STANLEY MUNGOFA
versus
CITY OF HARARE
and
REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE: 21 June 2021 & 10 August 2022

Civil Trial – Prescription and Rectification of Contract

B. Magogo, for the plaintiff
C. Kwaramba, for the 1st defendant

MUSITHU J:

INTRODUCTION

The plaintiff is a medical doctor by profession. He was employed by the first defendant as Health Services Director until his contract of employment was terminated through compulsory retrenchment on 22 February 2015. The first defendant is a local authority established in terms of the laws of Zimbabwe. It is responsible for the administration of the affairs of the Harare Metropolitan province. The second defendant is the authority reposed with mandate to record and register rights in real estate, as well as being the custodian of title deeds. A dispute arose between the plaintiff and first defendant in connection with a term of his retrenchment package. That dispute prompted the plaintiff to approach this court seeking the following relief:

"In the circumstances plaintiff prays for an order that:

1. Clause 3.15 of the agreement executed by the parties on 20 April 2015 be and is hereby rectified by inclusion of the identity and description of the immovable property mentioned therein as a house situated at 93 Rotten Row Road, Robert Mugabe Road, Harare being certain six hundred and ninety nine (699) square metres of land being the Remaining Extent of Subdivision A of Lot 14 of the Ranche situate in the District o Salisbury held by first defendant under deed of transfer number 682-78 dated 2nd March 1978.
2. Consequently, first defendant is ordered to transfer to plaintiff registered title in certain six hundred and ninety nine (699) square metres of land being the Remaining Extent of Subdivision A of Lot 14 of the Ranche situate in the District of Salisbury held by first defendant under deed of transfer number 682-78 dated 2nd March 1978 within 7 days of this order.

3. Should first defendant fail to comply with paragraph 1 above the Sheriff of the High Court of Zimbabwe or his lawful deputy shall be and is hereby authorised to sign all documents to pass transfer of registered title in the above immovable property to plaintiff.
4. Second defendant is ordered to do all that is necessary to give full and absolute effect to this order by making all the relevant entries and endorsements in his register and other deeds within his custody.
5. First defendant and all those claiming occupation through him and their privies, proxies, agents or representatives be and are hereby ordered to vacate from the above property within 24 hours of this order and shall all ensure that none of their belongings remain on that property beyond that time.
6. Should the above order not be complied with within the stated time, the Sheriff of the High Court of Zimbabwe and or his lawful deputy shall immediately and at once take all such steps as would ensure full compliance with the order, including enlisting the services of the Zimbabwe Republic Police for that purpose.
7. The first defendant shall pay to plaintiff damages for unlawful occupation at the rate of $3 000-00 per month with effect from 1st May 2015.
8. First defendant shall pay costs of suit on the legal practitioner and client scale."

I must highlight at the outset that the second defendant was cited for administrative reasons to ensure compliance with the order of this court should the court find in favour of the plaintiff. The second defendant did not file any papers herein. For that reason, any reference to the defendant hereafter shall mean the first defendant.

The Plaintiff's Claim

In his declaration, the plaintiff claimed that one of the terms of the retrenchment package was that he would receive a residential property called certain six hundred and ninety nine (699) square metres of land being the Remaining Extent of Subdivision A of Lot 14 of The Ranche situate in the District of Salisbury held by the defendant under deed of transfer number 682-78 dated 2nd March 1978 (the property). He claimed that in recording the terms of the agreement, the parties erroneously omitted to include the identity of the property, and only recorded it as "a house number situated at the corner of Rotten Row Road and Robert Mugabe Road, Harare".

The plaintiff claims that the first defendant used the omission to renege on its obligation to transfer registered title in the said property to him. As a result of the said refusal to pass title, and the deprivation of occupation, the plaintiff claimed that he was suffering damages at the rate of $US3 000.00 per month, in rental income that he would have earned if the property had been rented out in the same location. The plaintiff also claimed that the defendant had no lawful basis to retain possession and occupation of the property.

The Defendant's Plea

The defendant averred that the plaintiff's claim had prescribed. The retrenchment agreement between the parties was consummated on 20 April 2015. It was on that date that the

plaintiff's claims fell due. The plaintiff's summons were served on 19 October 2018, which was more than three years after the date on which the cause of action arose. For that reason, the claim had prescribed in terms of s 15 of the Prescription Act[1]. It had to be dismissed on that basis alone.

As regards the merits, the defendant denied the existence of an agreement in connection with the property as identified by the plaintiff. The defendant denied that there was any error of description as alleged. The lack of identity in the property signified the absence of an agreement between the parties. The parties could not have agreed on something they did not know. In the alternative, the defendant averred that even assuming such an agreement existed, it would be null and void and of no force and effect for vagueness. The agreement was also not approved or authorised by the defendant. Further, the alleged agreement violated s152 of the Urban Councils Act[2]. That law proscribed the alienation of Council property without fulfilling certain statutory formalities.

The defendant further denied any liability to pay damages as alleged by the plaintiff. Such a claim could not be founded on an invalid agreement.

The Replication

The plaintiff denied that his claim had prescribed arguing that a claim for rectification was not susceptible to prescription. The plaintiff further averred that the consequential claims for eviction, payment of damages and transfer of real rights, were also saved from prescription. The cause of action did not arise on 20 April 2015 when the agreement was signed. The agreement did not specify the period within which the obligation to transfer and to give vacant possession was to be discharged. Consequently, the defendant was never placed in *mora*. The defendant was only placed in *mora* after service of a letter of demand on 22 August 2016. The claim had not lapsed up to the point summons were issued on 12 October 2018.

As regards the merits, the plaintiff denied each and every allegation of fact and conclusion of law in the defendant's plea and joined issue with the defendant.

The matter was referred to trial on the following issues:

- whether or not the plaintiff's claim was prescribed;
- whether or not the agreement sought to be rectified was valid;
- Whether or not the plaintiff was entitled to the relief claimed in the summons.

[1] [Chapter 8:11]
[2] [Chapter 29:15]

The Plaintiff's Case

In his evidence the plaintiff told the court that he was notified of his retrenchment through a letter of 14 May 2014 from the then Town Clerk, Dr. T Mahachi (Mahachi). The letter requested him to proceed on leave on full salary and benefits, pending negotiations for his exit package. He was later on invited for a meeting to discuss his package. He was represented by his legal practitioner, while the defendant was represented by Josephine Ncube, the Chamber Secretary (hereinafter referred to as Ncube or the Chamber Secretary), and Cainos Chingombe (Chingombe), the Human Resources Director. The discussions led to the execution of a deed of settlement on 20 April 2015. The monetary values for the individual items that constituted the package were recorded in a separate summarised sheet which was also signed on the same day. The two sets of documents were signed by the plaintiff and Mahachi representing the defendant. Chingombe and Ncube signed the documents as witnesses.

The plaintiff argued that the defendant did not fully comply with the agreement as it failed to transfer title of the property into his name. Clause 3.15 of the deed of settlement was couched as follows:

> "House Allocation
> Parties agree that Dr SM shall be allocated a house number situated at the corner of Rotten Row Road and Robert Mugabe Road, Harare, by COH".

The attached summary sheet recording the specific details of the individual items stated as follows under the heading 'AGREED ISSUES/MONETARY VALUE:

> "Dr S. Mungofa will receive a house situated at Cnr Robert Mugabe & Rotten Row"

In terms of clauses 3.13 and 3.14, the parties agreed that the plaintiff would be allocated an industrial stand and a residential stand 'in terms of COH policy'. The plaintiff claimed that on his part he was not expected to do anything, other than wait for the defendant to perform its part. The defendant was expected to transfer ownership rights to him or pay the monetary equivalent. When asked to comment on when exactly the defendant was expected to comply with the clauses of the agreement pertaining to the allocation of properties, the plaintiff stated that it was not easy to prescribe a timeframe as the defendant had internal procedures to follow in order to formalise the entire process. The Chamber Secretary had informed him that some Council Committee which had been given a mandate to negotiate with him, was going to meet and deliberate on the matter and then revert to him.

The defendant complied with its obligations in connection with other items including the industrial and residential stands, save for this property in issue. The defendant complied with its obligations pertaining to the other two properties more than six months after the agreement was signed. On why the industrial and residential stands were to be allocated in terms of council policy, yet the agreement was not specific in the case of the house, the plaintiff stated that the issue of the house was borne out of negotiations between the parties. Following his unceremonious departure from the defendant's employ, it was agreed that he would be allocated a house in order to start a medical practice of his own. The other two properties were allocated to him in terms of council's housing policy.

In order to enforce his rights in connection with the property, the plaintiff claimed that he engaged the defendant's representatives on several occasions. At times they ignored his communication prompting him to engage his legal practitioners who had assisted him during the negotiations. On 22 August 2016, the plaintiff's legal practitioners wrote to the defendant's Human Capital Director. The letter reads in part as follows:

> **"RE: OUR CLIENT DR S. MUNGOFA v CITY OF HARARE: - OUTSTANDING HOUSE ALLOCATION BENEFIT**
>
> We refer to the above matter and to the retrenchment agreement signed between the City of Harare and our client on **20 April 2015.**
>
> We note that in terms of **Clause 3.15** of the agreement, our client was allocated a house which is situated at the corner of Rotten Row Road and Robert Mugabe Road, Harare.
>
> Our client advises that, over a year after the agreement and despite his persistent demands, you have not moved an inch to grant him possession and ownership of the house.
>
> We are instructed to demand as we hereby do, that within seven [7] days of receipt of this letter, you commence all the necessary process to effect transfer of the rights in the property into our client's name and to give him vacant possession on or before 31 August 2016.
>
> We have instructions to institute civil proceedings for the enforcement of this agreement should you choose to ignore our demand."[3] (Underlining for emphasis).

The defendant responded to the letter on 2 September 2016, through its Acting Chamber Secretary, one C.U. Kandemiiri, who requested for time to get instructions from the relevant department.[4] In spite of this undertaking, Kandemiiri did not revert to him.

The plaintiff told the court that despite the fact that clause 3.15 stated that he was allocated a house number situated at the corner of Rotten Row Road and Robert Mugabe road,

[3] Letter on p 92 of the record.
[4] Letter on p 93 of the record.

it was common cause that the parties were referring to Flat No. 2 Westcroft, which happened to be at that location. It was the only property owned by the defendant and located at the intersection of the two roads. The plaintiff conceded that the agreement did not aptly describe the property for legal purposes. The agreement was prepared by the defendant's officials, and the plaintiff did not notice that the description was incomplete when he signed the agreement.

The plaintiff also stated that the defendant had described the property as a flat at the corner of Robert Mugabe and Rotten Row in some court documents in which it sought the eviction of a tenant who was in occupation. The plaintiff also referred to a Notice of Cancellation of lease and repossession of a flat addressed to the tenant, a Mr Samuel Dhlakama by the defendant's Acting Director of Housing and Community Services. It used the same description. An application for the eviction of Dhlakama from the said property, which was instituted at the Harare Magistrates Court under Case No. 2254/09, also used the same description. According to the plaintiff, it was critical to note that in all those papers there was no reference to a street address.

At some point, the plaintiff caused a valuation to be conducted on the property. The property's Deed of Transfer (No. 682/78), described it as "CERTAIN SIX HUNDRED AND NINETY NINE (699) SQUARE METRES of land being the REMAINING EXTENT OF SUBDIVISION A OF LOT 14 OF THE RANCHE situate in the District of SALISBURY."[5] The valuation report prepared by Entredev Valuation Surveyors described it as "REMAINING EXTENT OF SUBDIVISION A OF LOT 14 OF THE RANCHE Otherwise known as WESTCROFT FLATS CORNER ROTTEN ROW ROAD AND ROBERT MUGABE STREET HARARE."

The plaintiff also told the court that it was the responsibility of the defendant to comply with s 152 of the Urban Councils Act[6]. It was the plaintiff's contention that the defendant had all but agreed to transfer the property into his name following their negotiations. As far as he was concerned, the stumbling block was the insufficient description of the property in the agreement, which he blamed on the defendant's officials who prepared that agreement. The error could be rectified, in the same way that the defendant paid him the outstanding leave days

[5] See p 90 of the record.
[6] [*Chapter 29:15*]

notwithstanding that there was an error in the description of the number of outstanding leave days.[7]

The plaintiff claimed that he would have been making a living from that property had the defendant complied with its obligations. He intended to use it for medical practice together with his professional colleagues who wished to set up a dialysis clinic. They had offered him US$3,000.00 per month. That explained his claim for damages for unlawful occupation in the said amount.

Under cross examination, while accepting that he signed the deed of settlement on 20 April 2015, the plaintiff denied that it was from that date that he was expected to enforce his claim in respect of the property. There were other internal processes to be undertaken by the defendant that he had no control over. The situation was different in respect of monetary entitlements which were to be paid by a specific date. The plaintiff was reminded that in his claim in HC 11653/16 he had attached text messages of his communication with the Chamber Secretary during the period April-May 2015 in which he was following up on the property.

According to the defendant's counsel, that communication confirmed that as at that stage the plaintiff was aware that his claim for the property was due. The plaintiff insisted that the communication was just a follow up seeing as the other entitlements had been paid, and he needed to know the status of the property. The plaintiff was further reminded that in one of the messages in April 2015 he had used emotive language to express his frustration at the delays in transferring the property, which suggested that he was aware that such entitlement had fallen due. The plaintiff admitted that he was upset with the delays. Despite his aforesaid demands, clause 3.15 still remained unfulfilled.

The plaintiff remained adamant that the cause of action did not arise in 2015 as alleged by the defendant, as no date had been set for the transfer of the property. In his communication with the Chamber Secretary, he was just expressing frustration at the defendant's unwillingness to comply with the agreement. The defendant accepted that three years would have lapsed in April 2018, if parties were to consider the date of signing the agreement as the date when the cause of action arose. The plaintiff however denied that his claim had prescribed in April 2018. Even the monetary benefits were paid outside the agreed three months period. His point was that for the non-monetary benefits no date for performance had been fixed by the parties.

[7] Para 3.7 on p40 of the record, the deed of settlement stated the number of leave days as one hundred and forty three, yet the bracketed and correct figure referred to 384.31 days. The plaintiff claimed that the defendant paid for the 384.31 days regardless of that error in the description of the number of days.

The plaintiff insisted that whilst clause 3.15 of the agreement stated that he was to be allocated a house number, the parties understanding was that he was to be allocated a house at the corner of Rotten Row Road and Robert Mugabe Road. It was for that reason that he was asking the court to rectify the anomaly so that the agreement reflected the true intention of the parties. The plaintiff was reminded that in rectifying an agreement, the court was obliged to look at the intention of the parties, and it was going to be difficult for the court to do so since the agreement was negotiated in his absence. The plaintiff averred that even though the agreement was negotiated in his absence, he was invited into the meeting when the defendant made its offer and when he eventually signed the agreement. He had read their offer, accepted it and signed the agreement. He had not noticed that the agreement was defective since he believed that everything had been done in good faith. It was only after the defendant's officials refused to cooperate that he realised that the defendant's intention had been to deceive all along.

The plaintiff argued that although the court papers for the eviction of Dhlakama in the Magistrates Court referred to Flat No. 2 Westcroft, his agreement was for the whole house and not just a section of the property. He denied that the reason why clause 3.15 was poorly crafted was because there was no meeting of the minds The Chamber Secretary was aware of Westcroft, and at one time he had been offered an opportunity to stay at the property. It was put to the plaintiff that he could not approach the court for the rectification of an invalid clause, but he insisted that he was unaware of the invalidity as the parties knew what they were referring to.

It was also put to the plaintiff that paragraph 6.2 of the agreement required him to approach the defendant for the amendment of the agreement if he was not happy with any issue, but the plaintiff averred that it was the defendant that raised the issue of the defect.[8] On his part he was merely asking for what the parties agreed upon. He did not see the need to approach the defendant for an amendment of the agreement. He did not see any defect in the agreement. When asked why he was approaching the court at this stage if he did not see any defect in that clause, his response was that the defendant's counsel were seeking to rely on technicalities to rob him of what belonged to him.

The plaintiff denied that what he was asking the court to do was prohibited by clause 6.2 of the agreement. He averred that the clause merely stated that the parties must agree on an

[8] Clause 6.2 of the agreement on p 42 of the record states as follows:
"No amendment, consensual cancellation or modification of this agreement shall be valid or binding on a party hereto unless reduced to writing and executed by both parties hereto. Any additions, modifications or amendments to the agreement shall not be binding unless made in writing and signed by the parties."

amendment failing which either party could approach the courts. The plaintiff conceded that the import of clause 6.1 of the agreement was that the agreement signed by the parties constituted the only record of what was agreed between them.[9] The plaintiff also admitted that after the allocation a residential or industrial stand or a house, the parties still had to enter into an agreement of sale of that property. The person to whom the property was allocated was then expected to pay the purchase price. He however insisted that in the case of the house referred to in clause 3.15, the intention was that he would receive it for free especially when one read the agreement together with the addendum to the agreement. The use of the word receive in the addendum meant that he was going to get it for free.

It was put to the plaintiff that if the defendant intended to give the property to him for free, then it ought to have been specified in clause 3.15 as well as the addendum. The plaintiff's response was that in light of the error of description in clause 3.15, he was not sure if the parties would have done it differently. He insisted that the person who drafted the agreement was not part of the meeting that agreed on the issues recorded in the agreement. The agreement ought to have recorded that he was getting the property for free. The people who were in the meeting were better placed to explain what the spirit of the agreement was all about. The plaintiff averred that even though he was not in the meeting that discussed the issue, he was aware of what the offer by the defendant entailed.

The plaintiff also confirmed under cross examination that he had not placed before the court any resolution of the defendant approving the agreement in respect of the property. He also admitted that there was no resolution from the defendant authorising its officials to sign any agreement with him. The plaintiff admitted that at one time he acted in the position of Town Clerk and was therefore familiar with the operations of the defendant. Asked whether it was not mandatory that there should be a resolution before an agreement to dispose of council property, the plaintiff averred that it was not his duty to ask the officials who represented the defendant whether they had the requisite mandate or not. He just assumed that they were authorised to negotiate with him. He however admitted that from his experience as Acting Town Clerk, no council property could be allocated without complying with s 152 of the Urban

[9] Clause 6.1 on p 42 of the record reads as follows:

> "This agreement together with any annexure or written amendments constitutes the entire agreement between the parties who acknowledge that there are no oral or written undertakings or agreements between them relating to the subject matter of this agreement."

Councils Act. He could not have known whether or not the defendant's officials had complied with s 152 of the said Act.

The defendant was asked to comment on whether his claim for damages for unlawful occupation from 1 May 2015, was not an acknowledgment that the cause of action arose on that day, but he maintained that he considered it to be the day he would have been given occupation of the property. The plaintiff admitted that clause 3.15 of the agreement did not specify that he would receive rentals pending allocation of the property. He had also not attached proof confirming that similar properties in the area were charging rentals of US$3,000.00 per month. He had also not placed before the court any agreement that he allegedly had with the doctors who intended to set up a dialysis clinic at the property.

In his re-examination, the plaintiff contended that the use of the word "receive" was not just confined to the property. It had also been used in the case of a Toyota Prado that he had since received from the defendant as part of his package.

The plaintiff's case was closed with the plaintiff having given evidence as the sole witness.

Bozman Matengarufu was the defendant's witness. He appeared in his capacity as the defendant's Acting Human Capital Director. He had been acting in that position since July 2020. At the time that the Deed of Settlement was signed, he was holding the position of Head Human Capital Administration. The witness told the court that the officials who signed the Deed of Settlement were no longer in the employ of the defendant. Mahachi was initially suspended and later dismissed. The same fate befell Chingombe. Ncube was initially suspended and latter retired.

Commenting on the plaintiff's claims for rectification of the agreement and transfer of the property into his name, the witness stated that it was no longer competent to claim that kind of relief as the personnel involved were no longer in the employ of the defendant. He also averred that the property that the plaintiff claimed was different from the property described in the agreement. His understanding of the word "allocate" as used in clauses 3.13 and 3.14 of the agreement was that the process had to be handled in terms of the defendant's housing policy. What made the case of the industrial and the residential stand different from the house allegedly allocated to the plaintiff was that the first two made specific mention of council policy whereas the latter did not. Any allocation had to be done on the backdrop of a policy or procedures which spelt out the terms and conditions of the alienation.

The witness stated that the allocation of land was done in terms of standard operating procedures which involved getting the requisite approvals from council. The requisite approval was obtained through a written report to the committee that gave the authorisation. That report also gave details of the property to be alienated. The report also dealt with any objections to the alienation and usage of such property. Such objections were invited from interested parties through an advertisement in the media. The committee would then make its own recommendations to the full council for adoption. Once council adopted the recommendations, the recipient was then informed that they had been allocated the property. The notification letter had a reference number. After the notification, the recipient was required to make the necessary payment that would then trigger the preparation of an agreement stipulating all the relevant terms and conditions.

According to the witness, this process was followed in respect of the residential and the industrial stands. As regards the property referred to in clause 3.15, the witness stated that the highlighted procedures were not followed. The defendant did not allocate land for free. The recipient had to pay some consideration in terms of the defendant's housing policy. The witness did not recall any occasion when council allocated land for free to any of its outgoing employees. The witness was asked to comment on the clause in the addendum which stated that the plaintiff would receive the said house, and he insisted that according to the defendant's procedures one had to pay for any property allocated to them as per the procedure he outlined.

The witness also stated that the officials who negotiated the settlement leading to the signing of the agreement did not have the mandate to do so. If ever that mandate existed, then it ought to have been referred to in the agreement. The mandate to negotiate was given by the council after a report was submitted to a subcommittee seeking the mandate to negotiate. The witness told the court that from his perusal of council records, the mandate to negotiate was never sought or granted. According to the witness, council business was run through resolutions of council. Officials were empowered to carry out council assignments through resolutions.

Further, according to the witness, it did not matter that the property was being allocated pursuant to a retrenchment. A resolution was still required. He expected the plaintiff to be aware of the procedure as a former senior council official himself. The witness made reference to several resolutions of council that involved the disposal or leasing of council's immovable properties. The witness also stated that s 152 of the Urban Councils Act was not complied with. It was mandatory that it be complied with in the circumstances.

As regards the claim for damages, the witness averred that such a claim was not sustainable as the agreement on which it was predicated was defective. The same logic applied to the claim for eviction. Procedures were not followed. The agreement was invalid for want of compliance with council procedures.

According to the witness, the other items in respect of which the defendant had complied with the agreement were distinguishable with the claim for the house. While it was admitted that the other entitlements were paid in line with the agreement, the procedure for the allocation of the house was not followed. The defendant could not countenance a flagrant violation of council procedures. The witness also stated that even though he was not involved in the negotiations that gave birth to the agreement, he could still comment authoritatively based on council records and procedures. It did not require one to have been directly involved in the negotiations to discover that procedures were not followed. The defendant had a perpetual existence which outlived even those that may have made decisions on its behalf.

Under cross examination, the witness was asked whether he had a council resolution to represent the defendant in the current proceedings, and his comment was that he had been authorised by the Town Clerk who had appointed him to his acting position. He was not in a position to comment on the parties' intention when they crafted clause 3.15 of the agreement. He was also not in a position to comment on whether the parties intended the Westcroft flat to be the subject of their agreement since the clause was poorly crafted.

Still under cross examination, the witness told the court that the negotiations leading to the agreement on retrenchment packages were delegated by council to the Town Clerk who was the Chief Executive Officer of Council. After the negotiations, the Town Clerk was required to report back to council on the outcome of the negotiations. He confirmed that as far as the negotiations were concerned, the Town Clerk and his officials had the required mandate to negotiate. The Town Clerk did however not report back to Council to seek ratification of whatever was negotiated and agreed upon. From the council records, there was no feedback of how negotiations went.

The witness conceded that the agreement did not specify the period within which the defendant was required to comply with clauses 3.13, 3.14 and 3.15 relating to the immovable properties. The time within which compliance was expected was dependant on the procedures to be followed in managing the disposal of immovable properties. The witness was not in a position to give a specific timeframe. The witness agreed with the plaintiff's counsel that the failure to give specific timeframes was intended to accommodate the internal processes that

had to be complied with by the defendant. The expectation was that the process would be completed within a reasonable time, which the witness reckoned to be between 3 to 6 months. It was therefore unreasonable for the plaintiff to even make a claim for damages going back to May 2015 under the circumstances.

The witness told the court that the team negotiating with the plaintiff was expected to take all steps necessary to give effect to clause 3.15. One could not conclude that the agreement pertaining to the property was approved or not approved by council since it was never placed before council. The witness further confirmed that Ncube, Chingombe and Mahachi had their employment contracts terminated for an array of reasons, and amongst them was what council considered to be a generous and costly retrenchment package awarded to the plaintiff and other council officials. The allegations came about after council instituted investigations into the matter. The witness was adamant that council did not approve the package even after it became aware following investigations into the conduct of the senior officials who were involved in the negotiations.

The witness also insisted that even though the defendant's plea was silent on the issue of the disposal of council property for free, it was council's policy that no council property could be allocated to any former employee for no consideration. He pointed to clause 14.4 of the defendant's Housing Policy document which states that where a stand is sold to an employee, the intrinsic land value would be charged at fifty percent of total cost.[10]The witness however conceded that the clause was not applicable to the plaintiff's case. He however averred that it was for that reason that the agreement ought to have been placed before council for ratification.

The witness told the court that the plaintiff's request could not be entertained by the defendant not only because it had come late, but procedures were not followed, even though such procedures were not placed before the court. The witness also insisted that even if there had been compliance, the process would only be complete after a separate agreement was signed between council and the plaintiff speaking to the alienation. The witness conceded under cross examination that the agreement did not violate s152 of the Urban Councils Act. He however insisted that what was agreed between the two negotiating parties was never brought before the council.

[10] Page 16 of the defendant's bundle.

THE SUBMISSIONS AND THE ANALYSIS

Whether the Plaintiff's Claim had Prescribed

In his closing submissions, the plaintiff submitted that the claims for transfer of title, eviction and damages were all predicated on the primary claim for rectification. The issue was whether that claim for rectification had prescribed. Citing the case of *Boundary Financing Ltd* v *Protea Property Holdings (Pty) Ltd*[11], the plaintiff argued that the claim for rectification was not a debt susceptible to prescription.

The plaintiff further argued that even assuming a claim for rectification was susceptible to prescription, his claim was still not prescribed. In their agreement, the parties did not agree on a time for performance. The defendant was expected to render performance within a reasonable time. The defendant still had to be placed in *mora* through a formal demand for it to know that performance was required. Reference was made to the cases of *Brooker* v *Mudhanda and Others*[12] and *Asharia* v *Patel & Others*[13] for that proposition. The plaintiff submitted that the cause of action arose when he wrote to the defendant on 22 August 2016 thus putting the defendant in *mora*. The claim was therefore timeously filed on 12 October 2018.

In its closing submissions, the defendant argued that the plaintiff's claim had prescribed by the time that it was lodged. It further argued that in making the claim, the plaintiff was seeking to recover a debt within the context of s 2 of the Interpretation Act[14]. According to the defendant, the primary remedy sought by the plaintiff was the transfer of the property. If the claim for rectification was granted, it would still have a retrospective effect in that the rectified document would be considered in that form from the time the agreement was signed. The other claims were consequential. They were all dependant on the outcome of the main claim.

Further, according to the defendant, the plaintiff's alleged entitlement to the property constituted the primary debt that he sought to recover. Prescription in respect of that claim started running on the signing of the agreement. The cause of action arose in April 2015 when the deed of settlement was signed. The defendant further argued that going by the defendant's

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[11] 2009 (3) SA 447 (SCA), where at p452 the Court said:

> "A claim for rectification does not have as a correlative a debt within the ordinary meaning of the word. Rectification of an agreement does not alter the rights and obligations of the parties in terms of the agreement to be rectified: their rights and obligations are no different after rectification…..Should a claim for rectification of a contract become prescribed after three years parties may become entitled to rights and subject to obligations wrongly recorded and never intended, for example in the case of a debt secured by a mortgage bond which only prescribes after the lapse of a period of 30 years. That, in my view, is a result never intended by the Prescription Act…"

[12] SC 5/18 pages 5-6

[13] 1991 (2) ZLR 276 (SC) at p 280

[14] [*Chapter 1:01*]

own account of events, all circumstances requiring a challenge to be mounted had occurred. The plaintiff's communication with Josephine Ncube showed that during April and May 2015 he was already making demands for performance.

In determining the issue of prescription, the court must establish when the cause of action arose. The plaintiff argued that the claim for rectification is not affected by prescription as it is not a debt. The defendant on the other hand argued that the primary relief sought by the plaintiff was the transfer of ownership of the property. As such, the relief of rectification was tied to the transfer of title. I agree with the defendant's contention. One cannot separate the two. It is the transfer of title in the property that the plaintiff predominantly wants. Even if the court were to grant the relief of rectification, still that would not affect the time when the need to act arose, as far as the primary remedy sought is concerned. As rightly observed by the defendant, the rectification would have a retrospective effect. The time when the need to act arose must be considered in the context of the agreement, with or without rectification.

In *Chiwawa* v *Mutzuris & 4 Others*[15], MAKARAU JP (as she was then), dealt with the question of cause of action as it relates to prescription as follows:

> "It may be pertinent at this stage to observe that the term "cause of action" as used by *Advocate Zhou* above has been the subject of many court decisions. It is now the settled position in our law, in my view, that the term 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 *Shinga v General Accident Insurance Co (Zimbabwe) Ltd* 1989 (2) ZLR 268 (HC) at 278 A- C).
>
> Applying the above to the facts before me, it is my view that the plaintiff's cause of action arose when she concluded the agreement of sale with the first defendant. It is at that stage that she at law became entitled to receive transfer from the defendants against payment of whatever was due from her in terms of the agreement of sale……"

What is clear from the above authority is that in the context of written agreements, the cause of action arises from the date when the parties append their signatures to the agreement. Where the time to perform is not stated in the agreement, it is then implied that performance of the obligations arises the moment the parties assume their obligations under the signed document. Authorities are however further agreed that where time for performance is not stipulated in the agreement, a debtor is not in *mora* until a reasonable time for performance has elapsed and the creditor has demanded performance.[16]

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[15] HH 7/09
[16] *Smart v Rhodesian Machine Tools Ltd* 1950 (1) SA 735(SR); *Asharia v Patel & Ors* 1991(2) ZLR 276(S) at p280

That the primary claim is in the nature of a debt is not in dispute. In *Brooker* v *Mudhanda and Another*[17], GOWORA JA (as she then was) made the following pertinent remarks

> "The term debt refers to anything that is owed or due, such as money, goods or services which one person is under an obligation to pay or render to another. Debt is defined in the Prescription Act as follows:
> **2 Interpretation**
> In this Act—
> "debt", without limiting the meaning of the term, includes anything which may be sued for or claimed by reason of an obligation arising from statute, contract, delict or otherwise.
> 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……"[18] (Underlining for emphasis).

The date or the time when the cause of action arose is critical for purposes determining when prescription started to run. The agreement between the parties did not stipulate when exactly the plaintiff was expected to receive transfer of the property into his name. In the absence of an agreement on the date when transfer was supposed to be passed to the plaintiff, then prescription only began to run when the defendant was placed in *mora,* since according to the parties there were internal processes that had to be undertaken by the defendant in order to give effect to the agreement. A party is placed in *mora* through a demand, which in the context of the agreement between the plaintiff and the defendant meant a claim for performance directed at the defendant by the plaintiff.

The communication between the plaintiff and the defendant's officials provide an insight as to when exactly demand was made herein. Under cross examination by the defendant's counsel, the plaintiff admitted that between April and May 2015 he corresponded with the defendant's Chamber Secretary wherein he was demanding compliance with the agreement.

In his closing submissions, the plaintiff made reference to what he referred to as *"informal text message follow ups to the then Josephine Ncube. These messages appear from pages 46-56 of the record"*. The text messages confirm that between April and May 2015, the

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[17] SC 5/18 at p 7

[18] See also s 16 of the Prescription Act which states as follows:
"16 When prescription begins to run
(1) Subject to subsections (2) and (3), prescription shall commence to run as soon as a debt is due.
(2) If a debtor wilfully prevents his creditor from becoming aware of the existence of a debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt.
(3) A debt shall not be deemed to be due until the creditor becomes aware of the identity of the debtor and of the facts from which the debt arises:
Provided that a creditor shall be deemed to have become aware of such identity and of such facts if he could have acquired knowledge thereof by exercising reasonable care."

plaintiff was actively pursuing the issue of the property with the Chamber Secretary. Paragraph 34.5 of the plaintiff's closing submissions records the following conversation between the Chamber Secretary and the plaintiff on 30 May 2015:

> *"Q – Good morning ma'am. Are you able to speak to me? Chingombe wanted to consult with you. He had no answer for me. Where are we with the Council reports on Westcroft?*
> *A – Gd' morning Doc will call in an hour"*

In some of the chats, the plaintiff was complaining that the Chamber Secretary was refusing to see him, and let alone talk to him on the issue of Westcroft. At one time he was informed that the relevant committees had not met.

The plaintiff claims that the letter of 22 August 2016, written by his legal practitioners to the defendant's Human Capital Director was the first formal demand made in connection with the property. He claimed that it was that letter which placed the defendant in *mora*. According to the plaintiff, all the communication with the Chamber Secretary were mere follow ups. This cannot be entirely correct. Paragraph 3 of the said letter states as follows:

> "Our client advises that, over a year after the agreement and despite his persistent demands, you have not moved an inch to grant him possession and ownership of the house…."(Underlining for emphasis).

The letter confirms that persistent demands had been made by the plaintiff but there had been no movement in the transfer of ownership in the property. The plaintiff's claim for damages for unlawful occupation was with effect from 1 May 2015, in a way confirming that he expected that he would have been given vacant possession by that date.

On the basis of the evidence before the court, it can be concluded that as at 30 May 2015, the plaintiff was clearly frustrated by the inaction on the part of the defendant's officials. Going by the *dictum* in the aforementioned authorities, the cause of action arose the moment the plaintiff started making demands for performance by the defendant. Going by the evidence before the court, such demands were made by the plaintiff during the period April-May 2015. At that stage, the defendant had been placed in *mora*.

I am not persuaded by the plaintiff's submission that it was the letter of 22 August 2016, which placed the defendant in *mora*. That letter all but confirmed that the plaintiff had made persistent demands which were ignored by the defendant. At the time the letter of 22 August 2016 was written, the defendant's attitude was already known to the plaintiff. Using the plaintiff's own terminology, the defendant had *"not moved an inch to grant him possession and occupation of the house"*, despite his persistent demands.

In the South African case of In *Minister of Finance and Others v Gore NO,*[19] the Court held:

> "This Court has in a series of decisions emphasised that time begins to run against the creditor when it has the *minimum facts that are necessary to institute action*. The running of prescription is not postponed until a creditor becomes aware of the full extent of its legal rights . . . ."

As at 30 May 2015, the plaintiff was aware of the facts and circumstances that made the institution of a claim against the defendant competent at that stage. Summons ought to have been issued on or before 30 May 2018 at the very least. Proceedings were only instituted on 12 October 2018. By that time the claim had prescribed.

For the foregoing reasons, the court is satisfied that the defendant's special plea of prescription is meritorious, and it is hereby upheld. Having made that finding, it becomes unnecessary to traverse the remaining trial issues.

COSTS

Costs follow the event. I see no reason to depart from this principle. In its plea, the defendant sought the dismissal of the claim with costs on the higher scale of legal practitioner and client. In the closing submissions it sought the dismissal of the claim with costs on the ordinary scale. The claim for costs on the higher scale was not motivated.

DISPOSITION

Resultantly it is ordered that:

1. The plaintiff's claim is hereby dismissed.
2. The plaintiff shall pay the first defendant's costs of suit.

Makuwaza & Magogo Attorneys, legal practitioners for the plaintiff
Mbidzo, Muchadehama & Makoni, legal practitioners for the first defendant

[19] *Minister of Finance and Others v Gore NO* [2006] ZASCA 98; [2007] 1 All SA 309 (SCA); 2007 (1) SA 111 (SCA).