. The offer price is shown as $806897.25 payable over a period of 25 years at $10 401.00 monthly instalments.

[24] The offer is not signed by any representative of the respondent. There is however no dispute that the offer was made. The issue is whether the appellant accepted the offer.

[25] The appellant testified at the trial that she received the offer to purchase the house sometime in 2000. She was unable to pay the full purchase price because she was facing some financial challenges. She however managed to pay in instalments a total amount which she believes amounts to the full purchase price. She thus claimed to be the new owner of the house on account that she paid the full purchase price. She therefore denied owing the respondent any holding over damages or breaching the contract of sale as alleged or at all.

**The trial Court's determination.**

[26] On the basis of the evidence placed before him, the trial magistrate found that the appellant's defence of prescription was invalid as the running of prescription had been interrupted by the various demands for eviction made by the respondent. On the merits he found that the appellant was guilty of material breach of contract in more ways than one. The trial magistrate ruled that the appellant failed to sign the agreement of sale and to pay the full purchase price. In the result he held that the appellant could not claim ownership of the disputed house in circumstances where she was in breach of contract. Consequently, he granted the respondent's claim.

**The court *a quo*'s determination**

[27] The learned judge *a quo* found on appeal that the trial magistrate had correctly decided that the respondent's claim had not prescribed but for the wrong reasons. She however found favour with the respondent's argument that the appellant could not use extinctive prescription as a mode of acquiring property. In that respect she had this to say at page 6 of her cyclostyled judgment:

> "Examining the historical origins and influence of the Roman law on prescription and its existing worldwide uniformity, Charles Sherman[2] a legal scholar captures the following distinction:
>
> > 'Roman law in its final development recognised two sorts of prescription, *acquisitive and extinctive.* The difference between the two is merely the effect of lapse of time upon the right prescribed. Acquisitive prescription is the acquisition of a right by lapse of time; extinctive prescription is the extinction of a right by lapse of time. Extinctive prescription is not a mode of acquiring ownership while acquisitive prescription is. Extinctive prescription is but a mode of extinguishing an obligation or right in person, and is based on the principle of the limitations of actions.' *(Emphasis added)*

[2] Charles P Sherman D.C. L, Acquisitive Prescription – Its Existing World - Wide Uniformity; 1911 Yale Law Journal pp 147 - 156

> *Acquisitive prescription* may be defined as the acquisition of a thing by possession thereof as if (the) owner for the period of time fixed by law. It is acquisition by operation of law; the courts then refuse to recognise the title of the old owner. The purpose of constituting prescription is to put an end to litigation"[3].

[28] Having traversed case law and legal texts the learned judge *a quo* came to the conclusion that on the facts of this case there was no legal basis upon which prescription could begin to run in the absence of a just and sufficient cause that the respondent could sue for. She accordingly found that the question of prescription did not arise. Resultantly she concurred with the trial magistrate that the respondent's cause of action had not prescribed albeit for different reasons.

[29] On the merits the court *a quo* found no misdirection on the part of the trial magistrate and upheld his verdict with costs at the punitive scale.

**Grounds of appeal.**

[30] The appellant raised 6 grounds of appeal that are rather long winding, repetitive and prolix. There is no point in regurgitating them verbatim. Suffice it to summarise the pertinent issues arising from the grounds of appeal.

**Issues for determination**

[31] The pertinent issues emanating from the 6 grounds of appeal may be summarised as follows:

1. Whether the court *a quo* erred in holding that the respondent's claim has not prescribed.

[3] Above at p 148

2. Whether the court *a quo* was at fault in determining that the appellant is liable for eviction and payment of holding over damages.
3. Whether the court *a quo* erred in making an award of costs on the punitive scale.

**Whether the court *a quo* erred in holding that the respondent's claim has not prescribed.**

[32] The appellant's claim for prescription is premised on s 15 (c) of the Prescription Act which governs the prescription periods of ordinary debts owed to the State. It is however pertinent to note at this juncture that the respondent's claim is not for an ordinary debt owed to the State which prescribes after 6 years in terms of s 15 (c). It is a special claim for a debt arising from the sale or leasing of State land. In this case the applicable law is s 15 (b) which provides that the prescription period for debts in this respect is 15 years or more. It reads:

> "**15 Periods of prescription of debts**
> The period of prescription of a debt shall be—
> (*a*) thirty years, in the case of—
> (i) a debt secured by mortgage bond;
> (ii) a judgment debt;
> (iii) a debt in respect of taxation imposed or levied by or under any enactment;
> (iv) a debt owed to the State in respect of any tax, royalty, tribute, share of the profits or other similar charge or consideration payable in connection with the exploitation of or the right to win minerals or other substances;
> (*b*) **fifteen years, in the case of a debt owed to the State and arising out of** an advance or loan of money or **a sale or lease of land by the State to the debtor unless a longer period applies in respect of the debt concerned in terms of paragraph (*a*)"**(My emphasis)

[33] Under cross-examination the appellant admitted that she neither signed a contract of sale with the respondent nor paid the full deposit stipulated in the offer letter. It is on the basis of such confession that the learned judge *a quo* came to the conclusion that the question of prescription did not arise in the absence of a just and sufficient cause of action.

[34] At page 33 of the record of proceedings, this is what the appellant had to say under cross-examination:

"Q. Did you sign the sale agreement.
A. No.
Q. So, when did you sign a sale agreement with the plaintiff.
A. I never signed a sale agreement as (the) Ministry of Local Government was saying it wanted to revalue the property but it has not yet done that up to now.
Q. In your plea you said you signed an agreement of sale and you paid the purchase price in full. What did you mean by that.
A. When I went to sign the agreement of sale, the Ministry advised me that they wanted to revalue the property.
Q. So, there is no sale agreement between you and the Plaintiff.
A. No."

[35] The appellant's admission that she had no contract of sale for the house with the owner, that is to say the respondent, divested her of any claim to ownership of the house. Both the trial magistrate and the learned judge *a quo* cannot therefore, be faulted for coming to that conclusion. This is because in the absence of any valid sale of the house to the appellant no debt arose between the parties in respect of ownership of the house.

[36] As we have already seen, s 16 of the Act provides that prescription shall commence to run as soon as a debt is due. Conversely what this means is that prescription does not begin to run until a debt is due. Consequently, it follows as a matter of logic that in the absence of a debt between the parties, prescription could not begin to run over a non-existent debt or cause of action.

[37] The appellant's recognition of the respondent as the true owner of the house and her admission of liability to pay rentals[4] was also fatal to her case. Her attitude meant that she appreciated that she occupied the house as a mere tenant and not as the owner. This was damning. The authorities are clear that in that case the question of prescription does not arise.

[4] See paragraph 19 of this judgment.

For acquisitive prescription to begin to run the possessor must have possessed the property as if she was the owner failure of which he/she cannot acquire ownership to the detriment of the owner. In *Malan v Nabygelegen Estates*[5] the court said that:

> "In order to create a prescriptive title, such occupation must be a user adverse to the true owner and not occupation by virtue of some contract or legal relationship such as lease or usufruct which recognises the ownership of another."

[38] In this case the appellant occupies the house in circumstances where she recognises the ownership of the respondent; hence the question of prescription does not arise.

[39] To make matters worse the appellant was in unlawful occupation of the respondent's house without paying rent contrary to previous agreement.

[40] The learned judge *a quo* was therefore correct in holding that the question of prescription did not arise in this case. That finding renders the correctness or otherwise of the case of *John Conradie Trust v The Federation of Kushanda Preschools Trust and Others* (*supra*) an irrelevant consideration. The determination as to whether a vindication claim is a claim for a debt liable to prescription is of no moment in this case and therefore nugatory.

[41] As regards her liability to pay holding over damages, the appellant admitted in her letter cited at paragraph 29 above that she was liable to pay rentals until the house has been revalued. In that letter she acknowledged that the event has not yet occurred. That being the case, both the trial magistrate and the learned judge *a quo* cannot be faulted at all for holding that the appellant is liable to pay holding over damages.

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[5] 1946 AD 562, at 573-574. Cited at p 119. The Law of Property, Harry Silberberg , Butterworth 1975.

**Whether the court *a quo* erred in ordering costs at the punitive scale**

[42] From the above summation of the undisputed facts and admissions by the appellant, it is plain that her pleadings amounted to an abuse of process. Initially she resisted the respondent's claim arguing that she had purchased the house and was now the lawful owner of the house only to buckle down under cross-examination and confess that she was infact not telling the truth. Her reliance on the defence of prescription was also premised on a lie. She used the law and the courts to prolong her unlawful stay at the house while thumbing her nose at the respondent

[43] It is clear that through her lies and intransigence she has put the respondent to unnecessary expense and wasted the courts' time up to the highest court of appeal in matters of this nature. The appellant's conduct was reprehensible and unacceptable in any court of law. It deserves censure by the courts. For that reason the court *a quo* properly exercised its discretion beyond reproach. She deserved to be mulated with an order of costs on the punitive scale as ordered by the court *a quo.*

**Disposition**

[44] The appellant having admitted that she has no sale agreement with the respondent which is the true owner of the house in question and that she occupies the house unlawfully as a tenant without paying rent, there is no lawful basis upon which she can claim ownership of the house.

[45] That being the case, the appeal is devoid of merit. It can only fail. Costs follow the result. It is accordingly ordered that the appeal be and is hereby dismissed with costs.

**MATHONSI JA** I agree

**KUDYA JA** I agree

*Dzoro and Partners*, appellant's legal practitioners

*Civil Division of The Attorney General's Office,* respondent's legal practitioners