HB 101/20
HC 2725/19

SIBONGILE SHAVA

Versus

ROBERT BRUCE MOFFAT

And

**THE MINISTER OF LANDS, AGRICULTURE &
RURAL RESETTLEMENT N.O. BULAWAYO**

IN THE HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 24 FEBRUARY & 4 JUNE 2020

Special Plea

Advocate S. Siziba for the plaintiffs
S. Mbondia for the 1st defendant

MOYO J: In this matter the plaintiff issued summons claiming the ejectment of the 1st defendant and all those claiming through him from her farm namely subdivision 2 Oaklands, Insiza arising from the offer letter issued to her on 6th June 2014.

The facts of the matter are that, plaintiff was offered the said farm through the land reform programme with 1st defendant being the farmer resident on the farm and the one who owned it prior to its being gazetted.

Plaintiff was allegedly offered the farm on the 6th of June 2014. 1st defendant has raised a special plea against plaintiff's claims wherein 2 points were raised. The 1st point being that the matter is *res judicata* and the 2nd one being that of prescription. On the point relating to *res judicata*, 1st defendant avers that the matter is *res judicata* in that it concerns a cause of action that has already been determined by the Magistrates' Court on the 28th of April 2017. Apparently, the 1st defendant was charged for a criminal offence in terms of section 3 (2) (a) and (3) of the Gazetted Lands (Consequential Provisions) Act Chapter 20:28 in the matter under cover of case number CRB 104/16.

The 1st defendant's contention is therefore that since plaintiff was a complainant in the criminal matter and since the learned magistrate acquitted the plaintiff and made a finding that he had some form of permit to remain on that land, then the matter is *res judicata*.

Plaintiff opposes that point on the basis that the criminal matter was between different parties and has nothing to do with the eviction suit now before this court. 1st defendant's counsel further argues that because plaintiff was the complainant in the current matter, then she was a privy of the state and therefore the matter is *res judicata*. It is trite that for a matter to be held to be *res judicata* a certain criteria must be met. That is –

1. it must be between the same parties
2. it must be on the same subject
3. it must be on the same cause of action.

Already the matter before me, is a civil suit for eviction as opposed to a criminal suit against the beach of a particular statute. Again, the actual matter was between the state and 1st defendant, not between plaintiff and 1st defendant.

However, 1st defendant interpretation of plaintiff's role in the criminal matter, in my view is neither here nor there because, the subject matter in that criminal case was a breach of a statutory provision wherein the state being the authority that oversees compliance with criminal statutes was the party with the *locus standi* to prosecute. In other words, it is the breach or otherwise of the applicable law that landed the matter in the criminal division of the Magistrates' Court. In his matter, what is before me is a civil suit in relation to the rights of occupation of the land in question not the breach of some enactment.

Indeed, if the subject matter had been the eviction without the alleged breach of the provisions of some law, the matter would never have found its way into a criminal court. In any event, section 278 (2) of the Criminal law Codification and Reform Act Chapter 9:23 provides a clear distinction between criminal and civil matters. It provides as follows:

> "A conviction or acquittal in respect of any crime shall not bar civil or disciplinary proceedings in relation to any conduct constituting the crime at the instance of any person who has suffered loss or injury in consequence of the conduct or at the instance of the relevant disciplinary authority, as the case may be."

This clause clearly makes criminal matters distinct from civil cases in so far as the question of res judicata is concerned. In other words a criminal court's decision does not affect a party's rights to proceed civilly in any respect.

This point is thus ill taken and is accordingly dismissed.

The 2nd point is that of prescription and the basis is formulated as follows:

That the plaintiff's claim is founded on an offer letter dated 6th day of June 2014 and that therefore plaintiff's cause of action arose on or about the 6th day of June 2014 and that a period of more than 3 years has elapsed since the happening of that event. Plaintiff disputes this assertion and submits instead that a declaratur is not a debt and therefore does not prescribe. In my view, however the answer to whether this claim has prescribed or not is found in the Supreme Court judgment of *Jennifer Nan Brooker* vs *Richard Mudhanda and Ors* SC-5-18. The Supreme Court in that matter stated the following with regard to determining the issue of prescription. In order to determine the question of prescription the court first had to make a finding on the cause of action upon which the respondent's claim was premised and when specifically it arose."

In the case before it, the Supreme Court found that the cause of action was the right of respondent to the transfer of the properties in terms of the alleged agreements. The Supreme Court in that case further upheld the accepted general rule that where a contract fixes no time for performance, the debtor is not in *mora* until a reasonable time for performance has elapsed and the creditor has demanded performance. The Supreme Court went further to quote its previous decision in the case of *Asharia* vs *Patel & Ors* 1991 (2) ZLR 276 (5) wherein GUBBAY CJ (as he then was) had this to say:

> "The general rule is that where time for performance has not been agreed upon by the parties, performance is due immediately an conclusion of their contract or as soon thereafter as is reasonably possible in the circumstances. But the debtor does not fall into *mora ipso facto* if he fails to perform forthwith or within a reasonable time. He must know that he has to perform. This form of *mora*, known as *mora ex persona*, only arises if after a demand has been made calling upon the debtor to perform by a specified date, he is still in default. (my emphasis)

The Supreme Court further held that for prescription to run there was need for the creditor to place the debtor in *mora* by demanding transfer. In terms of the Supreme Court judgment, it is the demand that plaintiff should vacate the farm that kick-starts the whole transaction. 1st defendant's averments however in paragraph 8 of the amendment to 1st defendant's special plea (page 18 of the bound documents), suggest that the mere granting of the offer letter, kick-started prescription. That is not a correct approach as shown in the Supreme Court case. 1st defendant must have based the prescription argument on him having been fail to meet the demand to vacate rather than the granting of the offer letter to the plaintiff. In other words we would count prescription from the date demand to vacate was made. For this reason I hold that the 1st defendant has failed to formulate a proper basis in terms of the law, which would show that prescription was rightfully kick-started by demand. The mere fact that 1st defendant bases his prescription claims on the granting of the offer letter as opposed to the demand for occupation which would consequently place the 1st defendant in *mora*, means that the prescription argument is thus misplaced.

I accordingly dismiss the claim that prescription has run and that therefore plaintiff's claim has prescribed.

Accordingly, the special plea is dismissed with costs.

Tanaka Law Chambers, plaintiff's legal practitioners
Webb, Low & Barry Inc. Ben Baron & Partners, defendant's legal practitioners