CITY OF HARARE
versus
AQUA- JETS (Private) Limited
and
THE REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
MUNANGATI-MANONGWA J
HARARE, 23 and 30 January 2023

Plea In Bar Opposed

Mr *A Moyo*, for the plaintiff
Mr *R G Zhuwarara*, for the 1st defendant

MUNANGATI-MANONGWA J: The adage that the law does not help the sluggard finds expression in the operation of the provisions of the Prescription Act [*Chapter 8:11*] which provides for the prescription of a debt if no action to claim the same is done within a period of three years in the absence of interruption. Such interruption can be through an express or tacit acknowledgment of liability by a debtor in which case prescription shall start running again from the date on which the interruption commenced. This court finds that this is the situation that the plaintiff finds itself in, and has not been able to extricate itself from after failing to act timeously, resulting in a dismissal of its claim as will be noted hereunder.

In this matter the court had to determine whether the claim raised by the plaintiff in which it sought cancellation of Deed of Transfer No 1084/98 and that the property held thereunder reverts to the plaintiff has prescribed or not. The facts of the matter are as follows: In 1992 the plaintiff and the first defendant entered into an agreement of sale for a certain immovable property known

as stand 14773 Harare Township of Salisbury Township Lands measuring 1 4221 Hectares (hereinafter referred to as "the property). The stand was paid for in full and plaintiff effected transfer into defendant's name and same is currently held by the first defendant under Deed of Transfer No.1084/98. Clause 7 of the agreement required the first defendant to commence erecting buildings within six months from the date of infrastructure servicing and complete the same within twelve months of such date. The first defendant did not manage to comply with this condition. On 17 August 2020 the plaintiff issued summons against the first defendant seeking inter alia the cancellation of the Deed of transfer for the property registered in the first defendant's name and that the property reverts to the plaintiff on the basis that the first defendant breached clause 7 of the agreement which required it to erect buildings within a certain period of time as aforementioned.

The first defendant entered appearance to defend and filed its plea in bar. The first defendant raised the defence that the plaintiff's claim had prescribed in terms of s 15(d) of the Prescription Act [*Chapter 8:11*] as the three (3) years within which the plaintiff was supposed to bring the claim after the claim arose had lapsed. The plaintiff's plea in bar disputed the prescription allegation and states that the first defendant had acknowledged liability through multiple requests for extension of time which requests were granted by the plaintiff. In that regard prescription was effectively interrupted.

Upon the matter being set down the parties agreed to put their evidence on affidavit. Upon perusing the affidavit the court decided to hear oral evidence which had to be tested under cross examination.

The first defendant called its first and only witness Mr Emmanuel Mujuru. This witness had earlier on deposed to an affidavit of evidence the contents of which he elected to stand by. The

witness stated that he is a director of the first defendant and has been so since March 2003. In his affidavit he confirmed the common cause facts of the purchase and transfer of the property into first defendant's name. He stated that as per the agreement the first defendant was supposed to commence construction of the building in March 1998 and complete the same within twelve (12) months that is, by March 1999.He stated that the cause of action arose on 1 April 1999 and prescribed in April 2002 at the lapse of three (3) years. The witness stated that even if it were to be held that plaintiff became aware of the breach in August 2000 prescription would run from August 2000 until August 2003.

The witness admitted that a letter dated 28 September 2000 brought out by the plaintiff's was written on behalf of first defendant by Messrs Gill Godlonton and Gerrans. That the letter was seeking extension of time to comply with the construction clause and that the letter was in response to the letter from the plaintiff dated 25 August 2000 which referred to the breach. He maintained that even if regard was to be made to that letter of September 2000 the debt would have prescribed on 27 September 2003 as prescription would have started to run on 28 September 2003. The witness fared well in his evidence and nothing material emerged from his cross examination. He admitted that he does not know the period granted when the letter of September 2000 requesting an extension was done and that no developments have been made on the property. He indicated during re-examination that there have not been any further requests for extension of time since 1 March 2003 which is the time he became a director.

The plaintiff put before the court evidence of one Phakamile Mabhena .He is the acting Town Clerk for the plaintiff. He stated on affidavit that the matter happened a long time ago when his predecessors were still in office and a lot of information and records were lost. He however confirmed that a letter was written by the plaintiff on 25 August 2000 advising the first defendant

of the breach and need to rectify the said breach. From his perusal of the record no formal communication between the parties ensued thereafter. The crux of his evidence is this: "However I learned that the defendant through its agents requested extensions of time so as to rectify the breach and the same was granted. These seem to have been oral arrangements after the letter was sent." The witness further referred to the fact that the 1st defendant was sold to new members who were not around at the time hence they also cannot deny the existence of the requests. It is apparent that the evidence of Phakamile Mabhena Moyo is simply inadmissible hearsay evidence and the only evidence that the court accepts from him pertains to the reference to the letter putting the defendant in mora which is common knowledge between the parties.

The plaintiff called Mr Hebert Munikwa a Senior Valuer in the Valuation and Estates Division. He has been with plaintiff for 20 years and he gave evidence that he familiarized with the case by reading the file pertaining to the property. He further referred to the building clause which the first defendant was supposed to comply with which it did not which is common cause. He stated that a request was made for an extension of time. He stated that "it seems an extension period was not clearly stated and has not been complied with." It was his evidence that a Mr Ramhewa was the officer dealing with the case but is now late. He further stated that several meetings were held and in one of the meetings Mr Ramhewa indicated that he had granted an extension to the first defendant. It was his evidence that no specific period was granted vis the extension. Under cross examination this witness conceded that there is nothing before the court as a record that Mr Ramhewa granted the first defendant an extension. He conceded equally that even if the letter seeking the extension of time which is dated 28 September was to be taken into account the 3 years requested therein would lapse by 1 October 2003 and the claim would still be prescribed at that juncture. The witness categorically stated that he was not aware of any oral arrangements

pertaining to any extension of time. He accepted that despite the letter of 28 September 2000 no written response was on file granting such an extension.

There is no dispute among the parties that the relief claimed by the plaintiff falls under the definition of a debt as defined by section 2 of the Prescription Act [*Chapter 8:11]* (hereinafter referred to as "the Act"). The section provides the definition of a debt as:

> "Anything which may be sued for or claimed by reason of an obligation arising from statute, contract, delict or otherwise."

Pertinent is s16 which then provides that prescription begins to run as soon as the debt is due. The provisions of s 14(1) as read with s 15(d) of the Act fixes the prescription period for such a debt at three (3) years. However s 18(1) of the Act provides reprieve in certain circumstances whilst s 18(2) regulates how prescription shall then operate after any interruption. The sections provide as follows:

18(1) The running of prescription shall be interrupted by an express or tacit acknowledgement of liability by the debtor.

18(2) if the running of prescription is interrupted in terms of subsection 1, prescription shall commence to run afresh from the date on which the interruption takes place if at the time of the interruption or at any time thereafter the parties postpone the date of the debt, from the date upon when the debt becomes due again.

Thus the section is instructive in terms of guiding would be claimants the period within which they may pursue debts before the debts become prescribed.

It is not in dispute that the first defendant was supposed to commence building sometime in March 1998 and complete around March 1999. The failure to do so amounted to breach which entitled the plaintiff to sue for cancellation of contract. Equally at that juncture prescription started to run as the debt was due. It is not in dispute that the plaintiff only raised the issue on 25 August 2000. In the letter of the plaintiff asked for reasons why the first defendant was in breach of the agreement and demanded that reasons be given by 30 September 2000. It is common cause that on 28 September 2000 the first defendant sought an extension of three (3) years and that letter has been produced as evidence. However no evidence was led to the effect that there was ever a response to that letter. So it remains in doubt whether the extension was granted and if so to what extent.

Given the fact that the first defendant had raised the issue that prescription had been interrupted the onus fell on the plaintiff to furnish evidence proving that there was interruption to the running of prescription. The evidence of the town clerk Mr Phakamile Mabhena Moyo amounts to inadmissible hearsay evidence given the provisions of the Civil Evidence Act [*Chapter 8:01]* in particular s 27(3)(a). He admitted that that as the matter happened a long time ago with a lot of information and records lost he relies on what he was advised pertaining to the matter. He stated that he learned that through its agents the defendant had requested extensions of time and that there seem to have been oral arrangements after the initial letter on the breach was sent. Such evidence is problematic in that in the evidence of records, the witness does not state who was giving him the information, he does not identify the names or persons who purportedly requested for extensions for the first defendant. Neither is there mention of the persons who approved the extensions nor the period given for the extensions. The uncertainty in the evidence comes out when this witness states that "…the erosion of evidence is simply in the fact that communication

occurred orally between parties who all no longer hold office. “It is untenable for one to seek to rely on evidence of oral discourse between parties which occurred in the witness’s absence. In essence this witness’s evidence is mere speculation in the absence of concrete evidence either documentary or acceptable hearsay. Thus the court concludes that the acting town clerk’s evidence does not assist the first defendant in discharging the onus upon it. The evidence of the second witness Mr Hebert Munikwa equally does not take the first defendant’s case any further. He indicated in evidence that one official Mr Ramhewa (now late) had granted an extension to the first defendant. He purports to have gathered that from some minute but does not produce the minute. More damning is that the witness could not substantiate the allegation but was not aware of the length of the purported extension. He conceded that the letter of September 2000 requesting an extension was not responded to by plaintiff and even assuming that an extension had been granted still prescription would have affected the claim.

Interruption of prescription can only be determined by the leading of evidence as it is from the weighing of factual evidence that a court can reach a decision on that aspect.

It is important to state that where there are allegations of interruption clear evidence of acknowledgment of liability must be led as the same has a profound effect on the calculation of the specified three year period. In considering the effect of s 18(1) of the Act GUBBAY CJ stated in *FM Zimbabwe Ltd* v *Fortress Industries Investment (Pvt) Ltd & Anor* 2000 (1) ZLR 221 (S) that”…it is the debtor or the debtor’s agent who must expressly or tacitly acknowledge an existing liability to the creditor’s agent before the running of prescription is interrupted, acknowledgement by a third party is ineffective…..” This is because once there is such an acknowledgment prescription runs afresh in terms of s 18 (2) cited earlier. Thus to simply allege that requests for extension were made and there is no evidence of acknowledgment of debt, the granting of such

extensions and the period given, would not suffice to prove interruption. It must be clear when interruption occurred. *In casu* summons was only issued in 2020 more than 20 years after the cause of action arose. Even it was to be remotely assumed that the request of September 2000 for a further three years was granted still the debt would have prescribed in 2003. The first defendant's witness gave evidence that he became a director in 2003 and no requests were made from that period till the time summons was issued against the first defendant. That in essence mean that without any proven requests for extension which would point towards interruption for a period of 20 years or even 17 years if it were to be assumed that the 2000 request was acceded to the debt would still have prescribed. For the plaintiff to succeed in alleging interruption of prescription there should have been evidence proving that for every three years from year 2000 there was acknowledgement of liability which has not been proven.

This is a case where the plaintiff has due to some inadvertence in its offices left a debt to lapse and rot until a wake up bell rung but it was already too late to salvage the debt. With no evidence of interruption of the running of prescription during the relevant material period the plaintiff cannot succeed in their defence that the prescription was interrupted. In conclusion the court finds that the plaintiff has failed to discharge the onus upon it to prove that there was interruption to the running of prescription. In that regard the debt is prescribed and plaintiff cannot sue on it. Accordingly it is ordered as follows:

The first defendant's plea in bar be and is hereby upheld with costs.

Gambe Law Group, plaintiff's legal practitioners
Kantor and Immerman, defendants' legal practitioners