BOYD ARTHUR STANLEY RAYNARS
versus
BERYL LILLIAN MUNGWARI

HIGH COURT OF ZIMBABWE
CHIGUMBA J
HARARE, 3 November and 26 November 2014

Opposed Application-Special Plea

G. Maseko, for the plaintiff
T. K. Hove, for the defendant

CHIGUMBA J: The plaintiff issued summons against the defendant on 29 November 2013. The defendant filed a special plea, that the cause of action arose on 28 November 2009, and that consequently, the plaintiff's claim has prescribed. The issue that falls for determination in this matter is whether or not the plaintiff's claim has prescribed in terms of s 15(d) of the Prescription Act [*Cap 8:11*] (hereinafter referred to as the Act).

The plaintiff claimed payment of US$9 500-00 together with interest thereon at the prescribed rate calculated from 28 November 2009 to the date of payment in full, being a refund of the purchase price that he paid to the defendant through ABC Auctioneers Private Limited, and payment of US$3 434-00 together with interest thereon at the prescribed rate being the amount he was forced to pay to the Zimbabwe Revenue Authority (ZIMRA) as consequential damages for the defendant's alleged fraudulent misrepresentation of selling a vehicle to the plaintiff when import duty had not been paid, and payment of the sum of SAR$14 100-00 together with interest thereon calculated at the prescribed rate from 25 June 2010 to the date of payment in full, which is the sum that the plaintiff is being sued for by Prosper Mayengahama under case number HC4433/13, on the basis of imperfect title passed by the defendant to the

plaintiff, then by the plaintiff to Prosper Mayengahama, arising from his arrest after the vehicle in question was impounded on the basis that it had been stolen from South African territory, and costs of suit on a Legal Practitioner and Client scale.

In the declaration to the summons, the plaintiff averred that, on 28 November 2009, he won a bid to purchase an Isuzu KB 280 motor vehicle, registration number AAR 7822, engine number 458693 which was being sold by ABC Auctioneers, on the defendant's behalf. The plaintiff attached a tax invoice to show that he paid the full purchase price. A perusal of the tax invoice will show that the defendant's name does not appear on it. The vehicle having been purchased at an auction was subject to certain conditions of sale, which appear at record p 15. ABC Auctioneers sold the vehicle "voetstoots", i. e. "as it stood", and disclaimed responsibility for any misrepresentation as to title, for any defect in title. ABC Auctioneers, in a letter dated 28 November 2009, addressed to the Officer commanding the car theft section at Southerton police station, in which change of ownership of the vehicle was requested, listed Beryl Mungwari, of 34 Sloane Street, Highlands Harare, as the seller of the vehicle, and the plaintiff as the buyer. Plaintiff averred that he received the vehicle registration book from the auctioneers. He does not attach a copy of it to his papers. On proceeding to Southerton police station for clearance of the vehicle and change of ownership procedures the plaintiff averred that he encountered two problems. The first was an inconsistency between the vehicle registration number and the vehicle. The second was that no import duty had been paid when the vehicle was imported from South Africa.

The plaintiff averred that he was forced to pay import duty and storage charges in the sum of US$3 434-00, in order to have the vehicle released by ZIMRA officials and in order to facilitate the change of ownership into his name. In August 2009, the plaintiff sold the vehicle to Prosper Mayengahama through an agent, Wheeler Dealer Car Sales Private Limited for US$9 500-00. The vehicle was subsequently seized by the South African Police for being stolen, and Prosper Mayengahama sued the plaintiff for a refund of the purchase price, and for damages for unlawful arrest in the sum of SAR$14 100-00. The plaintiff's issue with the defendant is that she passed defective title to the vehicle to him, which caused loss, and justifies a punitive award as to costs. The defendant entered appearance to defend on 12 December 2013. She requested further particulars on the same day, which were supplied on 19 December 2013. On 29 January 2014, the defendant filed a special plea and plea.

The special plea raised was that the plaintiff's claim had prescribed, because it was based on a cause of action which arose on 28 November 2009. Summons was served on the defendant on 5 December 2013, and the defendant contended that this was done four years after 28 November 2009, bringing the matter squarely within s15(d) of the Prescription Act [*Cap 8:11*]. The defendant pleaded *lis pendens.* In her plea to the merits, the defendant denied that she had mandated ABC Auctioneers Private Limited to sell a motor vehicle on her behalf with engine number 458693 and put the plaintiff to the proof thereof. She denied ever illegally importing a motor vehicle, or ever dealing in a fraudulently registered motor vehicle. The defendant averred that there was no privity of contract between herself and Prosper Meyengahama, and prayed for a dismissal of the plaintiff's claim with costs.

The plaintiff's replication to the defendant's plea, filed on 5 February 2014, averred that his cause of action arose from the fact that the defendant sold a stolen vehicle, a fact that the plaintiff only became aware of in 2013. Alternatively, the running of prescription was interrupted in terms of s 17(1) (c) of the Prescription Act. The plaintiff's heads of argument were filed on 2 April 2014. The plaintiff raised a preliminary point, that, in terms of r 138(c) of the High Court Rules 1971, a person raising a special plea has eighteen days within which to set the special plea down for hearing, and that the defendant did not do so in this case

"Order 21 of the High Court Rules 1971 provides as follows:

> ***"137. Alternatives to pleading to merits: forms***
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> (1) A party may—
> (*a*) take a plea in bar or in abatement where the matter is one of substance which does not involve going into the merits of the case and which, if allowed, will dispose of the case;
> (*b*)….
> (*c*)….
> (*d*)…..
> (2)….
>
> ***138. Procedure on filing special plea, exception or application to strike out***
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> When a special plea, exception or application to strike out has been filed-

> (*a*) the parties may consent within ten days of the filing to such special plea, exception or application being set down for hearing in accordance with sub rule (2) of rule 223;
>
> (*b*) failing consent either party may within a further period of four days set the matter down for hearing in accordance with sub rule (2) of rule 223;
>
> (*c*) failing such consent and such application, the party pleading specially, excepting or applying, shall within a further period of four days plead over to the merits if he has not already done so and the special plea, exception or application shall not be set down for hearing before the trial." (Eighteen days)

The defendant filed her special plea on 29 January 2014, and her heads of argument on 19 March 2014. The plaintiff submitted that the defendant ought to have set the special plea down for hearing within the eighteen day period beginning from 19 January 2014 when the special plea was filed. I agree with the plaintiff and uphold the point *in limine* as a true and correct interpretation of the provisions of r 138 of the rules of this court. My point of departure with the plaintiff's submissions is in relation to the action that I ought to take after having upheld the preliminary point. The defendant is out of time for setting the special plea down for hearing. The remedy that is open to the plaintiff is not dismissal of the special plea with costs. Dismissal suggests that the special plea has been found wanting in regards to its merits. In my view the appropriate remedy would be striking off of the special plea from the roll because of the procedural defect of it being filed out of time. This course of action would leave it open to the defendant to rectify the defect, and set the special plea down for consideration of its merits. This court has already heard both parties in regards to the merits of the special plea.

Counsel for the defendant, Mr *Hove* humbly begged the court's indulgence and expressed regret for his failure to comply with r 138. He suggested that the provisions of Order 21 r 138(b) are permissive and not peremptory, which leaves some room for the exercise of the court's discretion. He begged the court to have recourse to the provisions of r 4C of the rules of this court. I considered whether a strict adherence to the rules in this case would advance the interests of justice. I concluded that it would not. The court has already heard the merits of the special plea. To strike it off the roll and wait for it to be set down again for hearing, possibly before a different judge would impede the administration of justice in my view. It smacks of

duplication of effort, and time wasting. No prejudice would be suffered by the plaintiff in my view if the special plea was conclusively determined on its merits at this stage. I accordingly, in terms of r 4C, condoned the failure to set the special plea down for hearing within the period stipulated by r138, and proceeded to consider the merits of the matter.

The defendant filed heads of argument on 19 March 2014. The defendant submitted that the plaintiff's claim is for a debt, or liquidated demand, which brings it within the ambit of s 15(d) of the Prescription Act, which reads as follows:

> **"15 Periods of prescription of debts**
> The period of prescription of a debt shall be—
> (*a*) …
> (*b*) …
> (*c*) …
> (*d*) except where any enactment provides otherwise, three years, in the case of any other debt."

The meaning of debt was laid out in the case of *Elvins* v *Shield Insurance Company Limited*[1] where it was held that the word debt in the Prescription Act must be given a wide and general meaning denoting not only a debt sounding in money which is due but also for example a debt for vindication of property. In the interpretation section of the Prescription Act, it is stated that, "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, and delict or otherwise. In the case of *Shinga* v *General Accident Insurance Co. Zimbabwe Limited*[2] it was held that both at common law and under s 18(1) of the Prescription Act, service and not merely the issue of summons is essential to put an end to the running of prescription. In *Chiwawa* v *Mutszuris & Ors*[3] the term "cause of action" was described as follows:

> "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 to order to disclose a cause

[1] 1979 (3) SA 1136(W)

[2] 1989 (2) ZLR 268 HC

[3] 09/HH/007

> of action but does not include the evidence that is necessary to support such a cause of action".

The defendant submitted that the plaintiff became aware of all the facts in 2009, and that its claim is extinguished by prescription in that a period exceeding three years has lapsed between the date when the plaintiff's cause of action arose and the date when summons was issued in this matter.

In *Sadomba* v *Farai Uzumba Private Limited & Anor* [4], when summons was issued, the plaintiff's right of recovery against the applicant had already prescribed. The defendant submitted that, the facts of that matter are similar to the facts in this case. It has been held that the policy behind prescription is to penalize the tardy litigant. See *Coutts & Co* v *Ford & Anor* [5] The facts of that case are that, the defendants owed money to the plaintiff, a bank operating in England. When the plaintiff brought a claim in Zimbabwe for this debt, the defendants pleaded that the claim had prescribed. Under the Zimbabwean law relating to prescription, the claim would have been prescribed but under the English law it would not. It was held, that in terms of s 14 of the Zimbabwean Prescription Act [*Cap 8:11*] the legislature has clearly expressed its intention to make prescription a matter of substantive law and not a matter of procedural law. This provision lays down that the debt is extinguished by prescription rather than the remedy merely being barred.

The plaintiff, on the other hand, submitted that he only became aware of the full facts in 2013. Alternatively, that completion of prescription was delayed in terms of s 17(1) (c) of the Prescription Act. He relied on the case of *Sergio Tarwirei* v *Samuel Mboneli Kunene Haulage S.A. Private Limited* [6], as authority for this proposition. Where there is evidence that a court can rely on, to show that a debtor was outside the country at some stage after prescription had begun to run, and that for this reason prescription was interrupted, by all means such a court can be persuaded to follow the line of reasoning in *Sergio Tarwirei* (supra). Section 16 of the Prescription Act stipulates that prescription begins to run as soon as a debt is due. The Plaintiff

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[4] 1982(3)SA

[5] 1997 (1) ZLR 440(HC)

[6] HH 19-2008

in his summons, claimed payment of US$9 500-00 together with interest calculated from 28 November 2009 being a refund of the purchase price which he paid to ABC Auctioneers. The plaintiff submitted that, he did not become fully aware of the existence of the debt, and implied that this was because the defendant willfully prevented him from becoming aware of it. (see s16(2) of the Prescription Act). With all due respect to the plaintiff, the papers filed of record do not support this contention.

There is no evidence on record of the defendant behaving in any manner that may be construed as deliberately preventing the plaintiff from becoming aware of the existence of the debt, from 28 November 2009 when he won the bid to purchase the vehicle. The tax invoice attached to the plaintiff's papers is dated 28 November 2007, the letter to instruct change of ownership has the same date. It was only on 3 June 2009 when ZIMRA advised the plaintiff that the vehicle had been imported without payment of duty. It is implied, by the wording of the plaintiff's declaration, that this is the date when the defendant's obligation to the plaintiff, arose. The court accepts that the plaintiff became aware of the facts from which the debt arose on 3 June 2009. The court must then consider whether the plaintiff exercised reasonable care to become aware of the facts from which the debt arose. The plaintiff was given a letter by ABC Auctioneers on 28 November 2007, for use in effecting a change of ownership of the vehicle into his name. No explanation is given as to why it took the plaintiff two years from 2007 to 2009 to "discover" that the vehicle had been imported without payment of duty. Is it reasonable that the plaintiff failed to conduct these checks in 2007 when he took the vehicle to the car theft section at Southerton? In my view it is not. The plaintiff did not exercise reasonable care when he took transfer of title in 2007. He did not make the requisite inquiries that an average reasonable person who purchases a vehicle at public auction would be expected to make, especially where that vehicle had been sold "as it stood". Accordingly, in my view, the proviso to s 16(3) applies to the plaintiff. It stipulates that:

> " (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."

The plaintiff averred that the running of prescription was delayed in terms of s 17(1)(c) which provides that the running of prescription is interrupted for a period of one year where the

debtor is outside the country. The averment appears from the plaintiff's replication to the defendant's special plea and plea, which appears at record p 49. Unfortunately, in my view this defence is not available to the plaintiff because of the lack of evidence to sustain it, from the papers filed of record.

No evidence was adduced to prove, even on a *prima facie* basis, that the plaintiff was not residing in Zimbabwe. No evidence was adduced, to show the date when the plaintiff allegedly left Zimbabwe for South Africa. No evidence was adduced to show the date when the plaintiff returned to Zimbabwe. Without those dates, the court is constrained and cannot rely on a bald and unsubstantiated averment that the running of prescription was interrupted. In any event, my reading of s 17(1) (c) is that, it is the debtor who can avail itself of this defence, not the creditor. The debtor, the defendant has pleaded prescription. The plaintiff is the creditor. There is no evidence before the court that s 17(1)(c) can be, or ought to be, extended to a creditor. Lastly, no evidence was led as to the date when prescription was allegedly interrupted. This becomes important because the defence of interruption is available for a limited period of one year, which the court must calculate in order to do justice between the parties.

It follows that the plaintiff has not adduced sufficient evidence on the papers filed of record to show that prescription began to run in June 2013. The evidence adduced by the defendant, which was accepted by the court, is that the cause of action arose in 2009. This evidence is supported by the averments in the plaintiff's own summons and declaration. The defence that the running of prescription was interrupted is not available to the plaintiff, a creditor. In the result the special plea succeeds. The plaintiff's claim is dismissed with costs.

Messrs Sawyer & Mkushi, plaintiff's legal practitioners
Messrs T.K. Hove & Partners defendant's' legal practitioners