REPORTABLE: (11)

ROSEMARY NYAHUYE
(In her capacity as the Executrix Dative of the Estate of Late Farayi Benjamin Njiwah (DR 4397/99)) replaced by RICHARD MANWICK DHAKA
v
(1) LEO ELECTRICAL (PRIVATE) LIMITED (2) THE MASTER OF THE HIGH COURT

SUPREME COURT OF ZIMBABWE
UCHENA JA, CHIWESHE JA & CHATUKUTA JA
HARARE, 31 JANUARY 2021 & 31 JANUARY 2023

R. Goba, for the appellant

F. Mahere, for the respondents

CHIWESHE JA: This is an appeal against the whole judgment of the High Court (the court *a quo*) sitting at Harare dated 26 August 2020 confirming the cancellation of the agreement of sale entered into between the first respondent and the late Benjamin Njiwah and ordering ejection of the appellant from the property described as Stand Number 3131 Dzivarasekwa Township, Harare (the property).

Aggrieved by the decision of the court *a quo* the appellant noted the present appeal with this court for relief.

THE FACTS

The appellant is the executrix dative of Estate late Njiwah and the first respondent is a company registered in terms of the laws of Zimbabwe. The respondent is the owner of the immovable property described above. On 26 February 1999, the respondent sold the property to the late Benjamin Njiwah. In terms of the agreement of sale the purchase price was pegged at ZW $2, 800 000.00. Of this amount the purchaser was to pay a deposit of ZWS400 000 upon signing of the agreement and the balance was to be paid in instalments up to 1 March 2002. It was further agreed that the purchaser would, in addition, be liable to pay the first respondent's mortgage bond instalments in respect of the property till the purchase price was fully paid. In the event that the purchaser failed to meet its obligations, the moneys already paid were to be converted to rentals.

The respondent avers as follows:

The deceased breached the agreement of sale by failing to pay the stipulated instalments and the respondent's mortgage bond instalments. At the time of his death, the deceased owed the respondent the total sum of ZWS$5 379 552.38. The appellant was duly appointed the executor dative of the deceased's estate. Notices were sent to her in that capacity for her to remedy the breach. The appellant admitted the breach but offered much less than the amount owing. The respondent rejected that offer and proceeded to cancel the agreement of sale. The amounts which had been paid as part of the purchase price were converted to rentals in terms of the agreement of sale.

The respondent then issued summons in the court *a quo* claiming against the appellant confirmation of cancellation of the agreement of sale and the ejectment from the property of the appellant and all those claiming through her. In her plea, the appellant resisted the claim stating that the purchase price had been paid off and that she had tendered the amount of bond which tender had been refused without lawful excuse.

PROCEEDINGS IN THE COURT *A QUO*

At the close of the respondent's case the appellant made an application for absolution from the instance. She submitted, inter alia, that the plaintiff's claim had prescribed.

The court *a quo* held that a prima facie case had been established. It accordingly dismissed the application for absolution from the instance.

It further held that prescription had not been pleaded before and that it would be prejudicial to plead such a defence at the eleventh hour. In any event, reasoned the court *a quo*, the appellant had filed a counter claim based on the same facts, which confirmed the respondent's cause of action as continuing.

The issues for determination in the court *a quo* were as follows:

(a) Whether the appellant breached the agreement of sale.

(b) Whether there was valid cancellation of the agreement of sale by the first respondent, and

(c) Whether the first respondent was entitled to an order of ejectment of the appellant and all those claiming occupation through her.

The court *a quo* found that the appellant was in breach of clause 3 and 4 of the agreement as she failed to pay the instalments in respect of the balance of the purchase price and failed to make all the bond payments with regards the respondent's mortgage bond. It also noted that the appellant had been given notice to remedy the breach and that the agreement had been properly terminated on 25 September 2012. Finally the court *a quo* found that the appellant had not led evidence that justified her continued occupation of the property.

In the result, the court *a quo* found that the respondent had proved its case on a balance of probabilities and confirmed the cancellation of the agreement of sale. It ordered the ejectment of the appellant and all those claiming through her and ordered that appellant pays costs of suit.

GROUNDS OF APPEAL

The appellant appeals the decision of the court *a quo* on the following grounds.

"(a) The court *a quo* erred and grossly misdirected itself in refusing to grant absolution from the instance in circumstances where the plaintiff had failed to establish an answerable case.

(b) The court *a quo* erred in failing to find and hold that the plaintiff's claim had prescribed.

(c) The court *a quo* erred and misdirected itself in failing to appreciate the appellant's witness, Richard Manu Dhaka's *locus standi*.

(d) The court *a quo* erred and misdirected itself in holding that the agreement between the appellant and the respondent had been lawfully cancelled."

RELIEF SOUGHT

The appellant seeks the following relief:

"1. That the instant appeal succeeds with costs; and

2. That the judgment of the court *a quo* be overturned to read as follows:

'The plaintiff's claim be and is hereby dismissed with costs and it is ordered to transfer Stand 3131 Dzivarasekwa Township held under Deed Transfer No. 1846/1995 to the estate of the late Farayi Benjamin Njiwa.'"

ISSUES FOR DETERMINATION

The grounds of appeal raise four issues for determination. These are:

1. Whether the court *a quo* erred by refusing to grant absolution from the instance.
2. Whether or not the court *a quo* erred in disregarding the appellant's special plea of prescription.
3. Whether or not the court *a quo* erred in finding that the appellant's witness lacked *locus standi*.
4. Whether or not the court *a quo* erred in holding that the agreement of sale was lawfully cancelled.

ANALYSIS

Whether the court *a quo* should have upheld the appellant's submissions on prescription.

It is prudent to first deal with this ground of appeal because, if the court *a quo* had upheld prescription, the whole matter would have been disposed of without further ado.

Both Mr *Goba*, for the appellant, and Ms *Mahere*, for the respondent, are agreed that the question of prescription was never raised in pleadings in the court *a quo* nor at pretrial stage. In her written closing submissions in response to the application for absolution from the instance mounted by the appellant in the court *a quo*, at para 43, at p 345 of the record, Ms *Mahere* made the following submission:

> "It is respectfully submitted that the first defendant is clutching at straws with its contention that the claim has prescribed. It is worth highlighting that this was never pleaded before the court. At no point has it ever been argued, that the cause of action prescribed. If anything, the first defendant filed a counterclaim on the same facts, which confirms that the plaintiff's cause of action is a continuing one. It is prejudicial for it to be raised at the 15th hour as the plaintiff has not had the opportunity to plead to or lead evidence on it. The defence of prescription is accordingly improperly before the court."

The court *a quo* was persuaded by this argument and dismissed the appellant's submissions on prescription.

Ms *Mahere* did not however cite any authority in support of her contention that the filing of a counter claim bars the appellant from raising the issue of prescription. We are not aware of any such authority and, for that reason, we are unable to agree with her in that regard.

On his part, Mr *Goba*, in his heads of argument before this Court had this to say at para 4:

> "Although prescription was not specifically pleaded by the appellant, it at all times stuck out like a sore thumb. Indeed, the issue of delay was canvassed with the witness for first respondent in cross examination. In dismissing the issue in passing as he did, without proper consideration, the learned Judge erred. Had he applied his mind properly to the issue he should at least have called on counsel to address him on that specific point orally or in written form. The point shall be persisted with at the hearing of the appeal. It was a point of law pertinently raised during the trial."

We agree with Mr *Goba* that the issue of prescription was raised during the trial, specifically in the appellant's submissions for absolution from the instance.

In this jurisdiction prescription is a remedy governed by statute.

Section 20 of the Prescription Act [*Chapter 8:11*] "the Act," provides as follows:

"20 Prescription to be raised in pleadings.

(1) No court shall of its own motion take notice of prescription

(2) A party to litigation who invokes prescription shall do so in the relevant documents filed of record in the proceedings;

Provided that a court may allow prescription to be raised at any stage of the proceedings." (own emphasis).

Contrary to Mr *Goba*'s criticism of the court *a quo*, the Act prohibits the court to raise prescription *meru moto.* Prescription must be pleaded or raised in the papers before the court. However, the proviso to subsection 2 of s 20 of the Act empowers the court, at its own discretion, to allow prescription to be raised at any stage of the proceedings. In *casu* prescription was raised during the proceedings. The court *a quo,* exercising the discretion so conferred on it,

refused to entertain the issue of prescription. The question to be asked is whether that discretion was exercised fairly, reasonably and judiciously. The answer to that question must be in the negative, given the circumstances of this case.

In terms of s 16 of the Act, prescription shall commence to run as soon as a debt is due. Section 2 of the Act defines a debt as "anything which may be sued for or claimed by reason of an obligation arising from statute, contract, delict or otherwise."

The present matter falls squarely within that definition. Generally the cause of action arises on the date that the debt is due. In cases involving instalments, prescription begins to run when the last instalment is due. In *casu* the respondent contends that the last instalment was payable on 31 August 2002.

Prescription began to run from that date. The respondent should have issued summons within 3 years from that date, namely by 31 August, 2005. The respondent did issue summons at some point in 2005. The matter was dismissed on 20 January 2006 for want of compliance with the peremptory provisions of the Contractual Penalties Act. Thereafter the respondent took no action until 12 December 2012, a period of six years! These facts are common cause. The respondent's Managing Director attributed this inordinate delay to the fact that he is ordinarily out of the country on account of his business commitments. For that reason he says he was unable to prosecute this matter timeously. Given these common cause facts the court *a quo* should have realized that a prima facie case of prescription had been established and

for that reason it should have exercised its discretion in favour of hearing the appellant's submissions on the point. If it had done so it would have found in favour of the appellant.

The plea of prescription was raised at the hearing of the application for absolution from the instance. In terms of the proviso to subsection 2 of s 20 of the Act, it is permissible for prescription to be raised at any stage of the proceedings subject to the court's discretion. In its written submissions at the hearing, the appellant stated as follows, at para 20, p 332 of the record:

> "20. It is respectfully submitted that the plaintiff's own evidence shows that the plaintiff's claim is prescribed at law."

The appellant further amplified its argument on prescription in paras 21 to 29 of the written submissions. At para 28 the appellant correctly advised the court *a quo* in the following terms:

> "28. In terms of s 20 (2) this Honorable court may allow prescription to be raised at any stage during the proceedings."

In its judgment dismissing the issue of prescription, the court *a quo* makes no reference to this provision and how it may have exercised its discretion as it was empowered to do. Other than state that the plea had been raised belatedly and that to accept the plea at that late stage would be prejudicial to the respondent's case, the court *a quo* did not make any reference to the proviso cited above. The court *a quo* seemed to have been unaware of the existence of the proviso and the right of the appellant to raise the special plea at any stage of the proceedings. It

failed therefore to exercise the discretion reposed on it by that proviso. Its failure to do so constitutes a misdirection which must be corrected by this Court.

We are aware that an appeal court cannot lightly interfere with the exercise of judicial discretion by the court a quo. Such exercise of judicial discretion may only be interfered with on limited grounds.

In *Barros a*nd *Anor v Chimphonda* 1999(1) ZLR 58 (S) at p 62 G -63A, this Court had this to say:

> "It is not enough that the appellate court considers that if it had been in the position of the primary court it would have taken a different course. It must appear that some error has been made in exercising the discretion. If the primary court acts upon a wrong principle, if it allows extraneous or irrelevant matters to guide or affect it, if it does not take into account relevant considerations, then its determination should be reviewed and the appellate court may exercise its own discretion in substitution, provided always it has the materials for doing so."

In casu the court *a quo* failed to exercise its discretion in terms of the proviso to subsection 2 of s 20 of the Act. It seems to us that the court *a quo* was not even aware of the existence of subsection (2) which gives the appellant the right to raise the issue of prescription at any stage of the proceedings. It failed therefore to exercise its discretion and for that reason acted on a wrong principle.

It wrongly entertained the submission by the respondent that allowing prescription to be raised at that stage would prejudice that party. The respondent averred that prejudice would arise as it had not been given an opportunity to prepare its defense on the issue of prescription.

There was no merit in that argument as the issue was premised on the respondent's own dilatory conduct. It was common cause that the respondent had delayed its action for an uninterrupted period of six years. No valid reason was given for that delay. The respondent simply did not have any defence to that issue. The facts speak for themselves. The only prejudice that the respondent would have suffered was that if the issue of prescription was upheld it would lose its case! That is not the kind of prejudice contemplated by the law. No prejudice can arise merely because the correct application of the law renders one's claim nugatory.

DISPOSITION

In our view therefore this Court is constrained not to interfere with the exercise of discretion by the court *a quo*. The facts show that the respondent's claim had prescribed by the time the respondent approached the court *a quo* in 2012. The issue of prescription was raised by the appellant in the court *a quo* in support of an application for absolution from the instance. The court *a quo* should have upheld the issue of prescription and, for that reason, it should have dismissed the respondent's claim there and then. It should not have proceeded to hear the matter on the merits.

We are of the view that the court *a quo* failed to properly exercise its discretion on the facts of this matter. The issue of prescription must be upheld. Having come to that conclusion, it is no longer necessary to determine the rest of the appellant's grounds of appeal.

Costs shall follow the cause.

In the result it is ordered as follows:

1. The appeal succeeds with costs.

2. The order of the court *a quo* be and is hereby set aside and in its place substituted the following:

"It is ordered that the plaintiff's claim be and is hereby dismissed with costs."

UCHENA JA : I agree

CHATUKUTA JA : I agree

Ziumbe & Partners, appellants' legal practitioners

Chizengeya Maeresa & Chikumba, 1st respondents' legal practitioners