

ROSEMARY BASTIN
versus
SHAKESPEAR KARUWA
and
KARUWA & ASSOCIATES
and
KUFA JOHN MADZIMA
(In his capacity as executor of the estate
of the late Marimo Masawi Madzima)

HIGH COURT OF ZIMBABWE
CHAREWA J
HARARE, 29 March 2019 & 22 May 2019

Opposed Matter – Special Plea/Exception

C. Venturas, for the plaintiff
H. Mukonoweshuro, for the third defendant

CHAREWA J: On 29 March 2019, I upheld, *ex tempore*, the third defendant's special plea of prescription and his exception that in any event, the plaintiff's summons and declaration were bad in law, vague and embarrassing and did not disclose a cause of action. The plaintiff having appealed, these are my written reasons.

Background

In 2005, the plaintiff purchased and obtained transfer, through the agency of first and second defendants, of the property known as Stand 3437 Highfield Township, purportedly from the third defendant. However, defendant disputed authorising the sale and obtained judgment in his favour, setting aside the sale, in HC2120/07 on 25 May 2012.

Plaintiff appealed against the entire judgment in SC 283/12 on 11 September 2012, but the appeal lapsed and plaintiff took no further action. First and second defendants also filed an

appeal against the entire High Court judgment in SC 281/12, but the appeal was struck off the roll on 21 September 2017. Subsequently, and on 1 March 2018, first and second defendant obtained leave to appeal only against the order of costs which appeal, in SC211/18, is, as at the date of this hearing, still pending.

On 26 March 2018, plaintiff issued summons in this matter, claiming, payment, jointly and severally, the one paying the others to be absolved, of US\$55 000 being the market value of Stand 3437 Highfield Township Harare, prescribed interest from the date of summons and attorney client costs. Third defendant entered appearance to defend and raised the special plea that plaintiff's claim as against him had prescribed, it having arisen as at the date of the handing down of the High Court judgment in May 2012. Further, third defendant excepted to the summons and declaration as being bad in law, vague and embarrassing and disclosing no cause of action as against him.

The first and second defendant withdrew their appearance to defend plaintiff's claim and made no submissions with respect to the special plea and exception.

Parties' submissions

The third defendant submitted that plaintiff's cause, if any, arose as at the time of the judgment in HC 2120/07 in May 2012. Prescription as against plaintiff started to run therefrom and was not interrupted as plaintiff did not pursue any appeal to a final conclusion, her appeal having lapsed. As at 2018, when summons in this matter was issued, the judgment in HC 2120/07 remained extant, and was neither under appeal or review with respect to plaintiff. Therefore summons herein having been issued in March 2018, more than three years after plaintiff became aware of the facts from which the debt arose, plaintiff's claim *vis-a-viz* third defendant has prescribed. The onus was on plaintiff to prove any waiver or interruption of prescription. This she failed to do as the order with respect to first and second defendants' appeal in SC 281/12 has no relevance to plaintiff's claim.

Third defendant further submitted that in the event that prescription has not run its course, the plaintiff's summons and declaration are excipiable as being bad in law, vague and embarrassing and disclosing no cause of action. In particular, third defendant submitted that the summons did not comply with the peremptory provisions of Order 3 r 11 (c) in that it does

not contain a true and concise statement of the nature, extent and grounds of the cause of action. Further the declaration does not contain the necessary averments to link third defendant to plaintiff's cause in that it does not allege that plaintiff purchased the property from third defendant or that that third defendant was paid the purchase price. Besides plaintiff admits in the declaration that this court set aside the sale on the grounds that third defendant had not authorised it. Nor does the declaration link the actions of first and second defendant to the third defendant.

In response, the plaintiff submitted that the court should administer justice in such a way as to allow her, her day in court. In that regard, a dispute of fact should not be disposed of by way of a special plea. In any event, since the appeal by first and second respondent filed in SC 281/12 was against the entire judgment in HC 2120/07, prescription was interrupted, with respect to herself, and only started to run again as at 21 September 2017 when it was struck off, even though she herself did not prosecute to finality any appeal against the High Court judgment.

As for the exception, plaintiff was of the view that since she gave notice of intention to amend her summons, third defendant ought not to have filed a special plea and/or exception without first indicating his position with regard to the intended amendment. Therefore, the special plea and exception are improperly filed. Non-objection to the intended amendment leaves the plaintiff at liberty to pursue the amendment to address the very basis of exception. And since the exception would, in any event, lead to an amendment, it should not have been taken.

The law

It is trite that the prescription period for ordinary debts is three years¹. Further prescription begins to run from the date that a party is or ought to have become aware of his/her cause of action.² Consequently, judicial interruption of prescription occurs when a party serves process, provided that he successfully prosecutes his claim under the process in question to

¹ See(s 15 (d) of the *Prescription Act* [Chapter 8:11].

² See s16 of the *Prescription Act*. See also *Peebles v Dairibord Zimbabwe (Pvt) Ltd* 1999 (1) ZLR 41

final judgment.³ Where a party fails to act when she should, it is not the function of the court to help such party as the law is there to help the vigilant, and not the sluggard.⁴

It is further trite that an exception does not normally result in the defeat of a claim, but that the offending party is given an opportunity to amend his/her pleadings, except where the pleadings are fatally defective.⁵ While it is true that there is no set formal format for making an application for amendment, it is also settled in our jurisdiction that a party which pleadings are excipiable must apply to court for an order of such amendment where the other party has not consented to such amendment.⁶

It is certainly not the law that an amendment must always be granted by the court and that as soon as a litigant expresses an intention to amend, the other party is bound to do nothing until such intention to amend is determined or dealt with. Each case must be looked at according to its own circumstances. To allow an amendment is in fact an acknowledgement that a litigant has acted without due diligence in the preparation of his case. The process of granting an amendment is therefore an exercise intended to condone a litigant's lack of diligence. In that regard allowing an amendment is an exercise of judicial discretion, in the interests of justice. It is not to be had for the taking. Therefore a party must make a case for the amendment to enable the court to exercise its discretion.

Analysis

Special Plea of Prescription

The "sale" to the plaintiff was set aside on 23 May 2012, by judgment in HC 2120/02 (HH 221-12). Plaintiff became aware or ought to have become aware of the circumstances of her claim as at that date. Prescription thus started to run therefrom. As already traversed in the "background" section above the appeal noted by the plaintiff lapsed on 10 April 2014 as plaintiff did not prosecute it to finality, having failed to comply with the Supreme Court Rules. In terms of the law therefore, prescription was not successfully interrupted. The three year

³ See s19 (2) & (3)(a) of the *Prescription Act*

⁴ *Beitbridge Rural District Council v Russell Construction Co.* 1998 (2) ZLR 190 SC

⁵ See *Stewart Scott Kennedy v Mazongoror Syringes (Pvt) Ltd* 1996 (2) ZLR 565 @572D

⁶ See *ZFC Ltd v Taylor* 1999 (1) ZLR 308 @310

prescription period expired on 22 May 2015. The plaintiff did not institute this claim within three years from the date she had knowledge of it, having issued summons on 26 March 2018.

The plaintiff seeks to rely on the first and second defendant's appeal in SC281/12 by alleging that since that matter was finalised on 21 September 2017, prescription only started to run with respect to her from that date. That argument is as puerile as it is a grave misconception of the law. Prescription in respect of one party is not interrupted by the actions of a third party. In any event, even that appeal was not completed, having been struck off the roll. The order of the Supreme Court dated 21 September 2017 refers. And as is apparent on the face of it, that matter was being argued between second defendant and third defendant only. Further, the current appeal before the Supreme Court in SC 211/18 does not affect the substance of the plaintiff's claim it being limited to the order of costs in favour of third defendant as against first and second defendant.

Consequently, I find that it is elementary that the plaintiff's claim, if any, has prescribed.

Exception

In the event that I am wrong that the claim is prescribed, I note that the summons merely contains a prayer and does not contain a true and concise statement of the nature, extent and grounds of the cause of action. It therefore offends against the provisions of r11(c). For its part, the declaration establishes no link between the actions of the first and second defendant and the third defendant. In particular, paragraph 5 merely states that plaintiff, through the agency of first and second defendant, purchased Stand 3437 Highfield. The import of the literal interpretation of the paragraph is that first and second defendant were plaintiff's agents. No averment is made that first and second defendants represented third defendant who sold the property or even that third defendant entered into any agreement with plaintiff for the sale of the property. Nor is there any averment that any payment was made for the property or that third defendant received such payment.

It therefore behove upon plaintiff to seek an order of amendment of its summons and declaration seeing that third defendant had not consented thereto. In fact, plaintiff did not even approach third defendant for such consent. Thus the amendment sought was not consented to,

and in contradistinction to *Agricultural Bank of Zimbabwe*⁷ no application, however informally, was made to the court for an order of amendment of the summons and declaration. Therefore the summons and declaration remain un-amended and excipiable.

It is important to note that the notice to amend reads:

“TAKE NOTICE THAT pursuant to r 132 of the High Court Rules of Zimbabwe, 1971, Plaintiff intends to amend its Summons and Declaration filed of record on 26 March 2018.”

It is not certain when plaintiff intends to make such application to amend. This notice was filed on 7 May 2018. As at 6 June 2018 (a month later) when third defendant filed his exception, plaintiff had done nothing to seek consent or an order effecting the amendment despite the defendant’s lack of response to the notice. I would have been persuaded to agree that third defendant jumped the gun in excepting had the notice indicated that the application for amendment would be done at the pre-trial or any other stage of the proceedings. Instead, short of filing an indeterminate notice, plaintiff did nothing.

It seems to me that plaintiff’s attitude is that once a notice of amendment has been filed, that creates a right to be granted such amendment and the other party is thus barred from excepting or raising a special plea. I cannot agree. There is no right to make an amendment. One must make a case for it and the court retains the discretion whether or not to allow such amendment in the interests of justice.

Finally, and most importantly, paragraph 6 is an admission by plaintiff that third defendant disputed the transaction and successfully obtained judgment setting us aside the sale. The judge in HC2120/07 made the findings that the third defendant never authorised the sale but was in fact awaiting transfer into his own name; never signed any agreement of sale and consequent transfer documents, and further that he never received the purchase price. In fact the judge’s finding is that the sale and transfer to plaintiff was fraudulently executed by the first and second defendants, especially since the proper sequence of transfer in a deceased estate was never followed as transfer was made directly from the deceased’s name into the plaintiff’s name.⁸

⁷ *Agricultural Bank of Zimbabwe Ltd t/a AGRIBANK v Nickstate Investments (Private) Limited & Others* HH231/10,

⁸ See p6-7 of the cyclostyled judgment HH 221-12.

Further, the judgment remains extant and has not been set aside. Any amendment to the plaintiff's summons and declaration which seeks to make any averment in contradiction of the judgment cannot stand as that is tantamount to asking this court to improperly set it aside. *In casu*, para 11 of the intended amendment seeks to aver that third defendant "*acted in cahoots with 1st and 2nd defendants....and is an interested party in respect of the findings that may be made by the court against first and second defendants*". This is a direct attack on the findings of the judge in HC 2120/07 in circumstances where that judgment has not been impugned. That is unacceptable. *Ergo*, there cannot be any cause of action against third defendant, and the summons and declaration are not capable of amendment to establish such *causa*.

For these reasons I am unable to agree with the plaintiff's position and find that that her claim has prescribed, and alternatively and in any event, her summons and declaration are bad in law, vague and embarrassing and disclose no cause of action as against the third defendant and are in fact so bad that they are not capable of amendment.

Disposition

Consequently, it be and is hereby ordered that:

1. The special plea and exception are upheld with costs.

Messrs Venturas & Samukange, plaintiff's legal practitioners
Messrs Karuwa & Associates, third defendant's legal practitioners