MCLOUD ZVAVOVAVIRI MAPANGA

versus

ALFRED CHAPUPU MASANGA

and

REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE

BERE J

HARARE, 11, 12, 19 November 2009 & 21 May 2012 & 6 June 2012

**Civil Trial**

*N. Muhloro*, plaintiff’s legal practitioners

*F. Murisi*, defendant legal practitioners

BERE J: On 24 July 2008 the plaintiff issued out summons in this Court against the defendant seeking to compel the defendant to transfer stand number 623 Highway Chinhoyi into the plaintiff’s name and other ancillary relief.

The claim arose from the alleged sale agreement which the plaintiff claimed to have entered into with the defendant.

Subsequently and mainly due to the impact of dollarization the plaintiff had to amend his claim in order for the value of the property to be reflected in the appropriate currency - the currency in force now. The content of the summons itself did not change serve for the pegging of the value of the property in question at US$55 000-00.

The basis of the plaintiff’s action as can be gleaned from both his original and amended declaration is that sometime in 2000 the plaintiff and the defendant entered into an agreement of sale of stand number 653 Sinoia Township measuring 2215m2 held under Deed of transfer No. 11088/99. The stand is popularly referred to as stand number 623 Highway, Chinhoyi.

The defendant’s position was a multifaceted one, starting with the special plea that the plaintiff’s claim had prescribed, and in the alternative the defendant denied the existence of a sale agreement in his original plea. When the defendant amended his plea pursuant to the plaintiff’s amended declaration, he then shifted and admitted the existence of a sale agreement which he was quick to qualify by alleging that it had been mutually terminated by the parties.

When the parties convened for a pre-trial conference on 24 September 2009 four issues were agreed upon, viz:-

1. whether or not the claim has not prescribed.
2. whether or not the plaintiff has paid the purchase price in full.
3. whether or not the agreement of sale was lawfully cancelled; and
4. whether or not the plaintiff is entitled to transfer of the property or damages.

I propose to deal with the issues in the sequence they were proposed

regard being had to the fact that if I make a finding that the plaintiff’s claim has prescribed, then I will be precluded from dealing with the rest of the issues because of the effect of prescription on the whole case.

WHETHER OR NOT THE CLAIM HAS NOT PRESCRIBED

To decide this issue one has to closely look at and examine the evidence that was adduced in this case particularly by the plaintiff and the defendant as the main actors in these proceedings.

It was the clear evidence of the plaintiff that in February 2000 he entered into a sale agreement with the defendant which they had initially intended to have it reduced into writing with the assistance of his legal practitioners, Messrs Mushonga and Associates, Harare. It was the plaintiff’s further testimony that although they failed to have the sale agreement reduced to writing he was able to fulfil the terms of the verbal agreement although it was characterised by sporadic payments.

The plaintiff advised the court that he forked out $1 100 000 (Zimbabwe dollars) towards the fulfilment of the verbal agreement of sale with the last payment having been made on 13 January 2001. The plaintiff went on to say that he demanded to have the defendant transfer the sold house in the same year, 2001. In his own words the plaintiff stated:-

“Immediately after the last payment of $100 000 (Zimbabwe dollars) I went to see the defendant for transfer. From there on I decided to just stay and he avoided interacting with me. I just thought my lawyers would deal with the transfer”. (Page 6 of my long hand notes).

When questioned under cross-examination on the issues of transfer the questions and answers went along as follows:-

“Q. When did you make the first demand for transfer of this property into your name?

1. It was in 2001

Q. Categorically he refused to have the property transferred?

A. He did not respond hence my asking him whether there was any money outstanding and how much he wanted

Q. By his conduct you concluded he was no longer interested in transferring the house.

A. Yes.

Q. You issued summons against him in 2008?

A. Yes” (p. 11 of my long hand notes).

I have not the slightest doubt in my mind that the story told by the

plaintiff represents the probable truth in his dealings with the defendant.

In his closing submissions the plaintiff’s legal practitioner made a desperate attempt to convince the court that the plaintiff had advised the court that he had demanded the transfer of the property in 2009.

On the other hand, the defendant’s legal practitioner argued that the correct position was that the plaintiff had said that he had demanded the transfer of the property in 2001. I agree. This would be consistent with the tenure of the plaintiff’s evidence in chief and even under cross-examination. The position taken by the plaintiff’s legal practitioner is not borne out of the evidence on record as he was evidently on slippery ground in attempting to shield off the issue of prescription.

PRESCRIPTION

Whenever issues to do with prescription are raised resort must first be had to the Prescription Act itself. It is the oracle to which the Court must inevitably turn to resolve matters to do with prescription.

In terms of s 15(d) of the Act[[1]](#footnote-1)

“The period of prescription of a debt shall be except where any enactment provides otherwise, three years, in the case of any other debt”.

Section 2 of the same Act defines a “debt” as follows:-

“debt”, without limiting the meaning of the term, includes anything which may be used for or claimed by reason of an obligation arising from statue, contract, delict or otherwise”.

Clearly, in the instant case, being a case centred on a contractual

agreement, the prescriptive period must be three years. Put differently, the obligation to transfer the property would be extinguished by prescription after a period of three years from the date it became due.

Section 16(1) of the same Act goes further to state that:

“(1) Subject to subs (2) and (3), prescription shall commence to run as

soon as a debt is due”.

In the light of the provisions of s 16(1) (*supra*) the next pertinent issue to be determined would be to consider when precisely the plaintiff’s cause arose? See the case of *Dube* v *Banana[[2]](#footnote-2)* and *Gumbo* v *Sunganeyi Motorways* (*Pvt*)[[3]](#footnote-3) and a host of other cases referred in these cases.

In my brief assessment of the evidence in this case, I have already made a specific finding that the tenure of the plaintiff’s evidence was to the effect that he demanded the transfer of the property in question from the defendant in the year 2001. Having found no favourable response, the plaintiff did nothing until July 2008 when he decided to issue summons against the defendant in an effort to compel the latter to effect transfer. By simple calculation the Court process was issued exactly seven years after the cause of action had arisen.

The casual or lackadaisical approach adopted by the plaintiff in handling this case clearly ran foul of the Prescription Act. The plaintiff did not help himself. There has to be finality to litigation. In this regard I can do no more than refer to the remarks by CHIDYAUSIKU J (now Chief Justice of Zimbabwe) when he stated as follows:-

“The delay here is 5 years, this by any standard is an inordinate delay. There has to be finality to litigation. Those who sit on their litigation until cows come home have only themselves to blame if condonation is refused when they finally wake up from their years of somnambulism”[[4]](#footnote-4)

The need for litigants to timeously bring their dispute to Courts for

resolution cannot be over-emphasised.

SWAIN J[[5]](#footnote-5) in his judgment delivered on 6 January 2011 aptly summed up the rationale of extinctive prescription when he made reference to the wise words of GROSSKOPF A.J.A. (as he then was) in the case of *Murray and Roberts Construction* (*Cape*) (*Pvty*) *Ltd* v *Upington Municipality[[6]](#footnote-6)* where the learned judge stated:-

“…. Its main practical purpose is to promote certainty in the ordinary affairs of people. Where a creditor lays claim to a debt which has been due for a long period, doubt may exist as to whether a valid debt ever arose, or, if it did, whether it has been discharged. The alleged debtor may have come to assume that no claim would be made, witnesses may have died, memories would have faded, documents or receipts may have been lost etc. These sources of uncertainty are reduced by imposing a time limit on the existence of a debt and the relevant time limits reflect, to some extent, the degree of uncertainty to which a particular type of debt is ordinarily subject”.

I accordingly make a specific finding that the plaintiff’s claim, coming up

after an inordinate delay of seven years has been extinguished by prescription.

The plaintiff’s claim is dismissed with costs.

*Mushonga Mutsvairo & Associates,* plaintiff’s legal practitioners

*Antonio & Associates*, defendant’s legal practitioners

1. The Prescription Act Chapter 8:11 [↑](#footnote-ref-1)
2. 1998(2) ZLR 92(H) [↑](#footnote-ref-2)
3. 1988(2) ZLR 83 (HC) [↑](#footnote-ref-3)
4. Lovemore Sango v Chairman of Public Service Commission and Anor HH 28-96 [↑](#footnote-ref-4)
5. In The Kwazulu-Natal High Court, Durban Republic of South Africa; Case No. 8945/2006. In the matter between BBS Empangani (formerly Z.T.C. Cashbuild cc) and Phoenix Industrial Park (Pty) Ltd and Morcland Estates (Pty) Ltd p. 51 of the cyclostyled judgment [↑](#footnote-ref-5)
6. 1984(1) SA 571(A) at 578 [↑](#footnote-ref-6)