JOYLINE MUNDUNA
versus
ALBERTINA BENJAMIN FERREIRA
And
ALBERTO DAVID GUATURA
And
LEWROD INVESTMENTS (PRIVATE) LIMITED
And
THE REGISTRAR F DEEDS
And
THE SHERIFF OF ZIMBABWE

HIGH COURT OF ZIMBABWE
CHAREWA J
HARARE, 20 January & 6 February 2020

CIVIL TRIAL - Prescription

F Mushonga, for the plaintiff
Mrs *W Chingeya,* for 1st and 2nd defendant
Ms *F Gororo,* for the 3rd defendant

CHAREWA J: On 21 October 2015, plaintiff issued summons against the defendants claiming an order compelling:

a. First and second defendants to sign all documents necessary to effect transfer to her in respect of certain piece of land situate in the District of Salisbury called the Remainder of Subdivision B of Lot 31 of Hatfield Estate, commonly known as 21 St Patrick's Road, Hatfield, Harare;
b. Fifth defendant or his lawful deputy to sign all documents relevant to effect the transfer referred to in paragraph a. above in the event that first and second defendants refuse to sign the same; and
c. Legal practitioner and client costs against 1st and 2nd defendant, the one paying the other to be absolved.

Alternatively, plaintiff claimed for payment of US$150 000 by the first and second defendant.

First to third defendants entered appearance to defend and filed a special plea of prescription. At the same time they pleaded over to the merits disputing any alleged sale agreement to the plaintiff, and thus seeking dismissal of plaintiff's claim. In addition, first and second defendant counterclaimed for rentals owing by plaintiff for the period between October 2013 and March 2015 at US$500 per month, prescribed interest thereon and US$50504.00 being rates paid to City of Harare from the date of plaintiff' s occupation of the property to the date of sale to third defendant and costs.

The facts

The pleadings show that it is undisputed that plaintiff occupied the first and second defendant's premises described aforesaid. The basis for such occupation is in dispute, plaintiff alleging that she entered an agreement of sale with the first and second defendants while they, on their part, claim that there was never any agreement and thus plaintiff was an illegal occupier. It is also not in dispute that at some point after the alleged sale was complete, the first defendant went to Mozambique and returned only in 2012. Nor is it contested that the second defendant, having been born on 10 July 1995, was a minor as at 7 July 2005, when the plaintiff professes to have bought the property from him. The pleadings also reveal no dispute that no *curator ad litem* was ever appointed for the second defendant. It is also not in dispute that the first and second defendants did not sign any transfer documents in favour of plaintiff, hence her action to compel transfer, but that in fact, the first and second defendants did enter into an agreement of sale with third defendant in 2015 and transfer was effected in its favour on 16 March 2015, fully more than six months before plaintiff sought a compelling order.

The plaintiff's factual averments leading to the special plea are encapsuled in paragraph 7-10 of her declaration as follows:

> "7. On the 7th July 2005 the 1st and 2nd defendant's (sic) entered into an agreement of sale in terms of which they sold and the plaintiff purchased immovable property being certain piece of land situate in the District of Salisbury called the Remainder of Subdivision B of Lot 31 of Hatfield Estate, commonly known as 21 St Patrick's Road, Hatfield, Harare.
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> 8. The purchase price was in the sum of ZW$280000.00 which was duly paid upon the signing of the agreement of sale after which the 1st defendant and the plaintiff attended at the offices of the nominated conveyancer for purposes of effecting transfer.

9. The 1st defendant then defaulted at the next appointment and as it later turned out, she had actually left the country and gone to Mozambique. The transfer to the plaintiff of the property in question could thus not be effected.
10. 1st defendant only returned to Zimbabwe in 2013 at which juncture she refused to attend to the transfer of the property despite demand."

Special Plea of Prescription

On the basis of these facts as alleged by the plaintiff, the first to third defendants specially pleaded that her claim had prescribed given that summons was only issued on 21 October 2015, more than ten years after her cause of action arose.

Procedure

The court having advised the parties that the issue of prescription would be dealt with first, and that they could proceed to adduce evidence thereon, the first to third defendants declined the invitation, indicating that it was not necessary for them to adduce evidence as their special plea was predicated on the plaintiff's avowed facts: that the alleged agreement was complete as at 7 July 2005, and immediately thereafter, first and second defendants allegedly defaulted to attend to effect transfer and first defendant subsequently left the country. They therefore submit that those alleged facts reveal that plaintiff's cause of action arose then and raise the presumption of prescription. For that reason they only intend to make oral submissions rather than call any evidence of prescription.

In response, plaintiff's counsel also spurned the invitation to adduce evidence to rebut the presumption of prescription raised by plaintiff's factual averments in her declaration and also proceeded to make oral submissions, arguing that this court should not make a decision on prescription until it has heard evidence on the merits.

Parties' submissions

First and second defendants specifically rely on paragraph 7 of plaintiff's declaration to ground their special plea of prescription, averring that plaintiff asserts that the alleged sale agreement upon which she claims transfer was effected and the purchase price was paid on 7 July 2005. As at that date therefore, defendants submit, plaintiff was aware of her cause of action and prescription began to run. Defendants therefore submit that the claim ought to have been filed within three years, i.e. by or before 7 July 2008. Thus as at 2015 when summons was issued, it is self-evident, on plaintiff's own averments that the claim had prescribed.

First and second defendants further submit that, that first defendant was out of the country until 2012 is immaterial as there was nothing to stop plaintiff from issuing summons claiming registration of the property in accordance with the provisions of the Titles Registration and Derelict Lands Registration Act, [*Chapter 20:20*]. Besides, nothing prevented plaintiff from applying for substituted service. And regarding plaintiff's submission that the defendants were put *in mora* in 2012, and that, that was when prescription began to run, defendants submit that second defendant was still a minor and could not be put *in mora* in the absence of a curator.

In addition, third defendants argue that since transfer conveys real rights, it is illogical for plaintiff to claim that she was not aware as at the date she claims the alleged agreement became complete, that she had accrued rights which she had an obligation to enforce. And given that the law generally provides that a debt becomes due from the date that a litigant becomes aware of the set of facts which constitute the cause of action entitling her to sue arises, then prescription ordinarily begins to run therefrom.

On her part, plaintiff submits that prescription could not begin to run until second defendant came back to Zimbabwe in accordance with s 17(1) (c) of the Prescription Act, Chapter 8:11. Further, she submits that her claim had not prescribed by reason of the fact that second defendant was a minor acting without a *curator ad litem*. Therefore prescription could only begin to run after he turned eighteen or a curator was appointed in terms of s17 (1) (a) of the same act. Moreover, since she had not put the first and second defendants *in mora,* until second defendant came back to Zimbabwe, prescription could not have begun to run. Therefore, since she only did this in 2012, the running of prescription was delayed such that as at 2015, she was still well within the time limits to institute proceedings to prosecute her claim.

In any event, she submits, that defendants cannot raise the defence of prescription unless they are admitting the existence and validity of the sale agreement. Therefore defendants' plea of prescription presupposes a concession that there was a valid sale agreement between the parties. She further submits that the court should not rule on prescription until she has lead evidence on the existence of the sale agreement at trial as it cannot rule on prescription in the absence of the terms of the agreement. Therefore the court should refer the matter to trial.

Analysis

I will make short shrift of the plaintiff's last submission. Firstly, it seems to me that plaintiff's counsel does not appreciate that the issue of prescription had been referred to trial at the pre-trial conference and that these are in fact trial proceedings, hence my exhortation for

the parties to adduce evidence on that score. Secondly, plaintiff's counsel appears to lack a proper appreciation of the requirements for a special plea of prescription: prescription is not dependant on the terms of the agreement, nay, even its validity or existence. Prescription is concerned only with whether, at the time proceedings are instituted, a debt or claim is still squarely within the parameters of the provisions of the Prescription Act. The special plea of prescription is thus always concerned with when a cause of action arose, and more appropriately, when a claimant became aware of the basis of her claim. Therefore, where a plaintiff alleges that her claim arose from an agreement which was complete at a particular time, that awareness is enough ground to raise the special plea, for that is the time when her cause of action arose and she ought to have done something about it within the time limits prescribed in the Prescription Act.[1] The merits of the plaintiff's case are thus immaterial.

I therefore find the plaintiff's submission that defendants cannot argue prescription unless they admit the existence of a sale agreement and that the plea of prescription presupposes a concession that there was a sale agreement quite confounding, particularly since the special plea is very clear: the defendants are merely saying that on the facts alleged by the plaintiff, the claim has prescribed. In the premises, the plaintiff's argument that the court cannot rule that the matter is prescribed since the plaintiff wants to lead evidence at an ensuing trial as to the existence of a sale agreement is neither logical nor rational.

This is particularly so, given that it is trite that the purpose of a special plea, such as prescription, is to stop the litigation process in its tracks without proceeding to the merits. Consequently, in arguing a special plea such as in this case, evidence on the merits is not required: what is required is only such evidence as is relevant to the existence and validity of the plea of prescription. Therefore, once a special plea has been referred to trial for adduction of evidence, the litigants are obliged to lead evidence solely on the special plea. The court must thus make a decision on the special plea before proceeding to determine the merits of the case.

It is also trite that a special plea is raised on the facts grounding a plaintiff's cause of action as alleged in the summons and declaration. It is my view therefore that where a defendant submits that those facts, if accepted, show on the face of them that, as in this case, a claim is prescribed and therefore that there is no need for the defendant to lead any evidence, the onus shifts to the plaintiff to lead evidence of interruption or delay in the running of prescription. It is for this reason that the courts have decided that even though the rules do not specifically say

[1] For the general principles on prescription, see *Peebles* v *Dairibord Zimbabwe (Pvt) Ltd* 1999 (1) ZLR 41

so, a plaintiff must file an opposing affidavit to the special plea in order to adduce such evidence. Where a plaintiff fails to file such affidavit and further fails to lead evidence at trial to discharge the presumption of prescription raised in her own summons and declaration, she is hoist by her own petard.

I am further unpersuaded by plaintiff's submissions, with respect to second defendant in particular, that prescription could not have begun to run until he turned eighteen or a *curator ad litem* was appointed in accordance with s17(1)(a) of the Prescription Act. This is because this submission begs the question: was second defendant even capable of validly contracting any agreement in the absence of the appointment of a curator to enable s17 (1) (a) to be applicable? Besides, plaintiff placed no evidence at all before the court in this regard. Therefore, whether or not plaintiff put second defendant i*n mora* in 2012 is irrelevant. In any event, the provisions of s17 (1) (a) are clear and unambiguous. They refer to a situation where the minor is a creditor and are thus inapplicable *in casu* where the minor is in fact the debtor. The provision reads as follows:

> **"17 When completion of prescription delayed**
> (1) If—
> (*a*) the creditor is a minor (my emphasis) or is insane or is a person under curatorship or is a person whose behaviour or physical or mental condition justifies his being placed under curatorship or is prevented by superior force or any enactment or order of court from interrupting the running of prescription in terms of subsection (2) of section *nineteen* or is a juristic person and the debtor is a member of the governing body of such juristic person; or"

I find it inexplicable that plaintiff's counsel did not think it necessary to adduce any evidence as to the validity of a contract allegedly entered with a minor in the absence of a *curator ad litem* given the provisions of r249 and r250 in circumstances where he sought to rely on s17(1) (a) of the Prescription Act.

While the plaintiff is correct that the provisions of s17 (1) (c) of the Prescription Act delays the running of prescription where the debtor is outside the country, it seems to me that a distinction must be made between delaying the onset of the running of prescription as envisioned in the provision and interruption of prescription which has already commenced to run. Given that the plaintiff placed no evidence before the court as to when first defendant left the jurisdiction, and whether or not prescription had not started to run at that time, the unrebutted facts in the declaration are as contended by defendants. These facts portend that prescription started to run as soon as the sale was complete, and mean that plaintiff had to show

that the act of leaving then delayed the running of prescription. In the premises I see no value in the plaintiff in relying on s17 (1) (c).

This is particularly so given that in her own declaration, plaintiff suggests that demand for transfer was made in July 2005 and transfer processes were in fact commenced but were subsequently discontinued upon first defendant leaving the jurisdiction. Therefore, I find it astonishing that plaintiff's counsel's asserts that plaintiff's claim could not prescribe since she had not put the defendants *in mora* as that flies in the face of the principles and *raison d'etre* for the law on prescription: that a party with any rights or interests must enforce or protect them timeously or risk losing them[2].

Therefore, while I agree that it is generally correct that prescription can only start to run when a defendant has been put *in mora,* the circumstances of this case are distinguishable. Firstly, the general principle as enunciated in *Asharia* v *Patel and Ors*[3] and which is reiterated in *Mudhanda*[4] presupposes the existence of an agreement of sale which is acknowledged and admitted by the parties, which is not the case *in casu*, particularly since the plaintiff spurned the pointed invitation to call evidence in that regard.

To make matters worse for the plaintiff, her declaration seems to suggest that first and second defendants were, in any event, indeed put *in mora* as demand for transfer was made and the transfer process commenced before the first defendant left the jurisdiction. Paragraphs 8 and 9 of the declaration refer. Given these circumstances, it hardly seems reasonable to want to go back again and start putting defendants *in mora* once more in 2013 as claimed in paragraph 10 of the declaration.

Prescription is specifically designed to discourage parties from sitting on their laurels without expeditiously pursuing or enforcing their rights on pain of losing them. Quite apart from the *Mudhanda* (supra) case being distinguishable from the present matter in that plaintiff has proffered no evidence of any agreement of sale, it is not authority for the proposition that a party who becomes aware of her cause of action can comfortably sit back and do nothing about it until she puts her debtor *in mora.* That case did not overturn the primary consideration which always remains that prescription begins to run as soon as a party becomes aware of her debtor and the full facts and circumstances upon which her cause is premised.[5] In other words,

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[2] *Cape Town Municipality vs Allie NO* 1981 (2) SA 1
[3] 1991 (2) ZLR 276(S)
[4] *Van Brooker v Mudhanda & Anor* SC/5/18
[5] See *Peebles* (supra).

performance is due upon conclusion of a contract or as soon as reasonably possible. I fully subscribe to the comments of MALABA J (as he then was) in *Maravanyika* v *Hove*[6] that the age old adage applies: the law helps the vigilant, not the sluggard. In any event the effective administration of justice demands certainty and finality. A person with a complete cause of action must not unreasonably hold off claiming.[7] *In casu,* ten years is hardly reasonable. The principle in *Chiwawa* v *Mitzuris & Ors*[8] is thus pertinent: that a plaintiff is entitled to transfer of property from the date the agreement of sale is complete and prescription begins to run therefrom.[9]

Whether a matter has prescribed or not is a matter of fact. According to her declaration, plaintiff knew and was aware as at 7 July 2005 that she had apparently purchased property for which she had paid the full purchase price and was thus entitled to transfer, demanded transfer and commenced transfer processes. Yet when first defendant left the jurisdiction, she did nothing to protect her interests timeously. In fact, upon receipt of the special plea, she placed no facts before the court to rebut the special plea, but proceeded to file heads of arguments, which every litigant's counsel ought to know, are not the appropriate vehicle to adduce evidence. Even worse, her counsel spurned the invitation to call evidence to put facts before the court that prescription could not have begun to run as at 7 July 2005. The facts in the declaration therefore remain unexplained by the plaintiff, and on that account, defendants were eminently entitled to plead prescription.

Further and in any case, that first respondent left the jurisdiction does not help the plaintiff given that the law provides remedies for a situation where a party's whereabouts are not easily ascertainable or is out of the jurisdiction. The Titles Registration and Derelict Lands Act provides in s3 as follows:

> **"3 Persons having acquired title to derelict lands may apply to High Court to order registration of such title**
> Any person who, by prescription or by virtue of any contract or transaction or in any other manner, has acquired the just and lawful right to the ownership of any immovable property in Zimbabwe registered in the name of any other person and cannot procure the registration of such property in his name in the land register, the register of occupation stands or the register of claims, as the case may be, in the manner and according to the forms for that purpose by law provided, by reason of the death, mental incapacity, insolvency or absence from Zimbabwe of the person in whose name such property stands registered as aforesaid *(my emphasis)* or of any

[6] 1997 (2) ZLR 88
[7] Ibid at p95C-D, H-96C
[8] 2009(1) ZLR 72
[9] See also Loubser M.M. "Extinctive Prescription" (1996) p53 and Saner SC "*Prescription in South African Law*" Issue 23 (2016).

> person or persons through or from whom such right has been mediately or immediately derived or owing to any other cause may apply to the High Court to order the registration of the title to such property in his name in the land register *(my emphasis)*, the register of occupation stands or the register of claims, as the case may be, of Zimbabwe."

There was thus absolutely no reason why plaintiff could not have resorted to the remedy in the Titles and Derelict Lands Act or any other remedy, nor does she advance any explanation for such dereliction to protect her rights.

Further, I must agree with the defendants that plaintiff had ample recourse for a remedy when first defendant left Zimbabwe. The rules of court provide in Order 6 for service by edictal citation when a party is outside the jurisdiction as well as for substituted service. Moreover, the plaintiff had open to her the remedy of registering a caveat against the property to ensure that she would not be visited by the vicissitudes of prescription, all of which she did not do.

In my view therefore, the only answer to the question: when did prescription begin to run, can only be that prescription started to run from 7 July 2005 when the alleged sale was complete, demand for transfer was made and transfer proceedings commenced. This was the date plaintiff's claim arose as her rights to title came into being then. Consequently, the claim is prescribed.

Disposition

Accordingly, it be and is hereby ordered that

1. The Defendants special plea of prescription is upheld.
2. The plaintiff shall pay the first, second and third defendants' costs of suit.

Messrs Mushonga & Associates, plaintiff's legal practitioners
Chingeya-Mandizira Legal Practitioners, 1st & 2nd defendant's legal practitioners
J Mambara & Partners, 3rd defendant's legal practitioners