THE MILTON GARDENS ASSOCIATION
and
SYRIL MUPANGURI
versus
TECLA MVEMBE
and
TECLA MVEMBE
and
CHAMPION CONSTRUCTORS (PVT) LTD
and
THE REGISTRAR OF DEEDS, HARARE
and
THE SURVEYOR GENERAL

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 10 May 2022 and 3 August 2022

Opposed Matter

Advocate Zhwarara for the applicants
Mr K Takundwa for the 1st respondent
Advocate Magwaliba for the 2nd respondent

MANGOTA J: On 6 November, 2000 the first respondent, Tecla Mvembe ("Tecla") sold to Max Management (Private) Limited ("Max") a certain piece of land called 60 A Newwalk, Woodlands Road of Hilton of Subdivision A of Waterfalls ("the property"). The property is situated in the District of Salisbury. It is 25, 0532 hectares in extent.

In terms of the contract between Tecla and Max, the latter was to:

i) obtain a subdivision permit;

ii) develop the property in compliance with the permit;

iii) create stands as well as

iv) sell the stands.

Tecla is allegedly the owner of the property. She holds the same under Deed of Transfer 4573/73 of 1 June, 2000.

It is in the spirit of the contract of Tecla and Max that the latter allegedly sold the stands to members of Milton Gardens Association which is the first applicant *in casu* ("the applicant"). The members, it is claimed, started constructing their houses on the purchased stands. They did so, it is alleged, with the knowledge of Tecla.

Subsequent to the sale of the property to Max and after the latter had sold the stands to members of the applicant, Tecla, on 19 September 2007, sold the property to Champion Constructors (Pvt) Ltd ("Champion") which is the second respondent *in casu*. On 14 September 2011, Champion obtained default judgment against Tecla, the Registrar of Deeds and the surveyor – general. The judgment, HC 7398/11, which left the applicant's members in the cold, as it were, directed:

a) the registrar of deeds to pass transfer of ownership of the property from Tecla to Champion- and
b) the surveyor-general to cancel a general plan he issued in respect of subdivisions of the property whereby stands of the same were created and subsequently sold to members of the applicant.

The applicant's members who were not cited in HC 7398/11 remained of the view that the default judgment adversely affected their interests in the property. They, on 19 December 2013, applied through the urgent chamber book under case number HC 10716/11 wherein they sued Champion, Tecla, the surveyor-general, the registrar of deeds and the Director of Urban Planning Services whom they respectively cited as the first, second, third, fourth and fifth respondents. The draft interim order which the court entered in their favour reads:

"INTERIM RELIEF SOUGHT

Pending the determination of this case, the following interim relief is made:

1. 2nd respondent or the Deputy Sheriff or his lawful deputy, as the case may be, be and is hereby interdicted from signing such documents and/or papers passing transfer to 1st respondent of certain immovable property namely Newwalk of Hilton of Subdivision A of Waterfalls situate in the District of Salisbury measuring 25,0532 hectares;
2. consequently, 4th respondent be and is hereby interdicted from accepting , approving such documents and/or papers as may be presented to him to effect transfer of the aforesaid property into 1st respondent's name;
3. The 3rd respondent is interdicted from implementing a new plan in place of Plan CG 2836;
4. The 5th respondent is interdicted from implementing any plan brought into effect by the 3rd respondent in place of Plan CG 2836".

The final order which the applicant sought under HC 10716/11 reads as follows:

"FINAL ORDER SOUGHT:

That you show cause to this Honourable Court why a final order should not be made in the following terms that:

1. The order granted in default by Justice Mutema on 14 September, 2011 compelling 2nd respondent to pass transfer to 1st respondent and subsequently cancelling the general plan CG 2836 in relation to a certain piece of immovable property namely: Newwalk of Hilton of Subdivision A of Waterfalls situate in the District of Salisbury measuring 25,0532 hectares, should not be set aside or rescinded;
2. The agreement of sale entered into and by the 1st an 2nd respondent (sic) on or about 10 September, 2011 in relation to a certain piece of immovable property referred to in 1 above, should not be declared null and void and subsequently cancelled;
3. The decision made by the 3rd respondent of 20 October, 2011 cancelling the general plan CG 2836 should be declared null and void and, accordingly, set aside;
4. 4th respondent be and is hereby prohibited from passing transfer and/or accepting , approving and/or authorizing any documents or papers passing transfer to any other person other than Applicant without the approval or authority of the Applicant".

It is common cause that, on the return date, the final order which sought to reverse what Mutema J granted to Champion was neither granted nor dismissed. The final order was discharged. It was so discharged on 22 January, 2014.

The discharge of the final order constitutes the applicant's cause of action. It filed this application under r 449 of the repealed rules of court. It also applied for its joinder to HC 7398/11. Its cause is that HC7398/11 was erroneously sought and granted in its absence. It couched its draft order in the following terms:

"IT IS ORDERED THAT

1. The Order by default granted in case HC 7398/11 granted on 14 September, 2011 by the Honourable Justice Mutema is hereby rescinded;
2. Leave is hereby granted for applicants and Milton Gardens Association/its members being joined as respondents in the said HC 7398/11 and for them to file their opposing papers within 10 court days of the issuance of this order by the registrar in a typed form".

Tecla, it is observed, did not file any notice of opposition to the application for rescission of default judgment and joinder of the applicant to HC 7398/11. She chose to abide by my decision.

Champion mounted a stiff opposition to the two-in-one application. It raised a number of *in limine* matters. It, however, abandoned the rest and rested its defence on only two of those. These are that the application is:

a) *res judicata*- and/or

b) prescribed in terms of the Prescription Act [*Chapter 8:11*].

The applicant's assertion is to the contrary. It insists that the application is not *res judicata*. It also asserts that the same has not prescribed.

It is pertinent for me to consider the defences which Champion is raising. These should be considered in the context of the parties' respective cases. *Res judicata,* for instance, is available to a defendant or respondent against whom the plaintiff or the applicant has filed a suit. GUBBAY JA (as he then was) discussed the origin, meaning and import of the defence of *res judicata*. He did so in *Wolfenden* v *Jackson*, 1985 (2) ZLR 313 at 316 C-D wherein he remarked that:

> "The exception *rei judicatae* is based principally upon the public interest that there must be an end to litigation and that the authority vested in judicial decisions be given effect to even if erroneous…It is a form of estoppel and it means that where a final and definitive judgment is delivered by a competent court, the parties to that judgment or their privies (or in the case of a judgment in rem) are not permitted to dispute its correctness. The origin of the doctrine is to be found in the civil authorities who laid down two requirements for its successful invocation, namely that the proceedings relied upon must be between the same parties or their privies and that the same question, *aedem quaestio*, must arise. Voet 44.2.3 says that there must also be the same cause of action"

CHIDYAUSIKU C J re-emphasized the three elements for the plea of *res judicata* to succeed. He did so in *Flowerdale Investments (Pvt) Ltd* v *Bernard Construction (Pvt) Ltd*, 2009 (1) ZLR 110 (S) wherein he stated that:

> "The essential elements of *res judicata* are that the two actions must:
> a) be between the same parties;
> b) concern the same subject –matter- and
> c) be founded on the same cause of action."

A cause of action, it is mentioned in passing, is a combination of facts that are material for the plaintiff to prove in order to succeed in his suit*: Mahahlera* v *Clerk of Parliament & Anor*, HH 107/07.

The applicant's cause of action, as it stated it in HC 10716/11, was/is not in any material respect dis-similar from what it averred in this application. Its aim and object, in the interim relief, was to place the implementation of HC 7398/11 at a stand-still position pending the return date. The interim interdict which it successfully moved the court to grant to it when its application was heard speaks to the stated fact. Its aim and object in the final order was to reverse the entire decision which the court granted in Champion's favour under HC 7398/11. It, in effect, moved that HC 7398/11 be rescinded and, with its rescission, the returning of the parties in the case to the status *quo ante* the issuance of HC 7398/11. It predicated its application for its joinder to the

rescission of HC 7398/11. It could not move for its joinder where, as *in casu*, rescission of HC 7398/11 did not take place. Without rescission, joinder of the applicant to HC 7398/11 remained a pipe dream. It was a non-starter or an impossibility, if a comparison may be favoured.

The judgment of MTSHIYA J is at p 31 of the record. The parties, as cited in the judgment, are more or less the same as are cited in this application. Both applications- HC 10716/11 and the current one, HC 1236/15- relate to the same subject-matter namely rescission of HC 7398/11. The applicant alleges, in both cases, that its membership was adversely affected by HC 7398/11, which was decided in its absence. It insists that HC 7398/11 must therefore be rescinded so that it is accorded the opportunity to defend itself *vis-à-vis* its members' occupation of the property.

Champion's plea of *res judicata* cannot therefore be said to be without merit. It is with merit. This is a *fortiori* the case given the fact that the final order which the applicant sought carries in its substance the issue of rescission of HC 7398/11 which, unfortunately for the applicant, did not come to be.

Mr *Zhuwarara'*s argument which seeks to distinquish confirmation which the applicant sought in HC 10716/11 from rescission which it is seeking *in casu* is misplaced. He knows, as much as anyone does, that, if confirmation had been granted by MTSHIYA J, its effect was to rescind HC 7398/11. He cannot therefore suggest, as he is doing, that the causes of the two applications are different. They are not. The end-result of both applications is the same, namely rescission of HC 7398/11.

MTSHIYA J dealt with the parties' submissions on the return date. HC 10716/11 had been filed through the urgent chamber book. Because of the stated fact, MTSHIYA J could neither grant nor dismiss the application. The rules of practice and procedure did not allow him to adopt the one or the other course of action. That course remained closed to him. What was open to him, based on the nature of the application which he was then dealing with, was to either confirm or discharge the provisional order. Confirmation of the provisional order is, in line with the parlance of court procedure, synonymous with granting the application. Discharge, on the other hand, was/is synonymous with dismissal of the provisional order.

Because the issue of rescission of HC 7398/11 was heard and discharged (ie. dismissed) , the applicant cannot re-visit the same matter in this application. It cannot do so without violating the principle of *res judicata*. The judgment which MTSHIYA J delivered is, in the words which the

court enunciated in *Wolfenden* v *Jackson*, a final and definitive judgment. It is neither provisional nor interlocutory. It, in fact, discharged the provisional order which the court entered in the applicant's favour prior to its consideration of the final order.

Champion's second line of defence is that of prescription. It alleges that the applicant's right to rescind the default judgment has prescribed. The defence falls under the law of prescription. This is provided for in the Prescription Act, [*Chapter 8:11*] ("the Act"). The Act provides for extinction of debts by prescription. It defines the word 'debt' to include anything which may be sued for or claimed by reason of an obligation arising from statute, contract, delict or otherwise. Section 15 of the Act makes provision for periods of prescription of debts. The debt which is under consideration in this application falls under paragraph (d) of s 15 of the Act. The paragraph enjoins the applicant to rescind the default judgment within three years of its knowledge of the judgment. If it fails to do so, as it did *in casu*, its right to rescind outside the permitted three-year period becomes prescribed. Extinctive prescription, as it is often termed, disenables it to sue for rescission. Prescription, as provided for in section 16(1) of the Act commences to run as soon as the debt is due. A debt shall be deemed to be due, according to section 16 (3), when the creditor, *in casu* the applicant, becomes aware of the identity of the debtor (ie Champion & Others) and of the facts from which the debt arises (its cause of action).

In raising the defence of prescription, Champion received the same on a platter from the applicant. Counsel for the respondent referred me to what the applicant stated in para 19 p 120 of its answering affidavit. It stated in the same as follows:

> " 19. With respect, the time that elapsed to 11 February, 2015 when we filed this application is 3 years and 5 months. Applicant's members, including myself, are not legally trained people and we relied on our legal practitioners to do what was right for us".

The statement of the applicant, as quoted in the foregoing paragraph, falls into the *res ipso loquitor* principle which speaks for itself to a point where no further debate of it remains necessary. It is my view that Mr *Zhuwarara*, for the applicant, found himself in this very embarrassing situation and he, therefore, decided not to refer to what his clients had stated under oath. He, accordingly, alleged fraud which he claimed to have existed between Tecla and Champion. His well-made statement was that fraud unravels everything. He submitted that, if the order of 14 September, 2011 was built upon fraud, nothing could stand on the default order. He argued that a litigant, the applicant *in casu*, does not lose the right to approach the court if processes have been fraudulently procured. The court, he submitted, can *mero motu* rescind to ascertain if fraud was employed. He moved me to direct the application to proceed to the merits. He insisted that, because the original plea of prescription was between Max and Tecla, Max and not Champion should have raised the plea of prescription.

Mr *Zhuwarara* did what any smart legal practitioner would have done. He did not assert that Tecla and Champion committed fraud in the manner that HC 7398/11 was entered against Tecla and others. He predicted his submissions by the word '*if*"*...then*". The reality of the matter is that no fraud was committed by either Tecla or Champion or both. Champion whom the applicant referred to the court of the magistrate for prosecution was acquitted of the charge of fraud. Its hands were observed to have been clean. This renders Mr *Zhuwarara*'s argument on fraud to be without merit.

Mr *Zhuwarara*'s submission which is to the effect that Max and not Champion should have raised the defence of prescription is without merit. It is trite that a litigant can raise a point of law at any stage of the proceedings. He can do so even where he has not raised the same in his Heads. What he cannot do, however, is to, as it were, ambush his adversary. Where, as *in casu*, prescription was raised by Max or Tecla as a defence, the applicant's attention was drawn to the existence of the same. It cannot therefore complain if Champion raises the same defence.

All the applicant could do was to deal with the defence which had been raised. Its failure to deal with it spells doom for it. This is *a fortiori* so given that the defence which was raised is the result of its own confession. Mr *Zhuwarara* did not deal with this confession. He left the same untouched. He, in fact, did not refer to it at all. He referred to allegations of fraud having been committed by Champion and Tecla. He did not, however, prove such. He did not refer to any known defences which are available to a plaintiff or applicant who is faced with the defence of prescription. He did not, for instance, allege that prescription had been interrupted or that it commenced to run on a date which would reduce the period of prescription to less than three years. Champion's plea of prescription, therefore, stands.

Champion proved its case on a balance of probabilities. The defences of *res judicata* and prescription which it raised are both not without merit. They are therefore upheld. The application is, accordingly, dismissed with costs.

Valente Ferrao : Ferrao Law Chmbers, applicant's legal practitioners
Chadyiwa and Associates, respondent's legal Practitioners