HB 306/17
HC 1426/17

SITHEMBISO MPOFU

And

EVANS SYDNEY KAPENYA

And

FREDAH KAPENYA

IN THE HIGH COURT OF ZIMBABWE
BERE J
BULAWAYO 10 & 12 OCTOBER 2017

Opposed Application

Z.C. Ncube for the applicant
C. Dube-Banda for the 1st respondent

BERE J: The plaintiff issued summons against the defendants out of this court on 27 June 2017 seeking to be paid 79% of the market value of the immovable property known as subdivision A of Lot 4A, Four Winds Estate, Bulawayo, allegedly sold by the plaintiff to the defendants in terms of the agreement of sale of 14th May 1996 and the addendum thereof entered into on the 14th of February 1997.

Upon being served with the summons the 1st defendant filed a special plea of prescription in terms of the Prescription Act[1]. It was contended by the 1st defendant that there has been an unreasonable delay in instituting the proceedings for the recovery of the alleged sum of money and that the plaintiff was accordingly barred by prescription.

It was further contended that the 2nd defendant was not before the court in that she died on 2 June 2011 and that the administration of her estate has since been concluded.

[1] Chapter 8:11

The plaintiff's case

The plaintiff's case is apparent from the comprehensive heads of argument filed.

The plaintiff's position is basically that the claim in question concerns a debt covered or secured by a mortgage bond from CABS and that because of this the life span of such a debt is 30 years. It was argued for the plaintiff that the 1st defendant could therefore only rely on or raise prescription as a defence after 30 years in terms of the Prescription Act.

In advancing its argument the plaintiff referred me to the case of *Efrolou (Pvt) Ltd* v *Muringani*[2] where the High Court held that:

> "… In terms of section 15 of the Prescription Act [Chapter 8:11], a debt generally (other than specific debts listed in the section) becomes prescribed after the lapse of three years. The term "debt" is defined in s2 to include anything which may be sued for or claimed by reason of an obligation arising from statute, contract, delict or otherwise."

In the same case my brother, MAFUSIRE J stated as follows:

> "… In terms of s15 of the Prescription Act [Chapter 8:11], a debt other than one secured by a mortgage bond, or a judgment debt … becomes prescribed after the lapse of a period of three years. In terms of section 16 of the Prescription Act, prescription begins to run as soon as the debt s due."[3]

Mr Ncube further submitted that the prescriptive period of this particular debt was regulated by section 15(a)(i) of the Prescription Act which is framed as follows:

> "15. Period of prescription of debts
>
> (a) Thirty years, in the case of –
> (i) A debt secured by mortgage bond."

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[2] 2013 (1) ZLR 300 H at p (301 E)

[3] Prescription Act Chapter 8:11

The point which was emphasized by *Mr Ncube* was that the debt forming the subject matter of the claim was a debt secured by a mortgage bond from CABS and that 17 years after the debt arose, it had still not prescribed.

It was further argued by *Mr Ncube* that the debt became due once a letter of demand had been made to the defendants, which letter placed the defendants *in mora*.

The 1st defendant's case

In response, *Mr Dube* who appeared for the 1st defendant maintained that despite the earlier agreement and the subsequent addendum having made reference to CABS, the reality on the ground was that the debt claimed by the plaintiff in this case was never secured or protected by a mortgage bond as evidenced by the failure by the plaintiff to make specific reference to the registered mortgage bond in her papers filed in court.

Counsel for the 1st defendant was very specific that CABS had not registered any mortgage bond to secure the debt as argued by the plaintiff through her counsel and that because of this the plaintiff could not rely on the provisions of section 15 (a)(i) of the Prescription Act.

Mr Dube further argued that if this debt had been secured by a mortgage bond, the plaintiff would have made its position sustainable by merely producing tangible evidence to this effect, and that its failure to do so was conclusive evidence that there was no such mortgage bond in place.

It was finally argued that the only issue which the court was seized with and which required determination was when exactly did the cause of action arise.

Assessment of the submissions

There can be no doubt that on the face of it the agreement of sale entered into by the parties, including the addendum made reference to the purchaser having to obtain a first mortgage bond from a building society (CABS).

However, as correctly argued by *Mr Dube* for the 1st defendant, there was no indication that any bond had been registered against the sold property in favour of CABS.

What is apparent from the addendum is that having managed to raise the sum of $51 000,00 towards the purchase of the property, a balance of $27 000,00 remained outstanding.

I am more inclined to accept the argument that if any mortgage bond had been registered, the plaintiff would have made its task much easier by simply referring to the specific document supporting such an averment. That indication would have stretched the prescriptive period from 3 years to 30 years as argued by the plaintiff's counsel.

I accept the argument that in a proper case where a mortgage bond is clearly established to exist, the prescription period of a debt would be 30 years as the Prescription Act dictates.

If it is accepted that the immovable property at the centre of the dispute between the parties was in fact transferred into the defendants' joint names on 22 February 2001, then it goes without saying that the period of computation of prescription must commence from that time as it signified the beginning of the cause of action in this matter.

This being a debt which was not secured by a mortgage bond, the prescription period must consequently be three years from that date.

To bring proceedings for a debt which arose in February 2001 in June 2017 is in my view to demonstrate an unmistakable lackadaisical attitude in the prosecution of this case. The delay of 17 years is more than unreasonable in the prosecution of one's case. There must be finality to litigation and parties must always be conscious of the time limits prescribed by law to bring such litigation.

The plaintiff has attempted to rely on the principle of unjust enrichment on the part of the defendants but that argument misses one fundamental consideration. Unjust enrichment is a concept that cannot escape prescription in this case. Once it is established that this debt was not

one secured by a mortgage bond, then the three year prescriptive period would still operate against the plaintiff.

Disposition

In the case of *Avril Milward and Duduzile Tracey Manhenga*[4] I remarked as follows:

> "I am tempted to refer to the wise counsel by CHIDYAUSIKU J (as he then was) in the case of *Lovemore Sando* v *Chairman of the Public Service Commission and Another* where he remarked as follows:
>
> 'Those who sit on their litigation until cows come home have only themselves to blame if condonation is returned when they finally wake up from their year of somnambulism'.
>
> Although, the learned Judge was commenting on an application that had been made for condonation of late filing of a civil action, I believe his comments apply with equal force to the present case."

The delay of 17 years in bringing this litigation is unacceptable and there can only be one outcome.

In the result the plaintiff's claim is dismissed with costs.

Messrs Ncube and Partners, plaintiff's legal practitioners
Messrs Dube-Banda, Nzarayapenga & Partners, 1st defendant's legal practitioners

[4] HH-537-17 at p 4