KENNEDY CHIRIMUHUTA
versus
PATRICIA TENDAI TAFIRENYIKA
(In her capacity as Executrix Dative of the late Evans Tafirenyika having been duly appointed as such by the Master of High Court under DR 179/12)
And
PATRICIA TENDAI TAFIRENYIKA
And
MASTER OF THE HIGH COURT OF ZIMBABWE
And
THE REGISTRAR OF DEEDS N.O

HIGH COURT OF ZIMBABWE
SIZIBA J
MUTARE, 29 NOVEMBER 2024

CIVIL ACTION

Mr *B. Mudhau*, for the plaintiff
Mrs *M. Mandingwa with Ms M. Karimanzira*, for the 1st & 2nd defendant
3rd & 4th defendants in default

SIZIBA J**:** The plaintiff filed his claim on 20 October 2023 seeking a declaratory order and consequential relief. He prays for a declaratory order that Stand 5382 Dangamvura (hereinafter called the disputed property) does not form part of the Estate Late Evans Tafirenyika as he acquired the rights and interests in the said stand in the year 2000 through an agreement of sale before the demise of the late Evans Tafirenyika who died in 2010. He further seeks a declaratory order that the title deed number 5655/2015 which purportedly passed title of the disputed property to the second defendant is null and void and accordingly cancelled. He further craves an order compelling the first defendant to sign all necessary papers to effect transfer of the disputed property to his names within 10 days of the granting of the order.

The first defendant is the same individual who has been cited as the second defendant. She is the surviving spouse of the late Evans Tafirenyika and she is also the Executrix Dative of the deceased estate. Plaintiff's counsel submitted that there was need to cite her twice, first in her official capacity as Executrix Dative and secondly in her personal capacity. This is not proper at law since for all intents and purposes she has one identity as a natural person. Being cited or

sued in different capacities does not make her to become more than one person at law. She is accordingly referred to as the defendant for purposes of convenience in this judgment.

The issues that were referred to trial as per the joint Pre- Trial Minute are as follows:

(a) Whether or not the plaintiff's claim has prescribed.
(b) Whether or not plaintiff's claim is *res judicata*.
(c) Whether or not plaintiff bought and validly acquired rights and interests in stand number 5382 Dangamvura Township of Stand 5625 Dangamvura Township situate in the District of Umtali measuring 325 square meters also known as Stand No. 1168 Area 3 Dangamvura from the late Evans Tafirenyika in the year 2000.
(d) Whether or not the transfer of title into the defendant's name should be reversed and plaintiff be declared the owner.
(e) Whether or not stand number 5382 Dangamvura Township of Stand 5625 Dangamvura Township situate in the District of Umtali measuring 325 square meters also known as Stand No. 1168 Area 3 Dangamvura should not form part of the estate late Evans Tafirenyika.

At the commencement of the trial, plaintiff's counsel raised a preliminary objection that the first two issues which were special pleas in bar were irregular steps as they were filed without compliance with the provisions of r 42 (8) of the High Court Rules, 2021 which rule mandates that heads of arguments be filed simultaneously with such process. He prayed that the irregular steps should be set aside in terms of r 43 by striking out such issues so that the matter is tried on the issues dealing with the merits only. When I asked whether such an application was proper in view of r 43 (2) (a) which requires that such application be made before any further steps are taken after such irregularity, counsel withdrew the application. A reading of r 43 (2) of the High Court Rules, 2021 which requires such an application to be on notice to all the parties also seems to suggest that it would be very difficult if not impossible to satisfy such a requirement by means of an oral application especially where other parties such as the third and fourth respondents were in default and not before the court and hence in my view, the withdrawal of the application by plaintiff's counsel was proper. However, in his closing submissions, counsel sought to argue again that the plaintiff's special pleas were irregular and also a nullity for want of compliance

with r 42 (8) of the High Court Rules, 2021. This argument, to me, is not only an act of approbation and reprobation but it is also without merit especially when it is being raised at the very end of the trial when submissions are being made which serve the same purpose as heads of argument which were not earlier on filed. By replicating to the irregular special pleas and agreeing that they be made part of the issues for trial and also by participating in the trial, the plaintiff has acquiesced in the irregular step and he stands to suffer no prejudice at this stage. By his acquiescence, he is disqualified from pursuing such objection at this stage of the case. I will therefore proceed to consider the case before me without further reference to this issue.

THE EVIDENCE ADDUCED BY THE PARTIES

From his sworn testimony before this court, the plaintiff's case is that on 31 May 2000, he bought the disputed property from the late Evans Tafirenyika for $220 000.00 as per the old Zimbabwe dollar currency. He alleges to have paid the purchase price in full before signing the agreement of sale which was just a hand written piece of paper which they had prepared on their own as laymen. He was already in occupation of the disputed property since he had been a tenant thereon. His evidence was that after purchasing the disputed property, he ceased to pay any rentals to the late Evans Tafirenyika. This was disputed by the defendant whose evidence was to the effect that the plaintiff continued to pay rentals until 2009. The defendant's evidence was that the plaintiff only started refusing to pay rentals after her late husband's demise in 2010. The plaintiff conceded that the alleged written agreement did not indicate whether the purchase price hand been paid or not. The plaintiff's evidence was that, prior to the sale of the disputed property, the late Evans Tafirenyika used to come to his place to collect the rentals or he would send his friend one Antony Warara to collect the rentals. He alleged that the late Evans Tafirenyika was a friend to him and that they would do some sporting activities together. The defendant agreed that the plaintiff was indeed a friend to her deceased husband but she alleged that she would also accompany her deceased husband to the disputed property to collect the rentals. The defendant denied the plaintiff's testimony to the effect that he never saw her nor interacted with her at any stage.

The plaintiff further alleged that between the year 2000 and the year 2006, the late Evans Tafirenyika kept postponing the issue of transferring the disputed property to his names. He later became evasive about issues of transfer of the disputed property and he also did not disclose that the property was mortgaged. Around 2006, the plaintiff then employed the services of his

erstwhile lawyer Mr Innocent Gonese of Gonese and Ndlovu to compel transfer of the property to his names. This did not materialize as the property was mortgaged by Intermarket Building Society and it had a debt of $200 000 in the old Zimbabwe dollar currency which he ended up clearing so as to save the property from being sold by the said bank to recover its debt. Mr Innocent Gonese indeed testified as a witness and did elaborate and confirm under oath that he was contracted by the plaintiff at the relevant time to assist in compelling the transfer of the property to his names. He highlighted also that another challenge was that the title deed could not be located by Intermarket Building Society's lawyers who were Lock Donagher and Winter. He also highlighted that there was no conveyancing description of the property and hence it was not possible to do any search at the Deeds Office. There was correspondence to back up the plaintiff's interactions with Mr Gonese. The plaintiff alleged that by that time, the late Evans Tafirenyika could not be located even when he engaged tracing agents to trace him. This allegation was denied by the defendant who testified that her husband was always in Mutare at all material times. The late Evans Tafirenyika passed on in 2010.

Both parties agreed that sometime in 2012, the plaintiff dragged the defendant to the Magistrates Court and obtained an order of court to compel her to register the estate of her late husband Evans Tafirenyika. Plaintiff alleges that the defendant did not communicate with him when she obtained the Letters of Administration. She finalized the estate through the First and Final Liquidation and Distribution Account which was confirmed on 7 October 2013 without his knowledge. In 2015 when he heard that the property had been transferred to the defendant's names, he filed an application under HC 6805/15 and sought to set aside the third defendant's decision to award the disputed property to the defendant, among other things. Both parties agreed that the said case was dismissed for want of prosecution under HC12406/18 in 2018. The proceedings which remained when the current claim was filed were for the eviction of the plaintiff from the disputed property.

The defendant's case was that the plaintiff's claim is prescribed. Transfer of the property to her name was effected in 2015. On 30 May 2018, the plaintiff's application to challenge the Master's decision which confirmed the First and Final Liquidation and Distribution Account was dismissed for want of prosecution and he did nothing about it until he filed the present claim in 2023. Furthermore, the defendant contended that the plaintiff was their tenant who now wants to take advantage of her after her husband's death as she was not aware of such an alleged

transaction. She denied that the disputed property was ever sold by her late husband to the plaintiff. She said that this could not have ever happened without her knowledge and participation. Her evidence was that the plaintiff paid rentals up to 2009. The parties did not record such payment of rentals and hence there was no written proof of such payments. She testified that when the intermarket Building Society threatened to attach and sell the disputed property, she and her late husband pleaded with the plaintiff to bail them out by settling the mortgage bond and then offset the said amount by deducting it from what was due to them in rentals. This allegation was denied by the plaintiff. She pointed to correspondence by her erstwhile lawyers whereby the plaintiff's lawyers were being advised that an executor to the estate had been appointed sometime in 2012 but the said correspondence did not contain the exact names of such executor and the plaintiff testified that his erstwhile legal practitioner had not advised him of such correspondence.

WHETHER THE PLAINTIFF'S CLAIM IS *RES JUDICATA*

The basis of the defendant's argument on this aspect is that the claim by the plaintiff is constituted by the same parties, the same subject matter and the same cause of action as the matter under HC6805/15 which was dismissed by this court on 30 May 2018 under HC12406/18. For this reason, it is submitted by the defendant's counsel that the claim is *res judicata*. On the other hand, plaintiff's counsel submits that a plea of *res judicata* cannot be sustained where a matter was dismissed by a court on a procedural point without being decided on the merits. I agree. In *Maparura* v *Maparura* 1988 (1) ZLR 234 (H) at 236 to 237, CHIDYAUSIKU J (as he then was and may his soul rest in peace) articulated the law on *res judictata* and estoppel as follows:

> *"I accept that the parties to the counter-claim are the same as those in the dismissed action and the court that dismissed the claim had jurisdiction. It is also clear that the issues raised in the counter-claim are the same as those raised in the dismissed action. The question that arises is whether these issues were determined in the dismissed action. The essence of the defence of res judicata is that the issues being raised have been previously raised and determined by a court of competent jurisdiction. In the case of New Brunswick Railway Co v British and French Trust Corporation Ltd [1939] AC 1 Lord Maugham LC at pp 19-20 had this to say:*
>
> *"The doctrine of estoppel (per rem judicatam) is one founded on considerations of justice and good sense. If an issue has been distinctly raised and decided in an action in which the parties are represented, it is unjust and unreasonable to permit the same issue to be litigated afresh between the same parties or persons claimed under them."*

The emphasis is my own. I entirely agree with the remarks of LORD MAUGHAM LC. Res judicata is intended to prevent repeated redetermination of the same issues. Common sense and public policy considerations demand that there be termination in disputes and finality in judicial decisions. It also serves to protect the individual from vexatious multiplication of suits at the instance of professional litigants.

On the facts of the present case the issues raised in the original action were not determined. What was determined was whether or not discovery had been made in compliance with the court direction. The question of what constitutes res judicata in dismissals of actions or applications after hearing is discussed by Spencer-Bower and Turner in their book Res Judicata 2 ed on p 51 para 58:

> *"When an action, or motion, or application, is dismissed by a judicial tribunal after a trial or hearing, it is often a question whether anything can be said to have been decided, so as to conclude the parties, beyond the actual fact of the dismissal. The answer to this inquiry depends upon whether, on reference to the record and such other materials as may properly be resorted to, the dismissal itself is seen to have necessarily involved a determination of any particular issue or question of fact or law, in which case there is an adjudication on that question or issue; if otherwise, the dismissal decides nothing, except that in fact the party has been refused the relief which he sought."*

I agree with the approach of the learned authors. Applying that approach to the facts of the present case the inescapable conclusion is that the issues of divorce, custody of the minor children of the marriage, maintenance, damages or payment for the damaged property were succinctly raised but were never determined. The dismissal decided nothing except the fact that the respondent was refused the relief she sought. In the result the exception is dismissed with costs."

The above articulated position of the law has not changed in this jurisdiction. (See also *Mujeyi* v *Afrasia Bank Zimbabwe Limited* HH 202-20). In the recent case of *Zimbabwe Power Company* v *Intratrek Zimbabwe* SC 127–23, CHIWESHE JA, in addressing a ground of appeal dealing with the plea of *res judicata* in an instance where a case had not been dismissed on the merits remarked as follows at page 43 of the cyclostyled judgment:

> *"The first issue is based on a ground that has no merit whatsoever. As properly observed by the court a quo, this Court allowed the appeal in SC 39/21 on the basis of a technicality. It held, on a preliminary point raised by the appellant that the respondent should not have proceeded by way of application in the court a quo because the matter was replete with disputes of fact which could not be determined on the papers before the court a quo. In short, the respondent should have proceeded by way of action. That is precisely what the respondent did in the matter presently before this Court on appeal. No issues on the merits were touched on by this Court under SC 39/21. This ground of appeal has absolutely no merit."*

The position of the law is therefore that a special plea of *res judicata* will not be upheld if it is raised under circumstances where the previous case was not decided on the merits. This

is simply because the legal principle which lies at the core of the special plea of *res judicata* is that courts of law should not be made to decide a matter more than once. It follows that when a case is dismissed or if a default judgment is granted on procedural or technical grounds without the case being dealt with on the merits, no findings on facts, evidence, credibility of witnesses or conclusions of law would have been made to the extent that it can be said that the court has exhausted its jurisdiction and become *functus officio*. Furthermore, there would be no risk of contradictory judgments if the merits of the previous case were not considered and hence a plea of *res judicata* must fail in such matters. It is for these very reasons therefore that the defendant's special plea of *res judicata* which is premised upon a dismissal of the plaintiff's previous application for want of prosecution must fail. The defendant's special plea of *res judicata* has no merit and it must be dismissed.

WHETHER THE PLAINTIFF'S CLAIM IS PRESCRIBED

The nature of the defendant's special plea of prescription as pleaded by the defendant is that she took transfer of the property in 2015. The plaintiff instituted proceedings in HC6805/15 wherein he sought to challenge her title to the property by reason of his allegation that he had bought the property from her late husband Evans Tafirenyika. The case in question was dismissed under HC12406/18 for want of prosecution on 30 May 2018 and from that time onwards, the plaintiff did nothing about his challenge to the defendant's title to the property until he filed the present action on 20 October 2023. When the parties testified before this court, the defendant still maintained this position but also sought to take the position that the plaintiff's claim had already prescribed even prior to 2015. Before delving into the merits of the plaintiff's claim as a whole, I am unable to hold that the plaintiff's cause of action had prescribed prior to 2015 for a number of reasons. Firstly, the plaintiff's evidence, which was not admitted by the defendant was that from 2000 up to 2006, the late Evans Tafirenyika kept postponing the issue of transferring the disputed property to his names. This allegation, if proven true, would amount to an acknowledgement of liability which interrupts prescription in terms of the provisions of s 18 of the Prescription Act [*Chapter 8*:*11*] which reads thus:

> *"**18 Prescription interrupted by acknowledgment of liability***

(1) The running of prescription shall be interrupted by an express or tacit acknowledgment of liability by the Debtor"

The second reason why it is unsafe to hold that the plaintiff's claim had prescribed prior to 2015 is that the plaintiff claims to have had challenges which meant that he could not have a complete cause of action which challenges included the absence of title deeds, the absence of a conveyancing description of the property as well as the mortgage debt. After the demise of Evans Tafirenyika, there was no Executrix Dative of the estate for sometime and when the defendant was appointed such, the plaintiff was not aware of it until 2015 when he was threatened with eviction.

From the evidence presented before me, it is crystally clear that from 2015 onwards, the plaintiff's cause of action was complete. He had at his disposal all that he needed to mount a challenge to the defendant's title and prosecute his case whereby he alleges to have bought the disputed property from the late Evans Tafirenyika. In fact, it is common cause that he did launch such proceedings under HC6805/15 seeking a relief which is similar to the one sought herein. That case, however, was dismissed for want of prosecution on 30 May 2018. This fact is common cause from the evidence led before me. It is also common cause that from 2018 up to the time when the present claim was filed in 2023, the plaintiff instituted no other proceedings to claim ownership of the disputed property or to seek a cancellation of defendant's title. From what the court was told, there were eviction proceedings by the defendant which were not clearly specified to this court and which are immaterial to the issue at hand. All the grounds upon which the plaintiff sought to stand upon in avoiding the special plea of prescription do not avail him in so far as the period from 2018 to 2023 is concerned. In the submissions by plaintiff's counsel, it was argued that the running of prescription after 2018 was interrupted by the institution of legal proceedings in HC6805/15 and other cases. From what this court was told, the only proceedings which were meant to assert the plaintiff's ownership of the disputed property as at 2015 onwards related to case number HC6805/15. In any event, from the evidence led before this court, none of those proceedings were successful. This means that the alleged judicial interruption of prescription cannot amount to a defense to the special plea of prescription. Section 19 (2), (3) and (4) of the Prescription Act [*Chapter 8:11*] which provides for judicial interruption of prescription has explicit conditions as follows:

"*(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.

(4) If—

(a) the running of prescription is interrupted in terms of subsection (2); and

(b) the debtor acknowledges liability; and

(c) the creditor does not prosecute his claim to final judgment;

prescription shall commence to run afresh from the date on which the debtor acknowledges liability or, if at the time when the debtor acknowledges liability or at any time thereafter the parties postpone the due date of the debt, from the date upon which the debt again becomes due."

From the evidence that is common cause before this court, the plaintiff did not prove having successfully prosecuted any claim against the defendant in relation to his alleged ownership of the disputed property. There is no evidence which showed that the defendant ever acknowledged liability in relation to the plaintiff's claim to the estate. To the contrary, she was disputing his claims at all material times. The arguments to the effect that there was interruption of prescription due to court proceedings is therefore without merit.

It is settled law that the claim for transfer of property is a debt which prescribes after the expiry of a period of three years in terms of s 15 (d) of the Prescription Act. The courts in this jurisdiction have recognized the broad definition of a debt in section 2 of the Prescription Act as anything which may be sued for by reason of statute, contract, delict or otherwise. In *Nan Brooker* v *Mudhanda and Others SC 5–18* at p 7 of the cyclostyled judgment, the court held as follows:

"Going by the definition of debt as contained in the Prescription Act the right of the purchaser to place a seller in mora is itself a debt in favour of the purchaser which debt can prescribe. In the context of this dispute, debt would constitute the right to have transfer into the respondent's name. Critically, the Act provides that prescription starts running as soon as a debt becomes due."

In another attempt to escape from the special plea of prescription, the plaintiff has raised an argument to the effect that a declaration of rights is a statutory remedy which does not prescribe. The cases cited on this point are *Ndlovu* v *Ndlovu and Another* 2013 (1) ZLR 110 (H*)*, *Oertel NNO* v *Director of Local Government* 1981 (4) SA 491 (T) at 492, *National Security Authority* v *City of Mutare HH 385–18*, *Ngilazi* v *Mtemah and Another* HH 644–14.

On the other hand, counsel for the defendant has submitted that a declaration of rights prescribes. Reliance was placed on the case of *Nguluwe and Another* v *Dewa and Others HH 387–23*.

Both counsels have not elaborated why they hold their respective views and why I must be persuaded to take either side of the position in light of the fact that the issue of whether a declaration of rights can prescribe or not has resulted in decisions that appear not to be uniform from this court. It is the duty and privilege of legal practitioners to assist the courts on such difficult, contentious, novel and grey areas of law such as these.

A declaration of rights is a statutory remedy that this court has a discretion to grant in terms of s 14 of the High Court Act [*Chapter 7*:*06*] which provides as follows:

> *"**14 High Court may determine future or contingent rights***
> *The High Court may, in its discretion, at the instance of any interested person, inquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon such determination."*

On the same vein, prescription of causes of action is also in terms of a statute whereby a party is barred from obtaining a remedy which such party would have been ordinarily entitled to on the sole basis of the time lapse unless there are legal exceptions or defenses which defeat a special plea of prescription. In Zimbabwe, prescription of causes of action is mainly governed by the Prescription Act [*Chapter 8*:*11*]. In addition, there are other statutes which also provide timelines for one to prosecute certain claims failing which such causes of action will prescribe and thus extinguish such rights.

There is a longstanding presumption and principle of interpretation of statutes to the effect that the legislature does not intend to contradict itself and as such the courts should attempt to interpret statutes so that they reconcile unless there is a clear conflict. In the event of any clear conflict, the later Act will prevail. In *Tamanikwa and Others* v *Zimbabwe Manpower Development Fund SC 33–13* at pp 7 to 8 of the cyclostyled judgment, GOWORA JA (as she then was) articulated the position as follows:

> *"There is a general rule of statutory interpretation that where two statutes are in conflict with each other, the later statute, by virtue of the principle of lex posterior derogate priori, is deemed to be the superior one on the basis of implied repeal. This is because it is presumed that when the legislature passes the latter Act it is presumed to have knowledge of the earlier Act.*

In Heavy Transport & Plant Hire (Pty) Ltd &Ors v Minister of Transport Affairs & Ors 1985 (2) SA 597, NESTADT J stated:

"The principle is that statutes must be read together and the later one must not be so construed as to repeal the provisions of an earlier one or to take away rights conferred by an earlier one unless the later statute expressly alters the provisions of the earlier one in that respect, or such alteration is a necessary inference from the terms of the later statute. The inference must be a necessary one and not merely a possible one. (Kent N.O. v South African Railways and Another 1946 AD 398 at 405) As KOTZE AJA stated in New Modderfontein Gold Mining Co v Transvaal Provincial Administration 1919 AD 367 at 400:

> *'It is only when the language used in the subsequent statute is so manifestly inconsistent with that employed in the former legislation that there is a repugnance and contradiction, so that the one conflicts with the other, that we are justified in coming to the conclusion that the earlier Act has been repealed by the later one.'*

In Wendywood Development (Pty) Ltd v Rieger & Ano 1971 (3) SA 28 DIEMONT AJA, stated at 38A-C

> *'That sec 30 must be modified to give it efficacy can hardly be gainsaid. Indeed Mr Smallberger, who appeared for the respondent conceded that some modification was necessary, but I am not persuaded that the modification need be so extensive as to make it impossible to reconcile the sections. It is necessary to bear in mind a well-known principle of statutory construction, namely, that statutes must be read together and the later one must not be so construed as to repeal the provisions of the earlier one, unless the later statute expressly alters the provisions of the earlier one or such alteration is a necessary inference from the provisions of the later statute.'*

DIEMONT AJA in the Wendywood case had occasion to quote with approval the remarks of WATERMEYER CJ in Kent, N.O. v South African Railways and Another 1946 AD 398, to the following effect:

> *'The language of every enactment must be so construed as far as possible to be consistent with every other which it does not in express terms modify or repeal. The law, therefore, will not allow the revocation or alteration of a statute by construction when the words may have their proper operation without it. But it is impossible to will contradictions; and if the provisions of a later Act are so inconsistent with or repugnant to those of an earlier Act that the two cannot stand together, the earlier stands impliedly repealed by the later.'"*

At p 11 of the same judgment, the learned Justice of Appeal (as she then was) remarked as follows:

"It is a well established canon of construction that courts should endeavour to reconcile prima facie conflicting statutes as well as apparently conflicting provisions in the same statute. Courts therefore do not readily come to the conclusion that there is a conflict and by using all means at their disposal they attempt to effect a reconciliation. It is also an established canon of construction that different parts of the same statute should, if possible, be construed so as to

avoid a conflict between them. See Amalgamated Packaging Industries Ltd v Hutt & Anor 1975 (4) SA 943 at 949H."

In interpreting both section 14 of the High Court Act [*Chapter 7*:*06*] and the provisions of the Prescription Act [*Chapter 8*:*11*], one must not loose sight of the fact that the relevant provisions must be construed such that they do not contradict. When the legislature in Zimbabwe passed the High Court Act in 1981, it was awake, aware and alive to the provisions of the Prescription Act which it had already passed in 1975. There is no indication that the High Court Act, which is the later statute, intended to expressly or impliedly repeal the Prescription Act or other statutes which provide for prescription of causes of action. The declaration of rights in terms of s 14 of the High Court Act was therefore intended to be circumscribed or confined to those rights which are not prescribed or which are still in existence and enforceable for all intents and purposes. If the rights are prescribed, they cease to exist as prescription is a special plea in bar. In this sense therefore, the two pieces of legislation are not contradictory in the sense that the court cannot exercise its discretion to make a declaration of rights that are prescribed and consequently non existent by operation of law. To do such will be both an absurdity and a judicial repeal of the Prescription Act which is not the prerogative of the judiciary. The other undesirable result in simply holding that a declaratory relief does not prescribe and end there will be to open a floodgate whereby all litigants with prescribed causes of action will simply go around a special plea of prescription in whichever statute where it is provided by couching their pleadings such that they pray for declaratory orders so as to defeat special pleas of prescription. Such result will completely defeat all the legislative provisions which provide for prescription and prescription as a special statutory defence will cease to exist. Such undesirable result is foreseeable because it is a matter of common sense and simple logic that no one would consciously choose a path that leads to a dead end when there is a better alternative to avoid such obstacle. This is clearly not what the legislature intended by enacting the provisions of s 14 of the High Court Act. The legislative intent in enacting provisions which provide for prescription of causes of action still exists to serve a purpose which has been recognised by our courts in a number of pronouncements. Extinctive prescription is a necessary time bar to old stale debts which have not been actioned in the absence of valid legal excuses and which if actioned, will cause unnecessary inconvenience to the affected parties and for such reasons and others the law will not allow such causes of action or rights to be pursued. In *John Conrade*

Trust v *Federation of Kushanda Pre–Schools Trust and Others SC 12–17* at pp 6 to 7 of the cyclostyled judgment, BHUNU JA aptly expressed this point as follows:

> *"Prescription does not deal with the merits. It simply seeks to extinguish old stale debts not claimed within the prescribed time limits. The rationale for prescription was amply captured by the learned trial judge where he quotes Wessels in The Law of Contracts in South Africa, Vol. II para 2766 where the learned author says:*
>
> > *'Creditors should not be allowed to permit claims to grow stale because thereby they embarrass the debtor in his proof of payment and because it is upsetting to the social order that the financial relations of the debtor towards third parties should suddenly be disturbed by the demanding from him payment of forgotten claims.'*
>
> *The learned trial judge having correctly found that the applicant's claim had prescribed, I accordingly find that he has forfeited his right to vindicate the disputed property from the Applicant whether or not he has a valid claim against it."*

In *Masamba* v *Hove HCC 68–24* at p 8 of the cyclostyled judgment my sister BACHI – MZAWAZI J after considering a number of local and foreign decisions, concluded as follows:

> *"In my considered view, in casu, the plaintiff's claim is founded on a debt which fits the description in section 15 of the prescription Act Chapter [Chapter 8:11]. It arose from the purchase of an immovable property. It suffices to conclude that, the sale transaction is a contractual obligation falling under the definition of a debt advanced in the Prescription Act. Therefore, it prescribes. Thus, whether a declaratory order prescribes or not is context specific. This is evidenced by the approaches taken in the Ranch, Oertel ONN, Ndlovu and wireless cases above."*

In light of the position articulated above, the view that a declaration of rights as a relief cannot prescribe at law is not a correct interpretation of s 14 of the High Court Act. It is an interpretation that cannot harmonise with the provisions of the Prescription Act and all other statutes that provide for prescription of causes of action. To be more precise, it is not the declaratory relief that prescribes but the rights sought to be declared. When such rights are prescribed, then the court has nothing to declare as the rights would have ceased to exist and neither can the court grant any consequential relief from such a vacuum.

In the present matter, when the plaintiff instituted this claim on 20 October 2023, it was the 8th year after 2015 when his cause of action had been completed. When the case that he had filed in 2015 was dismissed for want of prosecution, the interruption of prescription ceased to exist. He did nothing for another five years before instituting this action. By means of

prescription, he has ceased to have any right to claim ownership of the disputed property. He stands time – barred. In the result, he has not made any case for a declaration of rights because he has none. The defendant's special plea of prescription has merit and it must be upheld. Having made such conclusion, there is no need for me to determine the other remaining issues since this finding disposes of all the remaining issues.

I am not persuaded to award any costs against the plaintiff since he has also succeeded to defeat the defendant's special plea of *res judicata*. I will therefore order as follows:

1. The defendant's special plea of *res judicata* be and is hereby dismissed.
2. The defendant's special plea of prescription be and is hereby upheld and the plaintiff's claim is accordingly dismissed.
3. Each party shall bear its own costs.

Muchirewesi & Zvenyika, plaintiff's legal practitioners
Mhungu & Associates, 1st & 2nd defendant's legal practitioners