REPORTABLE (81)

DRAW CARD ENTERPRISES (PRIVATE) LIMITED
v
(1) NASHCRYSTAL MOTORS (PRIVATE) LIMITED (2) TOTAL ZIMBABWE (PRIVATE) LIMITED (3) B H DRURY (4) THE REGISTAR OF DEEDS

SUPREME COURT OF ZIMBABWE
UCHENA JA, CHIWESHE JA & MUSAKWA JA
HARARE: 20 & 28 JUNE 2023 & 31 JULY 2024

W. Ncube, for the appellant

L. Uriri with *P. Makombe,* for the first respondent

No appearance for the second, third and fourth respondent

CHIWESHE JA: This is an appeal against the whole judgment of the High Court (the court *a quo*) sitting at Mutare handed down on 12 August 2021 cancelling the agreement of sale entered into between the second and third respondents pertaining to stand 2427 Umtali Township, Mutare, and, dismissing the appellant's counter claim.

Aggrieved by the decision of the court *a quo*, the appellant has noted the present appeal for relief.

THE FACTS

The facts are largely common cause. The third respondent is the owner of stand 2427 Umtali Township in Mutare (the property). The first respondent entered into a lease agreement with the third respondent in terms of which the first respondent occupied the property during the period 1 August 1999 to February 2009. The lease was negotiated through

the agency of the second respondent. In 2009, the second respondent, again acting as agent of the third respondent, sold the property to the first respondent as the sitting tenant. Pursuant to that agreement of sale, the first respondent paid the purchase price in full and stopped paying rentals. Despite that development, both the second and third respondents refrained from signing the draft agreement. Further, despite receipt and retention of the purchase price, the second respondent and the third respondent did not transfer the property to the first respondent. Instead, they proceeded to sell and transfer the same property to the appellant, despite the fact that the first respondent remained in occupation.

As a result, on 1 June 2018, the first respondent issued summons in the court *a quo* seeking an order cancelling the agreement of sale entered into between the third respondent and the appellant in respect of the property. It further sought consequential relief by way of an order cancelling Deed of Transfer number 4777/2017 which had been issued in favour of the appellant and an order compelling the third respondent to pass transfer to it. In the alternative, the first respondent sought an order cancelling the agreement of sale between it and the third respondent and a refund of the purchase price. It also sought compensation for the improvements it had made on the property and an additional $ 100 000-00 to enable it to purchase an alternative property of comparable value.

The appellant entered appearance to defend. It pleaded that it had not been made aware of the prior agreement of sale involving the first respondent and that it was thus an innocent purchaser. It confirmed that it had since acquired title to the property. In its counter claim, the appellant averred that it had purchased the property from the third respondent and sought an order evicting the first respondent from the property.

The second respondent also entered appearance to defend. It raised the special plea of prescription on the grounds that the agreement of sale with the first respondent was entered into in 2009 and that the first respondent was made aware of its termination in 2010. Accordingly, the first respondent was at all material times aware of the facts upon which it could have made its claim. A period of three years having since lapsed, the first respondent's claim had thus prescribed. In response to the special plea, the first respondent averred that prescription had been interrupted in terms of s 18(1) of the Prescription Act [*Chapter 8:11*] because the third respondent had acknowledged liability. It averred that it had written a letter of demand in 2018 in reply to which the second respondent had acknowledged that it was holding on to the first respondent's funds. The second respondent denied having acknowledged liability.

PROCEEDINGS IN THE COURT *A QUO*

At the trial, the first respondent called its Director, Mr T. Sarimana whose evidence was to the following effect:- The appellant was aware of the agreement of sale between the first respondent and the third respondent. He produced e-mails showing that the appellant was at all material times aware of that agreement of sale. He stated that the second respondent (third respondent's agent) never advised of the cancellation of the agreement of sale entered into with the first respondent. He told the court *a quo* that the second respondent only communicated through an email that the property had been sold to a third party. He said that a caveat had been placed on the property through the police barring the fourth respondent from transferring the property pending finalisation of the case. He was surprised to learn that the property had been transferred to the appellant in 2017. He testified that when the first respondent tendered the full purchase price in 2009, the second respondent's lawyers advised

him that they had no instructions to receive the money as the contract had been cancelled. The first respondent however refused the refund, insisting that the property be transferred to it.

The second respondent called its Training Manager, Ms E. Vherenge. She stated that the first respondent had not paid the purchase price on time which led to the cancellation of the agreement of sale. It was also communicated to the first respondent that the second respondent was no longer an agent of the third respondent so far as this property was concerned.

The appellant called its Manager Director, one Edmore Samson, who testified that the appellant bought the property in July 2009 and received title in 2017. He said that the appellant had become aware of the first respondent's occupation of the property in 2017 when it took ownership of the property.

FINDINGS OF THE COURT *A QUO*

The court *a quo* held that the cause of action arose in 2015 when the first respondent learnt that there was another purchaser. It held that the first respondent could not have proceeded to claim against the appellant in 2009 as it did not know then of the appellant's existence. It further held that the second respondent's lawyers acknowledged that they were holding the first respondent's money which acknowledgement interrupted the running of prescription. It further held that the second respondent could not raise the issue of prescription as it was not privy to the agreement having acted only as an agent of the third respondent. It was on that basis that the court *a quo* dismissed the special plea of prescription.

On the merits, the court *a quo* held that there was a contract between the first respondent and third respondent. It found that there was no evidence of fraud or

misrepresentation and that what it was dealing with was a simple case of a double sale. It further found that the contract between the first respondent and the third respondent was never cancelled and thus remained extant. It held that the appellant was aware of the first respondent's occupation when it entered into the latter agreement of sale as it would be absurd to conclude that the appellant had not inspected the property during the period 2009 to 2015. It thus held that the balance of convenience favoured the first respondent as the first buyer. Accordingly, the court *a quo* proceeded to cancel the agreement of sale between the appellant and the third respondent and upheld the earlier agreement of sale between the first and third respondents. It ordered that the deed of transfer issued in favour of the appellant be cancelled and that the property be transferred to the first respondent.

GROUNDS OF APPEAL

The appellant noted this appeal on twelve grounds. The first and second grounds of appeal relate to the question of prescription. They read:

"1. The court *a quo* erred in failing to appreciate that first respondent's principal cause of action for the transfer of the disputed property from third respondent to first respondent arose in or about October 2009 when the purchase price was paid in full and accordingly by June 2018 when the summons was issued the cause of action/debt had prescribed.

2. The court *a quo* erred in failing to appreciate that once a claim or debt has prescribed, the fact of its extinction by prescription can be raised by any party who is sued in relation to or in connection with that claim or debt."

As the question of prescription has the potential to dispose of this matter, we shall deal with it first.

THE ISSUE

(1) The first issue that arises from these two grounds of appeal is whether the first respondent's claim against the second respondent and third respondents had prescribed in terms of the Prescription Act [*Chapter 8:11*].

(2) The second issue that arises is whether the running of prescription was interrupted as averred by the first respondent.

SUBMISSIONS BEFORE THIS COURT

The appellant submitted that s 15(d) of the Prescription Act [*Chapter 8:11*] (the Act) was the applicable law in the present matter. In terms of that section the period of prescription of any debt is three years. It is trite that the period of prescription should be reckoned from the date that the debt or cause of action (that is the right to act) arose. The term, "cause of action" was defined in numerous authorities including the South African case of *Abrahamsen and Sons* v *South African Railways and Harbours* 1933 CPD 626 wherein at p 637 WATERMEYER J stated as follows:

> "The proper legal meaning of the expression cause of action is the entire set of facts which give rise to an enforceable claim and includes every act which is material to be proved to entitle a plaintiff to succeed in his claim. It includes all that a plaintiff must set out in his declaration in order to disclose a cause of action. Such cause of action does not arise or accrue until the occurrence of the last of such facts and consequently the last of such facts is sometimes loosely spoken of as the cause of action."

The appellant further submitted that, *in casu*, the cause of action arose on 16 November 2009 when the first respondent first made demand, through his legal practitioners, for the transfer of the property after payment of the full purchase price. Transfer was refused on the grounds that the agreement of sale had been cancelled as first respondent had not paid the purchase price timeously. It was submitted that the first respondent had been offered a return of the purchase price which offer was declined. It was also submitted that it was at that stage that the cause of action arose such that by the time summons was issued in

2018 the cause of action had already prescribed. For that reason, it was submitted that the cause of action prescribed on 16 November 2012, when the three-year prescriptive period lapsed.

The appellant criticised the court *a quo* for failing to appreciate that the third respondent's admission that it held the first respondent's purchase price for purposes of refund in respect of the cancelled agreement amounted to an admission of the debt sued upon. At all material times, the second and third respondents had consistently disputed the obligation to transfer the property to the first respondent as they maintained that the agreement of sale had been cancelled. The period of prescription could not have been interrupted by the fact of the second respondent's holding the first respondent's purchase price. In any event, the first respondent had previously refused to receive the purchase price. Consequently, by the time the property was transferred to the appellant, the first respondent's right to transfer had long prescribed.

The appellant also submitted that the court *a quo* erred in finding that the defence of prescription could only be raised by the third respondent and not by the second respondent. On the contrary, the plea is available to any party sued on any claim. In support of that submission, the appellant relied on the decision of this Court in *John Couradie Trust* v *Federation of Pre-schools Trust & 3 Ors* SC 12/17.

On the other hand, the first respondent submitted that the principal parties in the main matter are the second and third respondents. It observed that the third respondent had not defended the matter *a quo*, signifying his admission of the first respondent's claims. In fact, none of these two principal parties had appealed the judgment of the court *a quo*.

It was submitted that the first respondent's cause of action arose on 30 September 2015 when it became aware of the existence of the second purchaser (the appellant) and, consequently, sought recourse from the seller. Accordingly, prescription began to run from that date. Summons was issued on first June 2018, well before the lapse of the three-year prescriptive period. In any event, argued the first respondent, the appellant had not in the court *a quo* raised the issue of prescription and cannot now do so on appeal. The appellant's grounds of appeal relating to prescription are therefore without merit. The first respondent further submitted that the court *a quo* could not have allowed the appellant to lead evidence on prescription because it had not pleaded the same.

APPLYING THE LAW TO THE FACTS

The evidence given before the court *a quo* establishes that there were two agreements of sale of the same property. The first agreement of sale was between the third respondent and the first respondent in 2009. According to the appellant this agreement was cancelled despite payment of the purchase price. The first respondent sought transfer of the property to it and made demand for such transfer. This Court in *Jennifer Nan Brooker* v *Richard Mudhanda & Ors* SC 5/18 held that prescription commences to run when the demand for transfer is made. Similarly, *in casu,* prescription in the first agreement began to run when the first respondent made demand for transfer. The first respondent's right to challenge the second agreement between the third respondent and the appellant could only arise from the first agreement. In principle therefore, by the time that the first respondent took action in the court *a quo* for the cancellation of the second agreement and for the transfer of the property to it, its cause of action, based on the first agreement, had prescribed. The first respondent took more than 5 years to compel transfer. It only sought to do so because it had learnt that a third party, the appellant, had secured the property. In other words, the first respondent sat on its

laurels, content with the fact that it retained possession of the property. It should have sought transfer timeously to avoid the consequences of prescription. The first respondent demanded transfer in November 2009. Its cause of action prescribed three-years later, in November 2012. It is accordingly our view that the court *a quo* erred when it held that prescription began to run when the first respondent became aware that the appellant was the second purchaser.

It is not correct that the issue of prescription is being raised for the first time on appeal. The issue was raised by the second respondent *a quo*. At any rate it being a point of law, prescription can be raised at any stage as long as it is not prejudicial to the party it is directed at. See *ZIMASCO* v *Marikano* SC 6/14. The first respondent's objection has no merit.

The second issue for determination is whether prescription was interrupted in terms of s 18 of the Act. That section reads:

> "18. Prescription interrupted by acknowledgment of liability.
>
> (1) The running of prescription shall be interrupted by an express, or tacit acknowledgement of liability by the debtor.
>
> (2) If the running of prescription is interrupted in terms of subsection (1), prescription shall commerce to run afresh –
>
> (a) From the date on which the interruption takes place; or
> (b) If at the time of the interruption or at any time thereafter parties postpone the due date of the debt, from the date upon which the debt again becomes due."

The finding of the court *a quo* that prescription had been interrupted by an acknowledgement of liability is at variance with the facts placed before it. The second respondent's email was to the effect that it was holding the first respondent's purchase price for purposes of refunding same as the agreement had been cancelled. It cannot, by any stretch of the imagination, be construed as an admission that the second respondent was by that

communication reviving the cancelled agreement with a view to transfer the property to the first respondent. The second respondent had years back cancelled the agreement and offered to make the same refund at the time. That is not the conduct of a party that is admitting liability. On the contrary, the refund was being offered precisely because the second respondent had cancelled the agreement and even proceeded to sell the property to a third party. There was in our view neither tacit nor express acknowledgment of liability. See *Cape Town Municipality* v *Alie N.O* 1981 (2) SA 1 (C).

In any event, the running of prescription can only be interrupted judicially or otherwise during the period that it is deemed to be running. Thus, as in this case, where the prescription period is three years, prescription can only be interrupted during that period. After the lapse of that period, prescription will have run its full course, and no interruption can arise. The horse will have bolted! Any such admission of liability outside the prescriptive period forms a new and different cause of action, subject to its own period of prescription. However, as already pointed out, no such acknowledgement of liability occurred at all.

The court *a quo* erred in determining the issue of prescription purely on the basis of the second agreement of sale between the appellant and the third respondent. It reasoned that prescription commenced running from 30 September 2015 when the first respondent became aware of the existence and identity of the purchaser in the second agreement. Summons to cancel the second agreement was issued in 2018, within the three year prescription period. For that reason the court *a quo* came to the conclusion that first respondent's cause of action had not prescribed. This reasoning is flawed in two respects. Firstly, the special plea was raised with regards the first agreement, which was concluded between the first respondent and the third respondent in 2009. It was not raised with regards the second agreement, to which

the first respondent was not party. Secondly, the first respondent's rights and obligations arise from the first agreement. For that reason, the first respondent's right to cancel the second agreement can only arise on the basis of its own earlier agreement with the seller, namely the third respondent. That first agreement was challenged on the grounds that it had prescribed on account of the first respondent's inaction to enforce its demand for transfer within the three-year prescriptive period. As already alluded to, that agreement had prescribed by the time the first respondent instituted action in the court *a quo* for cancellation of the second agreement and transfer to it. In other words, its own agreement of sale was no longer enforceable on account of prescription. It was the validity of that first agreement that would have given the first respondent the right to challenge the subsequent sale of the property to the appellant.

The court *a quo* was of the view that it was not for the second respondent to raise the plea of prescription because "in practical and procedural norms involving transfer of ownership of title from second defendant (third respondent herein) to plaintiff (first respondent herein) first defendant (second respondent herein) has absolutely no role. It is second and third defendants (third respondent and second respondent respectively) who are directly affected yet the two did not raise the special plea of prescription." In other words, since the appellant was neither seller nor purchaser in the first agreement, it could not raise the special plea of prescription on behalf of the two parties. The court *a quo*'s views in this regard are not correct. In the case of *John Conradie Trust* v *Federation of Kushanda Pre-School Trust & 2 Ors* SC 12/2017, this Court held thus at p 5 of the cyclostyled judgment:

> "No authority was cited for the strange proposition of law barring third parties from raising prescription as defence.
>
> The applicant's proposition has no foundation at law. A perusal of the Prescription Act shows that nowhere does it prohibit or exclude third parties from raising prescription as a defence. What prescribes is the debt and not any of the parties concerned. It is therefore open to third parties to raise the defence of prescription in appropriate cases once prescription has run its course."

We conclude therefore that any party cited as a defendant or respondent in an action or application is permitted to raise the special plea of prescription, even under circumstances where such party is not perceived to be directly affected by it.

DISPOSITION

The first respondent's cause of action with regards its agreement of sale had long prescribed by the time it approached the court *a quo* for relief. Contrary to the first respondent's assertions, at no stage was the period of prescription interrupted by the second and third respondents. The evidence adduced *a quo* establishes that the third respondent had cancelled the agreement of sale and sought to return the purchase price to the first respondent. It held those funds for that purpose and no other. We are satisfied that the appeal has merit. It ought to succeed.

The court *a quo* having dismissed the special plea of prescription raised by the second respondent, and, having found in favour of the first respondent on its main claim, the first respondent's prayer in the alternative automatically fell away. The first respondent had claimed in the alternative, as against second and third respondents only, a refund of the purchase price in the sum of $80 000-00, payment in the sum of $100 000-00 being the additional money it required to purchase a replacement property of equal value, payment of the sum of $ 43 667-50, being costs of improvements done on the property. It also claimed interest on these amounts calculated from the date of summons to date of final payment plus costs of suit.

In this appeal, the special plea of prescription has been upheld thereby extinguishing the first respondent's main claim *a quo*. The decision of the court *a quo* granting the first respondent's main claim therefore stands to be set aside. That being the case, the first

respondent's alternative prayers in the court *a quo* have now been resurrected. These must be determined by the court *a quo*. Also due to be determined by the court *a quo* is the appellant's counter claim for the eviction of the first respondent from the property. The appellant has abandoned its claim for arrear rentals.

Accordingly, the matter shall be remitted to the court *a quo* for it to hear and determine the above stated claims.

The general rule is that costs will follow the cause. No reason has been advanced for this Court to order otherwise.

In the result it is ordered as follows:

(1) The appeal be and is hereby allowed with costs.

(2) The order of the court *a quo* be and is hereby set aside and in its place substituted the following:

"(a) The special plea of prescription raised by the first defendant be and is hereby upheld.

(b) The agreement of sale in respect of stand 2427 Umtali Township in Mutare entered into between the second and third defendants on 3 July 2009 be and is hereby declared valid and enforceable.

(c) The Deed of Transfer Number 4777/2017 issued in favour of the third defendant be and is hereby upheld.

(d) The applicant shall pay the costs of suit."

(3) The matter be and is hereby remitted to the court *a quo* for it to hear and determine the first respondent's alternative claims and the appellant's counter claim.

UCHENA JA : I agree

MUSAKWA JA : I agree

Thompson Stevenson & Associates, appellant's legal practitioners

Makombe & Associates, Muzondo & Chinhema Legal Practitioners, 1st respondent's legal practitioners

Gill, Godlonton & Gerrans, 2nd respondent's legal practitioners

Mark Stonier Legal Practitioners, 3rd respondent's legal practitioners