

PEARSON TACHIVEYI MUNGOFA  
versus  
ROBSON MAPFUNDE  
and  
GOLDEN PROPERTIES (PVT) LTD

HIGH COURT OF ZIMBABWE  
TAGU J  
HARARE, 17 March & 11 May 2016

### **Opposed Matter**

*IEG Musimbe* with *N Zvidzai*, for the applicant  
*M Mubvumbi*, for the 1<sup>st</sup> defendant  
*A Masango*, for the 2<sup>nd</sup> defendant

TAGU J: On 20 April 2015 the plaintiff issued summons against the first and second defendants jointly and severally claiming payment of a sum of US \$98 922.00, interest thereon at the legally prescribed rate from the date of judgment and costs of suit on a legal practitioner and client scale. The claim is in respect of damages arising from the breach by the first defendant working in the scope and course of his employment with the second defendant of the Seller and Estate Agent's agreement. The defendants entered appearance to defend. The second defendant requested for a number of further and better particulars to enable it to plead. Some further particulars were furnished by the plaintiff and some were refused on the basis that the information requested was not necessary for the second defendant to plead as it was a matter of evidence.

The second defendant filed a special plea and exception in the following format-

“2<sup>nd</sup> Defendant plead ads as follows to the Plaintiff's claim.

**A. SPECIAL PLEA OF PRESCRIPTION**

1. It is humbly submitted that Plaintiff's claim has prescribed.
2. The cause of action wholly arose on 15<sup>th</sup> August 2003 the three years within which to prosecute if any lapsed in 2006.
3. The Plaintiff claim is a debt in terms of the Prescription Act Chapter 8.11.
4. There was no interruption of the Prescription period because Plaintiff never successfully prosecuted his claim under the process in HC 1754/05 and HC 10122/11. The claim should thus be dismissed on that basis.
5. ALTERNATIVELY 2<sup>nd</sup> Defendant excepts to the claim on the basis that the Summons and declaration do not disclose a cause of action against the 2<sup>nd</sup> Defendant more particularly in that.

- 5.1 The 2<sup>nd</sup> Defendant is not liable on an agreement it made on behalf of the plaintiff who was its principle. Plaintiff appended his signature to the agreement of sale and is thus bound by his own signature and the caveat subscriber rule binds Plaintiff.
  - 5.2 No cause of action is consequently set out in the Plaintiff's declaration against the 2<sup>nd</sup> Defendant.
  6. 2<sup>nd</sup> Defendant excepts to the claim on the basis that it is vague and embarrassing in that it is not clear whether the claim is founded in delict or in contract.
  7. As to whatever branch of law the claim is founded under, the respective requirements for a suit under either branch have not been articulated and do not exist.
- WHEREFORE 2<sup>nd</sup> Defendant prays that the special plea and the exception may be upheld with costs being paid on a higher scale by Plaintiff and that the main claim may be dismissed with costs on a higher scale."

At the hearing of the special plea and exception the counsels for the plaintiff took two points *in limine*. The counsel for the first defendant elected not to make any oral submissions. The first point by Mr *Musimbe* was that the second defendant did not comply with r 138 (a) of Order 21 of the High Court rules in that they set the matter for hearing without the consent of the other party. The second point was that the issue of prescription was a factual issue which cannot be resolved on papers, but that evidence has to be led and for that reason the matter must be referred to trial.

Mr *Masango* opposed the points *in limine* and submitted that order 138 (b) was complied with. He referred the court to p 30 of the bundle of papers where there is notice of set down issued by the registrar on 23 November 2015 wherein the other party was notified of the date of set down. Order 21 r 138 says-

- "138. Procedure on filing special plea, exception or application to strike out**  
When a special plea, exception or application to strike out has been filed –
- (a) the parties may consent within ten days of the filing to such special plea, exception or application being set down for hearing in accordance with subrule (2) of rule 223;
  - (b) failing consent either party may within a further period of four days set the matter down for hearing in accordance with subrule (2) of rule 223;
  - (c) .....

*In casu* the counsels for the plaintiff were notified of the date of the hearing by the registrar on 23 November 2015. The special plea and exception had been filed on 23 October 2015. The matter was to be heard on 17 March 2016. In my view the second defendant though he had to first seek the consent of the other parties in terms of r 138 (a), did not do so but proceeded in terms of r 138 (b). To me there was and is still no prejudice to the other parties if the matter were to be heard as set by the registrar. The parties were given ample time to prepare and to argue their cases. Had the parties consented or failed to consent and the other party applied to proceed in terms of r 138 (b) I see no basis on which the application would have been turned down. The matter had to still be heard on 17 March 2016 which date

this court was scheduled to hear opposed matters. In the circumstances there was sufficient compliance with the rules regarding setting down of special pleas or exceptions. The first point *in limine* is therefore dismissed.

In respect of the second point *in limine* Mr *Masango* submitted that there are no factual disputes as regards the averment. He stated that the plaintiff did not seek to separate the two causes of action. He said what arose in 2003 continued in 2014 as per declaration. The issue of prescription is therefore still properly before the court and he urged the court to hear the matter on the exception and special plea.

In his declaration the plaintiff stated among other things that sometime in 2003 he entered into a verbal agreement with the second defendant duly represented by the first defendant as its registered estate agent. The defendants omitted to include an important condition of the sale agreement that the purchase price was to be paid by 18 July 2003. The plaintiff as a result was unable to cancel the agreement when the purchaser failed to pay by 18 July 2003. The purchaser managed to successfully sue the plaintiff for specific performance under case HC 8355/03. The plaintiff then instituted legal action against the second defendant under case number HC 1754/05 for damages. The second defendant then misrepresented to the plaintiff that the purchase price paid by the purchaser had been returned to the bank that had provided the mortgage finance. The plaintiff then subsequently reached a settlement with the second defendant being represented by the first defendant and he withdrew case HC 1754/04 by way of consent on 26 October 2006. The plaintiff then instituted legal action against the purchaser in case HC 10122/11 to set aside the transfer of the property based on the act that the purchase price had not been paid. During the hearing of the matter the plaintiff then discovered that the representation by the second defendant was not true. As a result the plaintiff's case was not successful and was dismissed. The plaintiff now sues the second defendant on the basis that the defendants owed him a duty of care to ensure that the agreement captured the plaintiff's interest and concerns.

However, what is critical is that the declaration in para 9 does not state when the case in case number HC 10122/11 was dismissed. The date of dismissal is critical in the calculation of the period of prescription. Furthermore, there are allegations of fraudulent misrepresentations by the second defendant which cannot be resolved on papers. In the circumstances, I agree with the plaintiff that there are factual disputes on the issue of prescription which cannot be resolved on papers. The second defendant must plead over and the case has to be referred to trial. In my view the second point *in limine* has merits.

In the result I make the following order.

IT IS ORDERED THAT

1. The first point *in limine* is dismissed.
2. The second point *in limine* is upheld. The 2<sup>nd</sup> defendant is ordered to plead over to the merits and the matter is referred to trial.

*IEG Musimbe and Associates*, plaintiff's legal practitioners,  
*Mambara and Partners*, 1<sup>st</sup> defendant's legal practitioners,  
*Musunga and Associates*, 2<sup>nd</sup> defendant's legal practitioners