GEORGE STEPHEN FUMIA

and

ELENA MARIA FUMIA

versus

MELINA MATSHIYA

(In her capacity as executrix testamentary of the

Estate of the Late Ettore Pietro Fumia)

and

FALCON HAULIERS (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE

HUNGWE J

HARARE, 27 May 2015 & 20 January 2016

**Opposed Application**

*A P de Bourbon SC,* for the applicants

*T Mpofu,* for the respondents

HUNGWE J: The applicants seek an order declaring as unlawful the allotment of certain shares in second respondent by Ettore Pietro Fumia to himself. They also seek an order for costs against the first respondent. The allotment was done on 15 November 1994. This application was filed on 30 June 2011. It is not in dispute that by that date the said Ettore Pietro Fumia had become indisposed and was no longer *compos mentis*. He has since died and the Executrix, on behalf of the deceased estate, has resisted the present application.

The factual background to this matter needs to be given in as much detail as possible for reasons which will become clear later. The first applicant is married to second applicant. The first respondent is the father to the first respondent. The second respondent is a limited liability company. The company was incorporated on 2 July 1990. On its incorporation, the applicants were both directors and shareholders of the company each holding a share in the company. The company was not trading and had no assets to its name. On 26 June 1992 the late Ettore Fumia purchased from one S Zhou, stand number 981 Kariba for ZW$13 000, 00. Notwithstanding the fact that he personally paid for the stand, the late Ettore Fumia registered it in the name of the second respondent. Between 1993 and 1995 the late Ettore Fumia built a double storey six bed-roomed house which he called Nyaminyami at a cost of ZW$ 288 269, 65. Of that amount, Dora Transport (Pvt) Ltd, a company in which both applicants were directors and shareholders, contributed only ZW$50 000, 00 being the cost of transporting material from Harare, Bulawayo, and Kwekwe to Kariba. This contribution amounts to about 17% of the total cost of developing the Kariba stand. On 15 November 1994 the late Ettore Fumia was allotted 8 shares in the second respondent and this allotment was duly registered by Taylor and company who were at the time the company’s accountants. This allotment was made with first applicant’s knowledge. He accepted it as can be clearly seen in his correspondence addressed to Mr Taylor of Taylor & Co the company’s accountants. The letter to Taylor & Co by first applicant is dated 8 June 1995. In its relevant portions it recites the following:

“Taylor & Co

P O Box 264

KWEKWE

**RE: Issuance of Shares**

With reference to the above, we are writing to advise that no further shares whatsoever shall be issued to any of the directors of this Company without a meeting being held at your office with all the Directors and yourself present.

Assuring you of our best attention at all times, we remain

Yours faithfully,

G. S Fumia”

From the affidavit deposed to by the deceased’s wife, Isabel Fumia, seeking rescission of a default judgement obtained by the present applicants when the estate had not been properly represented, the following is evident. Falcon Haulage (Pvt) Ltd does not trade. Its only assets consists in the Kariba immovable property. Dora Transport (Pvt) Ltd is a transport company set up by the first applicant with the assistance of his late father Ettore Fumia. This company contributed in the construction of the property in Kariba by ferrying building and other materials from various points around Zimbabwe. That contribution amounted to ZW$50 000,00. There was a point when first applicant failed to manage his company’s affairs when his father had bound himself as surety and co-principal debtor. As a result he had to bail that company out by paying off the first applicant’s creditors the sum of ZW$5 173 542, 17.

According to Isabel, the first applicant, an only child of the late Ettore Fumia, was unhappy that his father had married her. From 2000 onwards, the first applicant began to demand that Ettore Fumia distributes his estates during his lifetime. In one of the letter annexed to that application for rescission of judgment, the first respondents suggests to his father that he distributes his property in such a manner that only the first applicant, his wife the second applicant and their children benefit from it at the exclusion of Isabel and her children. He feared that Isabel would get most of the late Fumia’s assets. When the father refused to give in to the first applicant’s demand, he then started making claims on the Nyaminyami. When the late Fumia refused to yield to the demands by his son, the son then made claims regarding the eight shares held by the father in the second respondent. Still the late Ettore Fumia refused to acknowledge the unfounded claims as he had single-handedly bought and built the Nyaminyami. He had claimed a set-off against the sum of ZW$5 173 542, 17 paid on behalf of Dora Transport and the first applicant. He therefore disputed that the ZW$50 000, 00 contribution made by Dora amounted to 20% shareholding in the Nyaminyami. Put differently, the late Ettore Fumia refuted the applicants’ claims during his lifetime as he claimed a set-off against the sums he paid on behalf of the applicants and Dora Transport.

In his founding affidavit, the first applicant dwelt more on the failure by the account firm to obtain the consent of the directors as required by clause 4 of the company’s Memorandum and Articles of Association. He skirted around the fact that he had been aware of the allotment from as far back as 1995 when he addressed correspondence to Mr Taylor regarding the need to refer to the other directors should any future allotment be contemplated.

It is on the basis of this letter that the respondents take the point *in limine* against the grant of the application as prescribed. They also claim that having in this letter accepted the allotment as long back as 1995, the applicants are estopped from retracting the position which they earlier on had accepted when the principal player in the second respondent was still alive.

It seems to me that should I be persuaded with the argument on prescription, then I need not consider the argument on estoppel. However if I am not persuaded by it I will then consider that argument.

The first point to note is that the applicants deny that they became aware of their rights in 1995 when first applicant wrote to express his attitude on the allotment of shares in the second respondent then. They argue that they became aware of the issue on 27 November 2004. The record however shows otherwise. The terms of the letter of 8 June 1995 is in my view, quite clear. First applicant, at the very least was aware that certain shares had been allotted. He was unhappy about the matter. What exactly he was unhappy about is not clear but what is clear is that he accepted that the allotment had occurred. He expressed his view that any further allotment, should such allotment be undertaken in future, ought to occur in the manner he spelt out in his letter of 8 June 1995. That letter spells out how an allotment ought to be undertaken in future. He did not protest the legality of what had already been done. He in my view acquiesced in it such as to give ratification of the whole process. He cannot now be heard to complain about it some seventeen years after.

The principle of law on the issue is that there must be finality to litigation. The public policy rationale behind this principle is aptly set out in the text by Wessels *The Law of Contract in South Africa Vol II* para 2766 where it is stated:

“Creditors should not be allowed to permit claims to grow stale because thereby they embarrass the debtor in his proof of payment and because it is upsetting to the social order that the financial relations of the debtor towards third parties should suddenly be disturbed by the demanding from him payment of forgotten claims.”

In *Maravanyika v Hove* 1997 (2) ZLR 88 (HC) at p 95 C- D this court put the matter this way:

“That is as it should be. There should be legal certainty and finality in the relationship between parties, after a lapse of a period of time. It would be against public interest for a person who holds a complete cause of action against his or her debtor to refrain from exercising the right of action indefinitely”.

The applicants argue that what is being claimed is not a debt but a declaratur. The applicants relied on the following passage in *Evins* v *Shield Insurance Co Ltd* 1979 (3) SA 1136 (W) where the court stated:

“The word ‘debt’ in the prescription Act must be given a wide and general meaning denoting not only a debt sounding in money which is due, but also, for example, a debt for the vindication of property. While this is so ‘debt’ cannot embrace all rights between two persons. In my view, ‘debt’ in ss 10 and 15 (1) of the Prescription Act means an obligation or obligations flowing from a particular right. A cause of action accrues when ‘all the facts have happened which are material to be proved to entitle the plaintiff to succeed.”

The applicants argue that because their rights have never been disturbed in that they have never been deprived of their control of the company, therefore their intention is not to seek a final determination of those rights, their claim cannot amount to a debt. It is, according to that argument, a claim to confirm that nothing in fact took place. Alternatively, the applicants argue that should this court find that in fact the claim qualifies to be termed a ‘debt’ then the matter falls into the category of, or class where the cause of action is a continuing one. See *Hakos Cabinet Makers (Pty) Ltd v Pretoria City Council* 1971 (4) SA 465.

In their supplementary heads of argument, the applicants introduced the further argument that their application is no different from the one brought in terms of section 118 of the Companies Act *[Chapter 24:03]*. In the South African case of *Gaffoor and Another NNO* v *Vangates Investiments (Pty) Ltd and Others* 2012 (4) SA 281 (SCA) it was held that an application to ensure that the share register of a company correctly reflects the true position is not a debt for the purposes of the law of prescription, and therefore does not prescribe. The applicants rely, for that proposition, on paragraphs 31 to 36 of that judgment. Paragraph 31 of the above judgment reads:

“During the course of the hearing before this court, counsel for the appellants informed us that he was moving for only para 3 of the relief claimed in the notice of motion. In other words, the only relief claimed was the rectification of the company’s register in terms of s 115 of the Act. Counsel for the respondents, on the other hand, contended that the appellants’ ‘right to recover the shares’ is a ‘debt’ as envisaged in Chapter III of the [Prescription Act; that](http://www.saflii.org/za/legis/consol_act/pa1969171/) the three year period of prescription in respect of this right had commenced running before or on 20 October 2004, and that the right had been extinguished by prescription long before the application was launched in the court below. This being so, it was contended that, as the appellants cannot establish that they are ‘entitled’ to the shares, there is no basis on which they can claim rectification of the register of members.”

In my view, the *Gaffoor* case is distinguishable both on the facts as well as on the law. The applicants presently seek an order declaring as unlawful an allotment to first respondent of eight shares in second respondent. The claim is an ordinary declaratur which this court ought to make on the basis of the procedural irregularity which tainted the allotment. As I understand it, the court can grant such an order where it is satisfied that the applicant has made out a proper case for the grant of the relief sought. I must however consider the submission by Mr *de Bourbon*, for the applicants, whether an application in its present form amounts to an application for the rectification of the company register as envisaged in s 118 of the *Companies Act,* *[Chapter 24:03*] (“the Act”). If I find that indeed this application, for all intents and purposes, amounts to one envisaged under that section, then I am urged to conclude that since that section bestows a statutory right on the applicants, that right does not prescribe. I must decide the matters as presently constituted before me. I am unable to hold that the present application is one brought in terms of s 118 of the Companies Act.

The relevant section of the Act relied upon by counsel provides:-

**118 Power of court to rectify register**

(1) If—

(*a*) the name of any person is, without sufficient cause, entered in or omitted

from the register of members of a company; or

(*b*) default is made or unnecessary delay takes place in entering on the

register the fact of any person having ceased to be a member;

the person aggrieved or any member of the company or the company

may apply to the court for rectification of the register.

(2) Where an application is made under this section, the court may either refuse the

application or may order rectification of the register and payment by the

company of any damages sustained by any party aggrieved.

(3) On an application under this section the court may decide any question relating to

the title of any person who is a party to the application to have his name entered

in or omitted from the register, whether the question arises between members or

alleged members or between members or alleged members on the one hand and

the company on the other hand, and generally may decide any question necessary

or expedient to be decided for rectification of the register.

(4) The court, when making an order for rectification of the register, shall by its

order direct notice of the rectification to be given to the Registrar”.

The present application is not being brought in terms of the above section. I arrive at that conclusion on the basis of the following. The applicants do not contend that there is no just cause for the entry into the company register of the first respondent. They cannot make such an averment because it would be untrue. (s 118 (1) (a)). Nor can the applicants seek rectification of the register on the basis that first respondent had ceased to be a member of the company. Again this would be untrue as he has registered the second respondent and nominated his son and the wife to his son as directors. He had registered an immovable property which he had bought in the name of that company. He had every right to be a member of the company. Consequently, the applicants, in my view could not possibly have relied on this section to seek the court’s indulgence to rectify the company register. (s 118 (1) (b)) The prayer clearly indicates that this court ought to determine the matter on the basis of general law. Nowhere in the prayer is any reference to the rectification suggested by Mr De Bourbon made. It seems to me that had this matter been conceived as falling to be decided in terms of the Companies Act, then the proper procedure would have been for the applicants to withdraw the present application and file a fresh one which complied with the requirements of the Companies Act. In the absence of fundamental amendments, I am unable to consider this as an application under s 118 of the Companies Act. However, I am obliged to consider the rules relating to prescription insofar as they are applicable to the argument advanced for the applicants.

As indicated above, the applicants seek an order declaring as unlawful the allotment of eight shares in favour of the late Fumia on the basis that the allotment did not comply with article 4 of the Memorandum and Articles of Association of the company. The present papers make no reference to s 118 of the Act nor do they pretend to be couched in the language derived from reliance on that section. It seems to me that the case which the respondents were required to meet at court is that which was prepared and presented to them in the court application. That court application relied on the failure by the accountant to comply with article 4 of the memorandum and articles which required that in the disposal of shares in the company, there be consultation and consensus between and amongst the directors first. There is no suggestion that the registered members were not entitled to shareholding in the company but only that the correct procedure in the disposal of the eight shares was not followed. If regard is given to the effect of the claim, it inevitably would amount to declaring the applicants the sole shareholders. In my view, the claim is couched in a manner which does not preclude this court from determining the claim as one sounding in money and therefore a “debt” as envisaged in the *Prescription Act, [Chapter 8:11*]. The declaration that the shares were irregularly issued to the late Ettore Fumia would in effect result in the shares reverting to the other shareholders namely the applicants thereby enriching them. In that sense the claim amounts to one of return of an asset, which ordinarily would be a debt in terms of the Prescription Act. Where a time for payment is not fixed, a debt becomes due when the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises, or could have acquired that knowledge by exercising reasonable care.

In so far as the conclusion by the Supreme Court of Appeal (“SCA”) in South Africa on the point is concerned I do not doubt the correctness of the general application of the dictum that the statutory right created by the Act does not prescribe. I am of the view, however that the court there was dealing with a situation in which shareholders had acted patently unlawfully by unprocedurally depriving another shareholder of his shares without regard to that person’s rights to be heard. After his decease, the shareholders decided in the *Gaffoor* case, to deal with his shares as they pleased notwithstanding that fact that they knew at the time that no executor had been appointed to administer the affairs of the shareholder. When one was appointed, he alerted them that the estate intended to pursue its rights yet they ignored this advice. In any event the articles of Association did not provide for the procedure to be adopted in the event a member passed away.

In the South African case, the claim was one of rectification for the register of members of the company to reflect the membership of the deceased estate to the company. Because the company’s Memorandum and Articles of Association provided for the membership of that category or class shareholders and the peculiar facts surrounding the exclusion of the executor of the estate, I am of the view that rectification was specifically claimed as supported by the company’s Memorandum and Articles of Association. In the present case the applicants seek a declaratur whose net effect is to deprive the other shareholders of their share thereby enrich their own shareholding in the second respondent. The applicants were aware as far back as 1995 that Ettore Fumia had been alloted eight shares in second respondent on 15 November 1994. First applicant specifically responded to this event by advising the accountant not to allot further shares in second respondent without reference to himself. Unlike in the *Gaffoor* case, where there was no good cause for the disposal of the deceased’s shares, there was *justa causa* for the allotment in favour of Ettore Fumia. Ettore Fumia was the beneficial owner of the only asset to which the rights in the second respondent related. It is trite that for the purposes of prescription, "debt" has a broad meaning and includes the majority of litigation claims, including disputes where the thing claimed is something other than money (the return of an asset, for example). Where a time for payment is not fixed, a debt becomes due when the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises, or could have acquired that knowledge by exercising reasonable care. In *Truter & Another* v *Deysel* [2006] SCA 17 the plaintiff instituted proceedings for damages arising from medical negligence which caused the loss of his eye. He argued that prescription only started running when he lost the use of his eye five years after the first negligent medical procedure. In *Unilever Bestfoods Robertsons and Others* v *Soomar and Anor*[2006] SCA 172 the plaintiff contended that because the harm he suffered was the result of a conspiracy against him, prescription only started to run when the conspiracy ended. So in both cases the plaintiffs maintained that they were unable to institute a claim until the harm done to them was complete.

The SCA rejected this argument. It ruled that there are two distinct types of claims: either there is a single wrongful act which causes an ongoing harm (hitting a person on the head with a hammer, causing them to have a headache for several days followed by concussion) or there is an ongoing wrongful act which gives rise to a claim in law from moment to moment (someone unlawfully blocks a public road). The hit on the head is a single event. The moment the plaintiff has been hit and feels the first twinge of pain, time starts to run for the purposes of prescription. That plaintiff must claim all of their damages, both the pain they have already felt and the concussion that is still to come, in a single cause of action within three years of being hit. In the case of the road closure, for every moment that the road remains blocked one is committing a wrongful act. Prescription therefore effectively restarts with every moment that the street remains blocked. Prescription in the *Truter*case therefore started to run after the first negligent medical procedure and not when the plaintiff lost his eye. In *Unilever*the SCA held that prescription began when the plaintiff first suffered harm and not when the conspiracy came to an end.

In *Minister of Finance and Others* v *Gore NO*[2006] SCA 97, the plaintiff instituted proceedings for damages arising from a fraudulent tender process. Although the plaintiff had been convinced from inception that the tender process was tainted with fraud, he had been unable to uncover evidence of that fraud despite diligent attempts to do so. Evidence of fraud finally emerged five years after the conclusion of the tender process as a result of a separate investigation. The SCA held that the plaintiff had not been dilatory in instituting proceedings and had done all that could be expected of him in trying to uncover the facts necessary to support his cause of action. The proof of the fraud was a material fact which was necessary to support a cause of action and his claim had therefore not prescribed.

It appears to me that the law remains that the broad definition of “debt” as defined in the Prescription Act, includes a claim for the recovery of shares in the second respondent allegedly unlawfully in an allotment to the first respondent which occurred on 15 November 1994. By June 1995 the first applicant, and by inference the second applicant, was aware of the existence of this “debt” as correspondence was entered into on the subject. It is clear that the applicants were undecided as to how to prevent the inevitable from occurring following this allotment hence they resorted to all means fair and foul, to disinherit Isabel. They were aware of the first respondent’s views and the facts upon which he based his position. They did not act against this position until after the “debt” prescribed. In my view, there is no basis even in equity of considering the matter as not prescribed because it is prescribed.

In the result I make the following order:

1. The special plea in bar is upheld.
2. The application is dismissed with costs.

*Gill, Godlontons & Gerrans,* applicants’ legal practitioners

*Mtetwa & Nyambirai,* first respondent’s legal practitioners