DISTRIBUTABLE (12)

JOHN CONRADIE TRUST
v
(1) THE FEDERATION OF KUSHANDA PRE-SCHOOLS TRUST
(2) MUNICIPALITY OF MARONDERA
(3) UNITED METHODIST CHURCH (MARONDERA INNER CITY)
(4) REGISTRAR OF DEEDS N.O

SUPREME COURT OF ZIMBABWE
HARARE, FEBRUARY 23, 2016 & MARCH 24, 2017

T Bhatasara, for the applicant
M Mtolongwa, for the first respondent
No appearance for the second & forth respondents
E T Moyo, for the third respondent

BHUNU JA: This is a chamber application for condonation and extension of time within which to note an appeal in terms of r 31 (3) of the Supreme Court Rules 1964. At the close of argument, I dismissed the application with costs with reasons to follow. I now proffer the reasons for that ruling.

The judgment which the applicant seeks to appeal against was handed down by the High Court on 10 June 2015. No leave to appeal was required as the judgment was final and definitive. In terms of r 30, the applicant was required to file its notice of appeal within 15 days of the date of handing down judgment. The applicant did not however, file its notice of appeal within the prescribed time limit. It only filed its notice of appeal with the Supreme Court more than five months later, on 18 November 2015.

It being common cause that the appeal was filed out of time it became incumbent upon the applicant to give a reasonable explanation for the inordinate delay of 5 months. In a bid to discharge that *onus* Peter Mpiliwa a trustee of the applicant and its erstwhile legal practitioner Gwinyai Mharapara deposed to supporting affidavits vouching that despite making numerous enquiries from the court *a quo*, the applicant only became aware of the judgment through Mr Mharapara on 30 October 2015. Mr Mharapara in turn advised Mr Mpiliwa of the existence of the judgment on 2 November 2015.

The respondents have no knowledge as to when the appellant became aware of the impugned judgment. No verification has been sought from the registrar and his staff concerning the truthfulness or otherwise of the factual averments made by the applicant's representatives concerning this issue. For that reason the respondents have mounted no serious counter argument as to when the applicant became aware of the judgment in question.

There being no serious dispute to the factual averments made by the applicant's representatives in this respect, it is entitled to the benefit of a reasonable doubt. I accordingly come to the conclusion that the delay in noting the appeal was not wilful or deliberate. Having come to that conclusion, I proceed to determine whether there are reasonable prospects of success on appeal.

In determining the applicant's prospects of success it is necessary to recap the facts pertaining to the cause of action.

The first respondent, that is to say, The Federation of Kushanda Pre-Schools is the registered owner of Stand 1894 Marondera Township (the stand) held under deed of transfer 2910/2006. The third respondent bought and took occupation of the stand from the first

respondent sometime in September 2007. The applicant unsuccessfully sued the respondents in the High Court from which it had sought the following relief:

1. To be declared the lawful owner of the stand.
2. Cancelation of the 1st respondent's title deeds.
3. Registration of the stand in its own name and
4. Eviction of the 3rd respondent and all those claiming occupation through it from the stand.

At the hearing in the court *a quo* the first respondent consented to judgment. The second respondents did not oppose the application. The third respondent however opposed the application and took a special plea contending that the applicant's cause of action had prescribed in terms of s 15 (d) of the Prescription Act [*Chapter 8:11*]. That section provides as follows:

"**15 Periods of prescription of debts**
The period of prescription of a debt shall be -

(a) thirty years, in the case of—

(i) a debt secured by mortgage bond;

(ii) a judgment debt;

(iii) a debt in respect of taxation imposed or levied by or under any enactment;

(iv) a debt owed to the State in respect of any tax, royalty, tribute, share of the profits or other similar charge or consideration payable in connection with the exploitation of or the right to win minerals or other substances;

(b) fifteen years, in the case of a debt owed to the State and arising out of an advance or loan of money or a sale or lease of land by the State to the debtor unless a longer period applies in respect of the debt concerned in terms of paragraph (*a*);

(c) six years in the case of—

(i) a debt arising from a bill of exchange or other negotiable instrument or from a notarial contract;

(ii) a debt owed to the State; unless a longer period applies in respect of the debt concerned in terms of paragraph (*a*) or (*b*)

(d) **except where any enactment provides otherwise, three years, in the case of any other debt."**

The learned judge in the court *a quo* upheld the special plea with costs, hence this appeal. For the applicant to succeed it must show on a balance of probabilities that it has reasonable prospects of success on appeal. In doing so it must point to some fault, misdirection, irregularity or impropriety in the judgment it seeks to impugn. In short it must show on a balance of probabilities that it has an arguable case on appeal.

It is now incumbent upon me to determine whether the applicant has discharged that *onus* on a balance of probabilities.

The learned judge in the court *a quo* made a specific finding of fact at p 2 of his cyclostyled judgment that counsel for the applicant had made an unequivocal concession that the applicant's cause of action had infact prescribed. This is what the learned judge had to say:

> "Mr Mharapara for the plaintiff (applicant) conceded that the running of prescription commenced in September 2007 when the third defendant (3rd respondent) purchased the stand and took occupation. He conceded that the prescriptive period of 3 years has run its course."

Having made that clear concession Mr Mharapara nevertheless argued that prescription was not a remedy available to 3rd respondent in the circumstances of this case. Strange arguments were advanced both in the court *a quo* and before me in chambers as to why third respondent should be precluded from raising prescription as a defence. It was argued that

third parties are precluded from raising prescription as a defence if they have no real right or real interest in the disputed property.

Apparently relying on the well-known common law principle that the owner of property can vindicate it at any time wherever he might find it, it was argued that prescription does not apply where the owner seeks to vindicate its property from a third party. It was further argued that 3rd respondent could not raise prescription as a defence because vindication was not a claim for a debt. No authority was cited for the strange proposition of law barring third parties from raising prescription as a defence.

The applicant's proposition has no foundation at law. A perusal of the prescription Act shows that nowhere does it prohibit or exclude third parties from raising prescription as a defence. What prescribes is the debt and not any of the parties concerned. It is therefore open to third parties to raise the defence of prescription in appropriate cases once prescription has run its course.

As we have already seen above, the circumstances under which prescription may be raised as a defence are clearly spelt out under s 15 (d) of the Prescription Act which provides that a debt except where statute provides otherwise, shall prescribe after 3 years. Section 2 of the Act goes on to define a debt as:

> 2 (1) In this Act –
>
> 'debt', without limiting the meaning of the term, includes anything which may be sued for or claimed by reason of an obligation arising from statute, contract, delict or otherwise." (My emphasis).

The phrase, "*anything which may be sued for*" gives the term 'debt' a very wide meaning synonymous with cause of action as observed by GREENLAND J in *Denton v*

Director of Customs & Excise 1989 (3) ZLR 41 at 48. In that case the learned judge had occasion to remark that:

> "Note that the word "debt "used in this Act (Prescription Act) and the words "cause thereof" used in s 178 (4) of the Customs and Excise Act mean the same thing. This is because of the wide meaning of "debt" set out in the former"

Since the applicant is suing the 3rd respondent for vindication, its suit falls squarely within the ambit of '*anything which may be sued for.*' What this means is that a claim for vindication of property amounts to a claim for a debt in terms of the prescription Act.

It therefore follows as a matter of common sense that the applicant's suit being a claim for vindication, in legal parlance it is a debt which is subject to prescription in terms of the Act. For that reason, the learned judge in the court *a quo* cannot be faulted at all for determining that the applicant's claim against the third respondent had prescribed. The mere fact that the first respondent was consenting to the applicant's claim is an irrelevant consideration which does not interrupt the running of or defeat the defence of prescription in terms of the Act.

Once prescription has run its course it deprives the aggrieved party of the remedy or relief sought regardless of whether or not one has a valid claim on the merits. Thus an owner forfeits his right to vindicate his property once prescription has run its full course as happened in this case. The nature of the defence is that it even allows a litigant at fault to keep his ill-gotten gains.

Prescription does not deal with the merits. It simply seeks to extinguish old stale debts not claimed within the prescribed time limits. The rationale for prescription was amply captured by the learned trial judge where he quotes Wessels in *The Law of Contracts in South Africa*, Vol. II para 2766 where the learned author says:

> "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."

The learned trial judge having correctly found that the applicant's claim had prescribed, I accordingly find that he has forfeited his right to vindicate the disputed property from the Applicant whether or not he has a valid claim against it.

It is for the foregoing reasons that I dismissed the applicant's application at the close of argument in chambers.

Mupanga Bhatasara Attorneys, applicant's legal practitioners.
Scanlen & Holderness, 3rd respondent's legal practitioners.