TSITSI VERONICA CHITAGU
and
EVERISTO CHITAGU
versus
TAPSON STANLEY TOGARASEI DZVETERO
and
ANTONIA & DZVETERO LEGAL PRACTITIONERS
and
DAVID GARONGA
and
HAMILTON PROPERTY HOLDINGS

HIGH COURT OF ZIMBABWE
DUBE J
HARARE, 25 June 2018 & 10 October 2018

Trial

L. Rufu, for the plaintiff
C R J Sithole, for the 1st & 2nd defendant
M. Chambati, 3rd defendant

DUBE J: The plaintiffs bring a claim for damages for unlawful eviction.

The plaintiffs are husband and wife. The first defendant is a legal practitioner with the second defendant where he is a partner. The second defendant is a law firm. The third defendant was a client of the second defendant and he had a case which was being handled by the law firm. The plaintiffs' case is based on the following facts. The plaintiffs were the registered owners of stand 442 Good hope Township of Lot 4 Goodhope. On 22 February 2012, the fourth defendant unlawfully transferred the plaintiffs' property into its name using deceitful and fraudulent means. On 12 April 2011 the first to third respondents forged a fictitious court order purporting to be emanating from the High Court under case number HC 5434/11 authorising the third defendant to take transfer of the immovable property from the fourth defendant. The second defendant used the court order and registered transfer of the property into the third defendant's name. The first to third defendants evicted the plaintiff on the basis of the invalid transfer in January 2013. The order for eviction was subsequently set aside on 30 June 2016. The High Court has set aside the transfer of the plaintiffs' property into the fourth defendant's

name. The plaintiffs' claim for wrongful eviction and claim damages under the following categories, pain and suffering, shock embarrassment, stress, humiliation, mental anguish, *contumelia* and loss of dignity. They also claim damages for property that was damaged and lost during the eviction, legal costs and storage fees incurred for alternative accommodation and the monies they used to source alternative accommodation during the period they were unlawfully evicted.

The defendants raised special pleas on prescription and the plaintiff's *locus standi* to bring these proceedings and seek the dismissal of the claim. They assert that the third defendant validly purchased the property from the fourth defendant and was entitled to evict the plaintiffs. The order used to evict the plaintiffs was lawfully obtained and the eviction is lawful. The defendants refute that they forged a court order. They challenge the claim for damages. In response to the preliminary points, the plaintiffs' position is that they have *locus standi* to bring these proceedings as the property concerned belonged to them. They refute that the claim has prescribed and maintain that prescription was interrupted by various court processes filed in this court and the Magistrates Court.

The following issues were referred to trial;

a) Whether or not the plaintiffs' claim has prescribed?

b) Whether or not the 4th defendant is liable to pay any damages to the plaintiffs?

c) Whether or not the plaintiffs are entitled to claim damages from the defendants? If any, the quantum thereof?

At the hearing of the matter, the claim against the fourth defendant was withdrawn. The parties agreed that the special plea be dealt with as a separate issue. The parties led evidence on the preliminary points alone.

Mr Dzvetero testified on his own behalf. He testified as follows. The cause of action transpired in June 2013 and is premised on an alleged eviction. The plaintiffs were not the registered owners of the property in dispute. The registered owner was the fourth defendant. Before the property which is the subject of this dispute was transferred into the fourth defendant's name it was registered in the name of Douglas Nyaude. Parties sued each other under HC 3931/13 and this summons was issued at the same time as the judgment delivered under HH 196/16. The parties are the same. The court in that matter determined that the plaintiffs do not have *locus standi* to institute proceedings and they are back yet again. If they have a claim it must be against the fourth defendant. If the fourth defendant had defective title, they should put their claim through Douglas Nyaude. Both these parties are not before the

court. The plaintiffs had no direct interest in the matter when they instituted the proceedings. They have no *locus standi* to bring these proceedings.

The plaintiffs state in their replication that their cause of action arose from the unlawful eviction that took place sometime in January 2013. They seem to be deviating from that position and now aver that their cause of action arose in 2017. The summons in these proceedings was filed on 28 July 2017 and served on 30 August 2017. Similar proceedings were instituted under HC 196/16 between the same parties and based in the same cause of action which was dismissed on the basis that the plaintiffs were not the owners of the property when they were evicted from the property. The claim for eviction is *res judicata*. The judgment was not appealed against. When judgment was handed down the matter had already prescribed. Summons issued in July 2017 pursue the same claim. The plaintiff failed to prosecute their matter to finality.

Tendero Dzvetero testified on behalf of the second defendant. She is a partner in the second defendant and adopted the evidence of the first witness. She seeks an order for costs on an attorney client scale against the plaintiffs for the reason that there is no basis for citing the second defendant which acted on the instructions of a client. They sought an order for eviction on the third defendant's behalf because he had deeds of transfer for the property. The second defendant had not come into existence prior to the eviction. It came into existence well after the third defendant had obtained an order for the transfer of the property. The second defendant has been put out of pocket.

Lameck Garonga testified on behalf of the third respondent who is his father. His evidence is that he paid for the property on behalf of the third defendant. He has authority to defend these proceedings on behalf of his father. He adopted the evidence of the first witness.

The plaintiffs led evidence from Evaritso Chitagu the second plaintiff. He testified as follows. Before the fourth defendant took the property, the house belonged to him and his wife. They bought a stand and built the house. Deed of Transfer no, 69/2010 which states that they are not the owners of the property is a fake document. They borrowed money from the fourth defendant and gave him their title deeds as security. A director of Hamilton then changed the property into his company's name. They did not give him the property which he acquired fraudulently. At one time title was transferred into Hamilton and Nyaude's names fraudulently. Douglas Nyaude once owned the property. He is the previous owner of the stand and the plaintiffs bought it from him in 2004 and were issued with title deeds in 2004.

They were evicted in January 2013. When they were evicted the property was not in their names. Even if title changed hands, they still had rights over the property. After the order was granted, they applied for condonation of late filing of an application for rescission of judgment which was obtained in default. They were back into the house at the end of February 2013. The initial summons was issued in 2013. They approached the court under HC 3931/13 and were denied damages because the order for eviction granted by the Magistrates Court was still extant. The court commented about the plaintiff's *locus standi* in its judgment. At the time they did not have title. They were directed to go back to the Magistrate Court by the court. They have not appealed the judgment of CHAREWA J. The order for eviction was set aside on 30 June 2016 by the High Court which ordered that the deeds were to be reversed to fourth defendant and then to them. Title was put back into his name in June 2017. They delayed in instituting these proceedings because they were still putting together evidence and preparing for court. Their cause of action arose after 20 July 2017 when they had satisfied all the requirements and had set aside the eviction order and now they have *locus standi* to claim damages. This summons was issued on 28 July 2017. The state that the cause of action arose in January 2013 in their replication, it is an error. Their claim has not prescribed as the running of prescription was interrupted by various court proceedings.

The court will not comment on the credibility of the witnesses because their evidence deals with application of the law. It is common cause that at the time of the alleged eviction in January 2013, the property was not in the name of the plaintiffs. The plaintiff instituted this claim in 2017 after they obtained title in the property. The issues that the court is required to decide are whether the plaintiffs' claim has prescribed and whether they have *locus standi* to bring these proceedings.

Locus standi is defined in The Civil Practice of the High Courts of South Africa, 5th ed, vol 1, *Herbstein & Winsen* at p 185 define *locus standi* as follows:

> "This question involves a consideration of whether the party is enforcing a legal right and has sufficient interest in the relief claimed. It is important to note that a person who has an interest in the relief claimed may, nevertheless, not be able to claim that relief if the claim is not based upon a legally enforceable right…. In some cases , it has been held that the applicant must have a direct and substantial interest in the relief claimed, other cases have explained that a 'direct and substantial interest 'means a legal interest"

Locus standi is standing at law to bring proceedings for the relief sought in a court of law. *Locus standi* in a property derives from one's title to the property. In order to be able to claim relief stemming from one's ownership of property, a litigant is required to show that he

owns the property and has title to the property. He must have recognizable rights to the property. Ownership of land is transferred from one person to the other through registration in terms of s 14 of the Deeds Registries Act [*Chapter 20:05*]. Proof of ownership of immovable property is found in title deeds. Registration of property in the Deeds Registries Office is an announcement to the whole world of ownership of the property, see T*akapfuma* v *Takapfuma* 1994 (2) ZLR 103 (S), *Machiva* v *Commercial Bank of Zimbabwe Ltd* 2001 (1) ZLR 302 (HC). A litigant who has no title to an immovable property is not entitled to claim damages for wrongful eviction from a property unless he has rights of possession as in the sense of a lease.

At the time that the eviction took place in January 2013, the property was registered in the name of the fourth defendant which was the owner of the property. The property had been sold to the third defendant who subsequently took title of the property. The plaintiffs had no title to the property and did not have any right that protected them against eviction and hence had no *locus standi* to bring proceedings for damages against the defendants. They were not even lessees in the property. Consequently, in the absence of title, the plaintiffs were not entitled to bring a claim for damages for unlawful eviction and consequences arising therefrom.

A debt is extinguished by prescription after the lapse of a period of three years. The rationale behind prescription of debts is to penalise a tardy litigant. Prescription begins to run when the plaintiff's cause of action accrues. The term cause of action has been defined in a number of cases as the entire set of facts giving rise to an enforceable claim and includes every fact which is required to be proved to enable a plaintiff to get the relief sought, See *Chiwawa* v *Mutsuris* 2009 (1) ZLR 72. In Old *Mutual Property Investment Corporation (Pvt) Ltd* HH 216/02, the court defined a cause of action as, the entire set of facts giving rise to a claim. Prescription begins to run when the cause of action reaches completion, thus when the cause of action has fully accrued and the creditor is able to pursue his claim. A cause of action accrues when every fact that is material and needs to be proved to prove a claim has occurred. Prescription does not begin to run against a creditor before his cause of action has fully accrued. A litigant who brings a claim is required to show that he brings the claim within 3 years of the cause of action. If he brings the claim outside the three year period, he must show good cause for such a course. He may only bring a claim outside the prescriptive period where he is able to show that the cause of action was interrupted. Section 19 of the Prescription Act [*Chapter 8:11*], the Act, provides for interruption of prescription and reads as follows:

> **''19 Judicial interruption of prescription**
> (1) In this section—
> "process" includes—

(*a*) a petition;
(*b*) a notice of motion;
(*c*) a rule *nisi*;
(*d*) a pleading in reconvention;
(*e*) a third party notice referred to in any rule of court;
(*f*) any document whereby legal proceedings are commenced.
(2) The running of prescription shall, subject to subsection (3), be interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt.
(3) Unless the debtor acknowledges liability, the interruption of prescription in terms of subsection (2) shall lapse and the running of prescription shall not be deemed to have been interrupted, if the creditor—
(*a*) does not successfully prosecute his claim under the process in question to final judgment; or
(*b*) successfully prosecutes his claim under the process in question to final judgment, but abandons the judgment or the judgment is set aside.''
(the underlining is mine for emphasis.)

Section 19 deals with instances when the running of prescription is interrupted. Prescription is interrupted where the creditor serves the debtor with any process where the creditor claims payment of a debt and where the debtor acknowledges liability. In terms of s 19 (3) (a) of the Act, the running of prescription shall not be deemed to be interrupted where the creditor does not successfully prosecute his claim under the process in question to final judgment. In *Massena* v *Minister of Home Affairs* 1998 (2) ZLR 183 (HC) the court defined the word "successfully" as follows,

> "the word" successfully imports that an identifiable stage must have been reached in the proceedings at which one could say whether the claim is successful or not. It did not mean 'timeously' or 'expeditiously' or 'with all possible vigour'. It is only when it can be said that the claim had not been successfully prosecuted that the provisionally suspended prescription starts to operate again."

In *Gwiriri* v *Star Africa Corporation Ltd and 2 Ors* HH 674-15 the court had occasion to consider the meaning of the word "successfully" in the phrase "does not successfully prosecute his claim" at p 5 of the cyclostyled judgment and remarked as follows;

> "Put simply, the effect of s 19 (2) is that process issued in respect of a debt and served on a debtor within three years of the cause of action has the effect of interrupting prescription. The running of prescription shall not be deemed to have been interrupted in terms of s 19 (3) if the creditor, does not prosecute the proceedings under that process to finality or b) successfully prosecutes the claim under the process in question to final judgment but he abandons the judgment or the judgment is set aside. The mischief behind the section is that the creditor must successfully prosecute the matter to final judgment and must get a judgment in his favour. If he does not, he is entitled to pursue the matter until he gets final judgment in his favour. He is only entitled to successfully prosecute to final judgment the proceedings under the process in question that is, the process by which prescription was originally interrupted and not any other." See also *Van der Merwe* v *Protea Insurance Co Ltd* 1982 (1) SA 770 (E)

The word "successfully" has nothing to do with the effort that a litigant puts in prosecuting the matter or the pace at which he does this. The word "successfully" is not time framed. It is about the level that you have to get to with a matter for it to be able to interrupt prescription. In terms of s 19(3)(a) if a creditor fails to prosecute his claim successfully under the process instituted, which process interrupts prescription, in the court he instituted proceedings or at any subsequent stage of proceedings, the running of prescription is not interrupted. What this means is that when a cause of action accrues to a creditor, prescription begins to run. When he issues process to commence proceedings, he interrupts prescription in terms of s 19(1) by way of the process instituted. The rider in s 19 (3) (a) is that the creditor must prosecute his claim under the process in question to final judgment and not any other process. He must get judgment in his favour under that process for the process to have the effect of interrupting prescription. He must obtain a judgment in his favour for the process to have the effect of interrupting prescription Where the creditor is successful and prosecutes his claim under the process in question, prescription is interrupted until judgment is abandoned or set aside in terms of s 19(3) (b). Final judgment may be obtained in the court in which the process is instituted or a higher court. Where the creditor does not successfully prosecute his claim, the process so issued has no effect of interrupting prescription. There is no interruption of prescription where a litigant files wrong processes. Prescription is only interrupted where the process issued is based on the cause of action. A claim based on a different cause of action has no effect of interrupting prescription.

On 12 March 2012 an order was granted for eviction of the plaintiffs. The plaintiffs' cause of action is the alleged unlawful eviction which took place in January 2013. An eviction as a cause of action becomes complete upon full eviction. An eviction is a once off occurrence and there is no question of an entire set of circumstances. The plaintiffs' cause of action against the defendants arose when the eviction took place in January 2013. In their pleadings, the plaintiffs initially asserted that their cause of action arose in January 2013. They were correct. The plaintiffs sought to change and claimed that their cause of action arose in August 2017.

The plaintiffs instituted proceedings for damages for unlawful eviction in 2013 under HC 3931/13. The 2013 summons for eviction is the process by which prescription was initially interrupted. This is the process that must have been prosecuted to final judgment and not any other. That process was not successfully prosecuted to final judgment by the plaintiffs and hence it had no effect of interrupting prescription. By the end of 2016, the cause of action would have prescribed as there had been no successful prosecution. When the order for

eviction was set aside in June 2016, title was put back into the second plaintiff's name in June 2017. The plaintiffs decided to pursue the matter and summons in this matter was only served on 31 August 2017 more than 4 years after the cause of action arose. The 2017 summons was served well after the plaintiff's cause of action had prescribed. The plaintiffs were required to bring their claim within three years of the cause of action. They failed to do so.

Where a creditor files a claim, fails to prosecute successfully his claim to final judgment, the issuance of another summons has no effect of interrupting prescription. The fact that the plaintiff filed an unsuccessful claim or followed wrong procedures has no effect of interrupting the running of prescription. Once a claim has prescribed, it is not competent to interrupt the running of prescription as the claim will have been extinguished. The plaintiffs filed numerous other court processes after the matter under HC 3931/13 was filed. All the other processes that the plaintiffs instituted after this, had nothing to do with the claim for unlawful eviction and are not relevant for purposes of determining the question of interruption of prescription in this case.

It is only the process in question, thus the process by which prescription was originally interrupted which was required to be successfully prosecuted. Consequently, the court is unable to find that prescription was interrupted in this case. The points *in limine* raised by the defendants succeed.

The defendants seek an order of costs against the plaintiffs on a higher scale on the basis that the plaintiffs have wasted the court's time and put the defendants out of pocket when their claims had prescribed and they lacked *locus standi.* Further, that they have been changing goal posts and were not serious about their claims thereby abusing court process. In order to justify an order of costs on a punitive scale, there must be something more than just punishing the losing party. It must be shown that there are exceptional circumstances that justify the scale sought. Costs are generally in the discretion of the court. I am unable to find any conduct of the plaintiffs that warrants the scale requested for. The conduct complained of is not out of the norm.

In the result it is ordered as follows:

The defendants' points *in limine* are upheld.

The plaintiffs are jointly and severally the one paying the other to be absolved to pay the defendants' cost on the ordinary scale.

Rufu-Makoni Legal Practices, plaintiffs' legal practitioners
Machiridza Law Chambers, 1st defendant's legal practitioners
Antonio & Dzvetero, 2nd defendant's legal practitioners
Chambati, Mataka & Makonese, 3rd defendant's legal practitioners