MALTINA MASHAVA
versus
ANYWHERE MUTAMBUDZI
and
THE REGISTRAR OF DEEDS (N.O)
and
THE SHERIFF OF ZIMBABWE (N.O)

HIGH COURT OF ZIMBABWE
MUSHORE J
HARARE, 19th February, 11th March & 29 May 2019

Court Application

T. Zhuwarara, for the applicant
N. Tsarwe, for the respondents

MUSHORE J: This is an application for an order to compel the 1st respondent to transfer title in immoveable property which the applicant allegedly purchased from the 1st respondent. Applicant bases her claim on an agreement of sale which she entered into with the 1st respondent. According to the terms of the agreement, the 1st respondent allegedly sold her a vacant stand more fully described as Stand number 2684 Marlborough Township, of Stand 2576 Marlborough Township, Salisbury. She described the facts surrounding his alleged purchase of the property as follows.

Applicant alleges that on the 25th September 2001, having signed an agreement of sale between herself and the 1st respondent, she proceeded to pay the 1st respondent ZW325, 000-00 for the property. Applicant submitted through her affidavit that sometime in January 2018 when she wanted to sell the immovable property, the Estate Agent who was handling the sale requested proof of title from her. Transfer of title into her name had never been effected in 2001 at the time that applicant advanced payment to the 1st respondent, for what she alleges was the purchase price of the property concerned. Applicant contacted the 1st respondent for transfer of title to be done and that was when according to her, that 1st respondent demanded a 'top-up' payment first from the applicant. 1st respondent alleged that because the applicant had not paid her the full purchase price, she was not legally obligated to transfer the title in the

property into the applicant's name. The parties' lawyers exchanged letters; however no middle ground was found to exist between both parties. It was the applicant's case that when she realised that writing to each other was not going to achieve anything, that she filed the present application for an order to compel the 1st respondent to effect transfer of title into her name. Applicant stated that she had taken occupation of the property after the agreement was signed.

The application is opposed. 1st respondent's immediate reaction to the application was to submit that the 'contract' had prescribed on the 25th September 2013; because no demand was ever made by the applicant to transfer title for the property into applicant's name at the relevant time. She submitted that the applicant's right to claim specific performance had expired three years after the 25th September 2011.

Secondly the 1st respondent alleged that arising from applicant's failure to disclose the time when performance was due in terms of the contract, the applicant has not met the standards required to establish a cause of action for specific performance.

Thirdly, the 1st respondent submitted that the matter was incorrectly filed with this court arising from the fact that the agreement of sale states that if any dispute arose, such a dispute was to be determined by the Magistrates' Court.

Lastly, 1st respondent denied that applicant had taken occupation at all, and instead stated that the property was a stand which had remained unoccupied all these years.

On the merits, in her affidavit, the 1st respondent alleged that the applicant was supposed to pay her $325,000-00 for the property, but that the applicant had only ever paid her ZW$225,000-00. She explained that the reason why she signed the agreement of sale, in circumstances where the applicant had only made a part payment for the property, was because she was placed under duress to co-operate in signing as the applicant's husband was her boss. As she put it, she signed the agreement in the hope that the applicant would honour her obligation to pay the balance outstanding, within a month of signing the agreement of sale. However, applicant failed to honour the promise to pay the balance of ZW$100,000-00. As a precaution, and for her own records, 1st respondent asked her legal practitioners to issue the applicant with a receipt, so she would have always have evidence that she had been paid less than the amount due to her by the applicant. 1st respondent alleged that applicant had made several promises to pay the remaining ZW$100,000-00, but that the applicant and her husband later refused to honour the alleged promise to pay her the full amount. 1st respondent also alleged that the applicant's claim for specific performance had expired, because applicant had failed to make a demand for transfer of title within the prescribed time limits for the recovery

of a debt in terms of the Prescription Act [Chapter 8:11]. To that end 1st respondent submitted that the date when the debt arose was the 25th September 2011; thus a demand for transfer of title should have been made by the application by the 25th September 2014.

1st respondent then criticised the applicant's choice of adopting the application procedure; stating that the fact that there was a dispute on the issue of payment meant that the applicant should have used the action procedure because it was evident that there were disputes of fact which would could only be resolved by way of trial proceedings.

When the parties appeared before me at the hearing of the matter; applicant's counsel sought my indulgence to approach the unfolding of the proceedings in a slightly different manner. Mr *Zhuwarara* invited me to consider referring the proceedings to trial arising from his belief that the fact that the special plea of prescription would only be determinable after further evidence is led. He cited the case of *Van Brooker* v *Madhanda & Anor*; *Pierce* v *Madhanda & Anor* SC5/18 as authority for his proposition. Mr *Zhuwarara* submitted that if the court is to be persuaded by his submission, then the proceedings ought to be referred to trial. 1st respondent's legal practitioner ascribed the opposite meaning to the *Van Brooker* case; his point being that the issue of prescription was determinable from the papers; and thus if the court upheld his plea the application ought to be dismissed.

The dispute in the *Van Brooker* case also centred on an agreement of sale of immoveable property. The respondent in that case sued the applicant for transfer in title of two properties which the respondent alleged that he had purchased from the applicant. The dispute arose when the respondent sought to consolidate the two stands by way of a registration at the Deeds Office. That was when the appellants defended the claim and filed special pleas stating the following (*van Brooker* case) paraphrased;

> "1. Even if Plaintiff's averments that he personally acquired the rights in respect of the two properties on the 6th August 2002 was correct (although it is denied), the consequent obligations allegedly owed to him personally by the first defendant were extinguished after three years elapsed by reason of section 14 and 15 of the Prescription Act [*Chapter 8:11*].
> 2. The defence raised in paragraph 1 above is one of substance which does not involve going into the merits of the case and which if allowed will dispose of the case.
> 3. Plaintiff's averment that until 2015 he mistakenly believed that the rights flowing from the Agreement of Sale of 6 August 2002 were owed to his company rather than himself, does not assist his supposed cause of action and are irrelevant.
> 4. Wherefore first defendant prays that the plaintiff's claim be dismissed with costs"
>
> The findings of the court *a quo* (the High Court) were that the agreement did not state when ownership was passed to the purchaser, and that in the absence of an agreed date,

> the purchaser should have placed the seller *in mora*. The court held that from the papers it was not clear whether demand had been made if at all and therefore it could not make a finding that the claim had prescribed. It proceeded to dismiss the special plea as a result'
> GOWORA JA commented as follows:
> To summarise there was no evidence from the papers by themselves a demand had been made for specific performance by the purchaser".

The facts in the *Van Brooker* case are clearly distinguishable from the facts in the present matter. In the matter at hand the date for the debt becoming due is specifically stated in the agreement of sale signed by both parties. That is to say that the agreement states:

WITNESETH

(I) …….

(II) ……

(III) ……..

(IV) That he (the seller) will sign all the necessary documents to give effect to this Agreement and to pass transfer to the Purchaser and/ or to sign all cession papers giving his rights, title and interest to the Purchaser by not later than the 25th September 2001.

Thus paragraph IV tells us that in the present matter, prescription began to run on the 25th September 2011. Therefore a demand needed to have been made by the respondent for specific performance within three years after the 25th September 2011, in terms of s 15 (as read with s2) of the Prescription Act [*Chapter 8:11*] which reads

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

In the present matter, the period of prescription was not interrupted for the three years following the 25th September 2011. Also in the present matter, the parties agreed that the demand for specific performance was made by the applicant sometime in January 2018. I am failing to see where the mystery lies in relation to determining whether the demand was timeous or not. It is my view that there would be no need to hear further evidence to determine the special plea of prescription *in casu* because the parties are not at odds as to the date when the

demand was made and to the fact that the agreement before the court is binding upon them both. It is evident that by the time the applicant made his demand, his claim had prescribed. It is my view therefore, that the reference to the *Van Brooker* case as being authority for the proposition that this matter is one where further evidence is required to settle the matter is wrong.

Cause of action

This is an application for specific performance. It is trite that in application proceedings the supporting affidavits must set out the cause of action. Such a cause of action would include the debtor being placed *in mora* before prescription can begin to run. A failure to establish *causa* in the founding affidavit entitles the respondent to invite the court to dismiss the matter there being no basis upon which the relief prayed for can be granted.

Hay v *African Gold Recovery* 1902 TS 232; *Richard Mudhanda* v *Pierce and Anor* HH 657/16.

In the present matter it appears that the applicant's legal practitioner had not made the link between the facts and the order sought when he settled the founding affidavit. The founding affidavit should have established that a demand had been made and ignored by the respondent before filing the present application for specific performance. The facts in this matter show, however, that the applicant sat on her rights and only made her demand for specific performance in January 2018. She cannot be rewarded for that inaction. The consequences for such a failure are that the claim be dismissed.

Jurisdiction

The point taken by the 1st respondent on jurisdiction is in my view misguided. 1st respondent submitted that because the parties agreed that any dispute arising from the agreement should be determined by the Magistrates Court thus ousting the jurisdiction if this court.t to the justifiable conclusion of the matter.

The fact that the parties agreed to the Magistrates' Court as being the court to resolve any disputes which may arise from the contract is neither here nor there. It is trite that this Court enjoys original jurisdiction in all matters such as the present one. An agreement signed by contracting parties does no oust the inherent jurisdiction of this Court provided for in section 13 of the High Court Act [*Chapter 7:06*]

> "**13 Original civil jurisdiction**
>
> Subject to this Act and any other law, the High Court shall have full original civil jurisdiction over all persons and over all matters within Zimbabwe"

and section 171 of the Constitution of Zimbabwe (Amendment) Act 20.

> **"171 Jurisdiction of High Court**
> (1) The High Court—
> (a) has original jurisdiction over all civil and criminal matters throughout Zimbabwe;
> (b) has jurisdiction to supervise magistrates courts and other subordinate courts and to review their decisions"

Thus the special plea taken in the present matter by the 1st respondent was appropriate in the circumstances. In the light of my foregoing findings I conclude that the applicant's case is without merit. I therefore order as follows:-

"The application is dismissed with costs".

Mutumwa Mugabe & Partners, applicant's legal practitioners
Messrs Tadiwa & Associates, respondent's legal practitioners