

GAYLORD MANDIZVIDZA
and
DONALD MANGENJE

HIGH COURT OF ZIMBABWE
CHIRAWU-MUGOMBA & MANZUNZU JJ
HARARE, 11 July 2019 & 16 January 2020

Civil Appeal

E Mubaiwa, for the appellant
H Mukonoweshuro, for the respondent

MANZUNZU J This is an appeal against the judgment of the magistrate sitting at Harare on 3 April 2017 where the court upheld the special pleas of res judicata and prescription.

Six grounds of appeal were raised against the judgment before the 2nd ground was abandoned at the hearing. The grounds of appeal are somewhat unusually couched in that each is preceded with a preamble of evidence meant to demonstrate the alleged misdirection by the magistrate. We did not find that to be fatal to the grounds of appeal.

The background of this case is largely common cause. During the period 2007 and 2014 the appellant leased his house to the respondent through a written lease agreement. The respondent vacated the leased premises on 30 June 2014. It is also not in dispute that during the lease period the respondent changed a mono pump to the borehole and replaced it with a submissible pump and replaced a crastermatic pump to the swimming pool with an ordinary pump. These changes were done in contravention of clause 8 of the lease agreement which required prior written consent of the appellant. The respondent did not restore the fixtures to their original position, as per clause 8 of lease agreement, when he vacated the premises.

In 2014 the appellant sued the respondent in the Magistrate Court under Case No. 23625/14 for, inter alia, repair cost to the borehole pump. The court then ordered respondent to pay the appellant “the sum of \$50.00 being the cost of installation of the borehole pump.”

In the case which is subject of this appeal, the appellant sued the respondent in 2016 under Case No. 5770/16 for the cost of restoring a mono pump to the borehole and crastermatic pump to the swimming pool. The appellant’s claim was resisted by the respondent who raised

the defence of res judicata in respect to the borehole claim and prescription in respect to both the borehole and swimming pool claims.

The matter was argued before the court *a quo* as a stated case to decide the special pleas. After hearing the parties the magistrate upheld the special pleas and as would ordinarily follow the appellant's claims in respect to the borehole and swimming pool failed on that basis. Aggrieved by the decision the appellant lodged this appeal and raised the following grounds of appeal:

1. That the 2014 claim in respect to the borehole was not identical to the 2016 claim.
2. That appellant was unaware of when respondent effected the pump replacements.
3. That the court *a quo* ought to have called *viva voce* evidence to resolve the factual issue of when appellant became aware of the pumps being replaced.
4. That the cause of action arose when the lease terminated and not during the subsistence of the lease.
5. That the court failed to find in favour of appellant as to when pumps were replaced.

RES JUDICATA

The requirements for this plea are settled. For one to succeed one must show that:

- (a) The action is between the same parties
- (b) The two actions must concern the same subject matter
- (c) The actions must be founded upon the same cause of action.

See the case of *Flowerdale Investments (Private) Limited & Anor v Bernard Construction (Private) Limited & 2 Others*, SC 5/09 and the following authorities cited therein: *Hiddingh v Dennysen* 3 SC 424 at 450; *Bertram v Wood* 10 SC 180; *Pretorius v Divisional Council of Barkly East* 1914 AD 407 at 409; *Mitford's Exors v Elden's Exors* 1917 AD 682; *Le Roux v Le Roux* 1967 (1) SA 446 (AD); and *Voet* 44.2.3.

The fact that the action is between the same parties and concerns the same subject matter is not in dispute, that is in relation to the borehole pump. In respect to the cause of action the appellant argued that in MC 23625/14 the appellant claimed there was damage to the borehole pump and wanted to be paid the repair cost. This is the submissible pump installed by the respondent during the tenure of his lease. The court determined the issue and granted appellant \$50 for such repairs. It is further argued that the MC 5770/16 claim, while it relates to the same borehole, is now based on clause 8 of the lease agreement in that it seeks the replacement of the submissible pump with the mono pump.

In arriving at the conclusion that the claim was *res judicata* this is what the magistrate said in his judgment; “It is to be noted that the swimming pool pump was not in issue in case 23625/14, which only related to the borehole pump, for which repairs were being sought. Regarding cause of action, it is apparent that in 23625/14, plaintiff was seeking either compensation or restoration (repairs). In *casu*, plaintiff is seeking compensation only (replacement). The claims with regards to the borehole only, therefore overlap, as far as cause of action is concerned, with respect to the common claim for restoration (repairs). What this means, in respect of the borehole pump, is that plaintiff is again claiming upon the same cause of action as he did in 2014.”

Respondent argued in support of the judgment of the court *a quo*. The written submissions were not detailed enough to deal with the specific claims in respect to the two matters. Instead the submissions transgressed to the doctrine of peremption which was also argued before the magistrate. However, the court *a quo* did not make any decision on the applicability of the doctrine and its end result. In any event no appeal lies against the court’s decision on this doctrine. We find no need to pursue it in this judgment.

We disagree with the court *a quo* in its finding that *res judicata* had been proved by the respondent. Clearly the magistrate misdirected himself in the analysis of evidence and the conclusion that the claim on the borehole was *res judicata*. There are two distinct causes of action as correctly pointed out by the appellant, one for the cost of repairing the damaged borehole pump and the other for replacement/restoration cost. While the defence of *res judicata* did not succeed in the court *a quo*, that did not preclude the respondent from raising any other valid defence to the claim.

The court *a quo*’s decision on *res judicata* ought to be set aside.

PRESCRIPTION

The appellant’s claim is subject to a three-year prescription period. The issue before the court *a quo* was to determine when prescription began to run. In its judgment the court *a quo* was correct in realizing that the claim was subject to the three year prescription period. The judgment noted, “The matter was instituted in 2016, which would mean that the cause of action should have arisen not prior to 2013.”

The issue became that of knowledge on the part of the appellant as to when he became aware of the replacement of the pumps by the respondent. The contention before the court *a quo* by the respondent was that he replaced the pumps in 2009 and 2010. He argued that the appellant ought to have knowledge of that replacement, according to the judgment, because he

had the right of inspection of the property in terms of clause 13 of the agreement. The appellant had denied knowledge of the changes but argued that even if that knowledge was available the cause of action only arose when the lease agreement was terminated. He relied on clause 8 of the agreement which we have decided to recite hereunder; it reads in part; “The lessee shall not make any alterations, additions or improvements to the premises without the prior written consent of the lessor..... The lessee shall, if so required by the lessor, at its own cost remove at the expiration of the lease all movable fixtures and fittings which it may have installed in the premises, making good any damage thereby caused to the premises, and shall reinstate any fixtures and fittings of the lessor which the lessee may have removed or disconnected during the lease.” (underlining is our own).

The only issue the magistrate was faced with was to determine as to when the cause of action arose. It was necessary to determine this fact because it will then allow the calculation of the prescription period. The court *a quo* heavily relied upon clause 13 of the lease agreement which deals with the right of access to the premises by the appellant. On the basis of that the court concluded; “Even assuming that the pumps were not replaced by defendant in 2009 or 2010, one would still expect that plaintiff should have been able to discover the anomaly before the prescription threshold of 2013.” We were at a loss with this reasoning. The issue is not that one ought to but rather whether there was evidence to prove that he knew.

The appellant argued that there was factual deadlock of when appellant became aware of the change to the pumps. In our view failure to call viva voce evidence is of no consequence to this appeal. In our considered view whether or not appellant was aware of the changes in 2009 or 2010 it still takes us to the next stage of when did the cause of action arise. Did it arise in 2009 and 2010 when appellant is said have knowledge or at some later stage?

The appellant argued that with or without knowledge on the part of appellant the cause of action arose when the lease was terminated. The respondent’s argument which is not tenable is that because changes were made without the prior written authority by appellant then appellant cannot rely on clause 8 at the termination of the lease for restoration of the original pumps. Respondent cannot be heard to say so because he breached the condition of clause 8 for which he now seeks to be a beneficiary for his breach. Certainly, that could not have been the intention of the parties.

We agree with the position taken by the appellant that a reading of clause 8, (cited supra) is clear as to when the cause of action arose. A close look at the underlined words will

show that the cause of action can only arise after the lease has terminated because of the words “removed or disconnected during the lease.”

The court *a quo* therefore misdirected itself in its finding that the period of prescription started to run in 2009 and 2010.

Consequently, we find that there is merit in this appeal. Accordingly;

1. The appeal succeeds with costs,
2. The judgment of the court *a quo* be and is hereby set aside and substituted with the following;
The special pleas of *res judicata* and prescription be and are hereby dismissed with costs.

CHIRAWU-MUGOMBA J agrees.....

V Nyemba & Associates, appellant’s legal practitioners
H Mukonoweshuro & Partners, respondent’s legal practitioners