CATHERINE NGULUWE
and
NOBUHLE NGULUWE
versus
DORIS DEWA (Nee NGULUWE)
and
GM CROSLAND N.O. (In his official capacity as Executor in Estate Late Elijah Nguluwe)
and
MASTER OF THE HIGH COURT N.O.
and
THE TRUSTEES FOR THE TIME BEING OF THE TINEI AMOS FAMILY TRUST
and
REGISTRAR OF DEEDS N.O.

HIGH COURT OF ZIMBABWE
MAXWELL J
HARARE, 17 January & 13 March 2023

**Special Plea – Prescription**

*R Mabwe & A Chatsama*, for the applicant
*T Chagudumba*, for the 1st and 2nd defendants
*CW Gumiro*, for the 4th defendant
No appearance for the 3rd and 5th defendants

**MAXWELL J:** On 30 August 2022, first and second plaintiffs issued out summons seeking that the will in estate late Elijah Nguluwe be declared null and void. They also sought the nullification of the sale and transfer of Plot Number 2022 Glentor of Glenlorne, Harare, by the second defendant to the fourth. They further sought an order directing third defendant to facilitate the proper distribution of the assets of the late Elijah Nguluwe in accordance with the laws of intestate succession in Zimbabwe. In the Declaration they stated that they are siblings and biological children of the late Elijah Nguluwe together with first defendant. Their late father met his demise in 2011 whereupon after his death, sometime in 2012, first defendant produced a photocopy of a will alleged to have been authored by their late father. The plaintiffs disputed it and requested for the original copy but first defendant did not avail it. They then wrote to third defendant requesting him to obtain the original of the alleged will and requested him to disregard

the photocopy that had been produced. They alleged that they were told to wait for a response which did not come. On 5 August 2022 they were advised of an eviction claim and got to know that the estate of their late father had been registered and was at an advanced stage of distribution.

First and second defendants entered their notices of appearance to defend and filed a special plea in bar to the effect that in terms of s 15(d) of the Prescription Act [*Chapter 8:11*] the plaintiffs' action had prescribed. In their heads of argument they stated that the plaintiffs' claim is for a declaratur and consequential relief and that a claim for a declaratur prescribes at law. They referred to the case of ***Fumia & Fumia*** **v** ***Matshiya N.O. & Anor*** HH 31/16 in which a special plea of prescription was upheld. They also referred to the case of ***Conradie Trust*** **v** ***Federation of Kushanda Trust*** SC 12/17 in which it was stated that in the Prescription Act the term 'debt' is defined to include anything which may be sued for giving it a very wide meaning synonymous with cause of action. First and second defendants submitted that plaintiffs have been sitting on a cause of action for a period of ten years, in excess of the statutory three years. Further that the cause of action arose in 2012 when they became aware of the will of their late father and wrote to the third defendant challenging same. They argued that on the authority of ***Courtesy Connections (Pvt) Ltd*** **v** ***Mupamhadzi*** 2006 (1) ZLR 479, the plaintiffs lost the right to raise a claim irrevocably and not even the court can extend that right. They prayed for the upholding of the special plea and the dismissal of the plaintiffs' claim with costs on a higher scale.

In response to the special plea, plaintiffs disputed that the claim had prescribed. They argued that prescription started to run when they became aware of the registration of the will through their nephew after service of eviction summons in relation to the estate plot. In addition they stated that second plaintiff was a minor until the year 2020. In their heads of argument they stated that they were not aware of the full set of facts in 2012 and only became aware of the registration of the estate of their late father in August 2022. They referred to ***Zimasco (Pvt) Ltd*** **v** ***San He Mining (Pvt) Ltd*** HH 654/15 where it was stated in obiter that the taking place of one factor does not trigger the running of prescription and that the trigger is a full set of facts. They relied on the same case for the submission that prescription begins to run when the last of the facts required to prove a claim becomes known to the plaintiff. They further submitted that *in casu*, this last set of the facts was when they knew of the registration of their late father's estate when eviction summons were served upon their brother's son who resides at the plot of their late father. They

also reiterated that for second plaintiff, prescription did not run until she became a major in the year 2020. They prayed for the dismissal of the special plea.

Three issues arise for determination. These are:

1) does a claim for a declaratur prescribe?
2) when did the cause of action arise? and
3) second plaintiff's status and its effect on the claim.

The issues will be discussed in that order.

1. **Does a claim for a declaratur prescribe?**

Ms Mabwe submitted that the claim for a declaratur does not prescribe. She relied on the authority of ***Ndlovu* v *Ndlovu & Anor*** 2013 (1) ZLR 110. She further submitted that a declaration is not a debt within the meaning of s 2 of the Prescription Act [*Chapter 8: 11*] and therefore such claim does not prescribe. She argued that in ***Fumia & Anor* v *Matshiya N.O. & Anor*** (supra) and ***Mupfumira* v *IDBZ*** HH 353/19 the point whether or not a declaratur prescribes was not covered. That argument is not genuine considering that in both cases applicants were seeking declaraturs and in both cases the special plea of prescription was upheld. In any event, as submitted by Mr *Chagudumba*, the judgments that upheld the special plea of prescription on a declaratur were decided later than the judgment relied on by Ms *Mabwe*. The answer to the question in issue is therefore that a claim for a declaratur prescribes.

2. **When did the cause of action arise?**

It is trite that the term "cause of action" refers to when the plaintiff is aware of every fact which it would be necessary for him or her to prove in order to support his or her prayer for judgment. It is the entire set of facts that the plaintiff has to allege in his or her declaration in order to disclose a cause of action but does not include the evidence that is necessary to support such a cause of action. See ***Chiwawa* v *Mutzuris & Ors*** HH 7/09, ***Shinga* v *General Accident Insurance Co. (Zimbabwe)*** *Ltd* 1989 (2) ZLR 268 (HC) at 278 A-C), ***Peebles* v *Dairibord Zimbabwe (Private) Limited*** 1999 (1) ZLR 41. Plaintiffs seek a declaration that the will in the estate late Elijah Nguluwe is null and void and consequential relief. In the declaration, they stated that a photocopy of the will was produced to them sometime in 2012 after the demise of their father. They argued that the cause of action was the registration of the will and imply that the will could then be challenged after registration. Plaintiffs did not provide any authority for that position.

From a reading of s 11 of the Administration of Estates Act [*Chapter 6:01*], questions on the validity of any will are to be dealt with in the High Court. I agree with the submissions for the first and second defendants that the date when they became aware of the existence of the will is the date when the cause of action arose. Nothing precluded plaintiffs from challenging the validity and authenticity of the will as soon as they became aware of it.

There was an attempt to argue delay in commencement of the running of prescription. Ms *Mabwe* referred to para(s) 11 and 12 of the declaration in which it is stated that plaintiffs notified third defendant of their reservations, in writing, concerning the genuineness of the will and were advised to wait for a response but none came until 5 August 2022. She further submitted that there was an assurance that nothing would be done pending determination on the validity of the will. Plaintiffs did not attach the correspondence sent to third defendant's office. The correspondence and an affidavit by first plaintiff were attached by first and second defendants to their special plea. Both documents confirm plaintiffs' disgruntlement with the will. In the undated letter, Annexure "A" to the special plea, they ask third defendant to collect the original from Atherstone of (sic) Cook Legal Practitioners in Harare and confirm the genuineness thereof. In the affidavit deposed to on 16 July 2012, Annexure "B" to the special plea, first plaintiff said she wants the court to disregard the questionable will. The assurance referred to by Ms *Mabwe* is not on record. No written confirmation that plaintiffs were advised to wait for a response is on record. The running of prescription can only be delayed or interrupted in circumstances outlined in ss 6 and 7 of the Prescription Act [*Chapter 8:11*]. The sections are worded as follows:-

> "**6. When completion of prescription delayed**
> (1) If—
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> (*a*) the person against whom the prescription is running is a minor or is insane or is a woman whose separate property is controlled by her husband by virtue of his marital power or is a person under curatorship or is a person whose behaviour or physical or mental condition justifies his being placed under curatorship or who is prevented by superior force or any enactment or order of court from interrupting the running of prescription in terms of section *seven*; or
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> (*b*) the person in favour of whom the prescription is running is outside Zimbabwe or is married to the person against whom the prescription is running or is a member of the governing body of a juristic person against whom the prescription is running; or
>
> (*c*) the person against whom or in favour of whom the prescription is running is deceased and an executor of the estate in question has not yet been appointed;
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> and the period of prescription would, but for this subsection, be completed before or on, or within three years after, the date on which the relevant impediment referred to in paragraph (*a*), (*b*) or (*c*) has ceased to exist, the period of prescription shall not be completed before the expiration of the period of three years which follows that date.

(2) Subject to subsection (1), the period of prescription in relation to fideicommissary property shall not be completed against a fideicommissary before the expiration of the period of three years which follows the date on which the right of that fideicommissary to that property vested in him.

**7. Judicial interruption of prescription**

(1) In this section—
"process" includes—
(*a*) a petition; or
(*b*) a notice of motion; or
(*c*) a rule *nisi*; or
(*d*) any document whereby legal proceedings are commenced.
(2) The running of prescription shall, subject to subsection (3), be interrupted by the service on the possessor of the thing in question of any process whereby any person claims ownership in that thing.
(3) Any interruption in terms of subsection (2) shall lapse, and the running of prescription shall not be deemed to have been interrupted, if the person claiming ownership in the thing in question—
(*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.
(4) If the running of prescription is interrupted in terms of subsection (2), a new period of prescription shall commence to run, if at all, only on the date on which final judgment is given."

The unproved assurances, advice and undertakings are not in any of the categories listed above and cannot delay or interrupt the running of prescription.

It is common cause that second defendant was a minor at the time the cause of action arose. In accordance with s 17(1)(a) of the Prescription Act [*Chapter 8: 11*] the period of prescription would not be completed before the expiration of the period of one year following her becoming a major. At the time of the hearing she was still a minor. The submission for the first and second defendants that the claim prescribed is therefore correct in respect of the first plaintiff only. Accordingly, the claim is prescribed for the first plaintiff.

3. **Second Plaintiff's status and its effect on the claim**

Mr *Chagudumba* submitted that second plaintiff lacks *locus standi* to have instituted proceedings, and that she could not have sued in her own personal capacity by virtue of being a minor. He prayed that second plaintiff's claim be struck off. He pointed out that there is a misrepresentation in para 2 of the declaration where it is stated that second plaintiff is a female adult. Ms *Mabwe* conceded that second plaintiff is a minor but prayed that the matter be postponed

for the appointment of a curator. The legal principle of *locus standi in judicio* has been described as follows:

> "The capacity to participate in legal proceedings is technically described by the phrase *locus standi in judicio* and has been succinctly summed up in the following terms:
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> > 'The right to sue or the liability to be sued depends in the first place on capacity. In order to be capable of either suing or being sued, a person must have *locus standi in judicio.* Consequently persons who are wanting in that capacity cannot be parties to any civil action …'"

See *Introduction to South African Law and Theory* (2nd Edition) by WJ Hosten, AB Edwards, F. Barman and J Church and ***Masenga* v *Guthrie & Ors*** 2002 (2) ZLR 321 (H). In legal proceedings, a minor falls in the category of those wanting in capacity to sue and requires the assistance of a guardian. See Herbstein and Van Winsen *The Civil Practice of the High Courts of South Africa,* 5th edition, p 160. Second plaintiff instituted proceedings without the assistance of a guardian. What that means is that the proceedings instituted by second plaintiff without the assistance of a guardian are a legal nullity. The observation of LORD DENNING in ***McFoy* v *United Africa Company Limited*** 1961 3 ALL ER 1169 at 1172 is apposite. He observed that:

> "If an act is void, then, it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of court for it to be set aside. It is automatically null and void without more ado, although it is sometimes more convenient to have the court declare it to be so. **And every proceeding which is founded on it is also bad. You cannot put something on nothing and expect it to stay there. It will collapse."** (My emphasis).

The request by Ms *Mabwe* that the matter be postponed for the appointment of a curator, in my view, cannot be granted. Postponement of a matter presupposes that the pleadings are in order but the parties, for one reason or another, are not in a position to proceed with the hearing. You cannot postpone a nullity. Accordingly, the claim by second plaintiff will be struck off the roll.

**COSTS**

First and second defendants prayed for costs on a higher scale in their special plea. In heads of argument the prayer was repeated without substantiation. An award of such costs are the exception and not the norm. No submissions were made to motivate the court to grant the costs on such a scale. I am not persuaded that such costs are warranted in this case. Ordinary costs will meet the justice of the case.

**DISPOSITION**

**The following order is appropriate**:-

The Special Plea taken by the first and second defendants be and is hereby upheld.

The first plaintiff's claim be and is hereby dismissed with costs.

The second plaintiff's claim be and is hereby struck off the roll.

*Chatsama & Partners*, plaintiffs' legal practitioners
*Atherstone & Cook,* first and second defendants' legal practitioners
*Moyo Chikono & Gumiro,* fourth defendant's legal practitioners