

GERALD JAILED JAJI
versus
CLAUDIUS NHEMWA

HIGH COURT OF ZIMBABWE
MHURI J
HARARE, 14 February & 2 April 2024

Opposed Application

Advocate Madzoka, for the applicant
Advocate R Mabwe, for the respondent

MHURI J: Applicant filed this application seeking a declaratur to the effect that:

1. The Deed of Settlement entered into between the applicant and respondent on 2 October 2018 and filed with the Supreme Court of Zimbabwe be and is hereby declared the only binding deed of settlement between the parties.
2. Consequently, the Deed of Settlement produced by the respondent dated 18 August 2020 be and is hereby declared not a valid document and is set aside.
3. Applicants' debt arising from the judgment HH 689/16 and the proceedings under SC 273/17 was discharged by the payment of the sum of ZWL 339 000.00 to the respondent on 12 May 2023.
4. Respondent pays applicant's costs of suit on a higher scale.

The application was opposed by respondent. At the commencement of the hearing of this application, Advocate *Mabwe* for the respondent raised three preliminary points to wit:-

1. That applicant's answering affidavit is defective and must be expunged from the record.
2. That applicant's application being a declaratur on factual issues ought not to be entertained by the court.
3. The matter has prescribed and that in any case there are material disputes of facts that cannot be resolved on papers.

To substantiate the preliminary points, it was submitted that in terms of r 59 of this court's Rules SI 202/2021 an answering affidavit must be filed within a month of date of filing of the Notice of Opposition. Where a party elects not to file within the time limits, they forfeit their right to file an answering affidavit. The Notice of opposition was filed on 7 June 2023 and respondent's heads of argument were filed on 27 July 2023 and applicant then filed his answering affidavit on 8 August 2023 that is after respondent's heads of argument had been filed. Applicant's heads of argument were only filed on 19 September 2023 that is a month and half after filing the answering affidavit.

On that note it was respondent's submission that the answering affidavit is defective as it was filed outside the peremptory requirements of the Rules, filed after close of pleadings, it contains new material which is not a reply, namely the supporting affidavit by Mutsa Mujaji. Respondent moved that the answering affidavit be expunged from the record.

On the second point, it was respondent's submission that applicant is requesting a declaratur on factual issues, that is, that in para 1 of his Draft Order he is requesting that the court makes a finding whether or not the judgment of FOROMA J was novated. In para 2 he is requesting the court to declare whether the document entered into between the parties is valid or not and that there be a determination on factual issues which determination will state that the debt was discharged. He summed up this submission by stating that the court cannot make a declaratur on factual issues as s 14 of the High Court [*Chapter 7:06*] only allows the court to entertain a matter where a party clearly spells out a right that must be pronounced upon, which is not the case in *casu*.

He moved that the application be struck off.

On the third issue, respondent submitted that if applicant wants to debate the deed of 2 October 2018 there is no basis, as that right has been extinguished by prescription. The application was filed on 23 May 2023 and if applicant's word is taken that the Deed of 2 October 2018 is binding then applicant must justify why it took him 5 years to come to court and have the matter resolved. Respondent moved that the application be dismissed because it is prescribed.

It was respondent's other submission that applicant faced another hurdle that, there are material disputes of facts which cannot be resolved on the papers which are that applicant alleges that the Deed of Settlement of 18 August 2020 is fraudulent. This requires that evidence be led to

prove the fraud. The other allegation that requires evidence to be led is the averment that the applicant's wife will verify the authenticity of the facts between applicant and respondent with regards to the signing of the 2018 Deed of Settlement. The wife has to give evidence as there is no affidavit from her to verify these facts.

Respondent's prayer was for the dismissal of the application with costs.

In response to the preliminary issues raised by respondent, Advocate *Madzoka* on behalf of the applicant, made the following submissions.

Firstly, he registered his disappointment at the manner the issues were raised in that they were not pleaded.

As regards the first issue he submitted that r 43 of this court's Rules provide a specific procedure to be followed, that is, that there must be an application and raising a point *in limine* on the date of hearing is not one of them.

As regards prescription, it was submitted that the matter is not prescribed as applicant got to know about annexure F in May 2023 and was shocked that there was another Deed. So, from May 2023 the matter cannot be said to have prescribed. Further, that in terms of s 20(2) of the Prescription Act [*Chapter 8:11*] prescription must be pleaded and submissions are not a relevant document filed of record.

On the issue of factual issues, it was submitted that there is no legal dispute that does not involve examination of factual issues. The question whether a document is valid or not is a question of law and the Supreme Court in the case of;

Zambezi Gas Zimbabwe (Private) Ltd

versus

N R Barber (Pvt) Ltd

and

The Sheriff for Zimbabwe for Zimbabwe SC 3/20 dealt with a declaration as to the payment made.

Applicant moved that this point be dismissed.

On the issue of material dispute of facts, the submissions made were that the court is entitled to take a robust and common-sense approach and resolve the matter on the papers. The issue being whether applicant and his wife signed the 2020 Deed when they are saying they were in South Africa and not Harare as indicated on the Deed.

Applicant moved that this point also be dismissed.

It is an established position that a point of law can be raised at any time even on appeal for as long as it goes to the root of the matter and also does not cause prejudice to the other party which cannot be cured by an order of costs. *Muchakata v Netherburn* 1996(1) ZLR 153(S).

This is notwithstanding, it is however prudent in my view for the party that intends to raise such points *in limine* to alert the other party in advance so that the other party does not feel ambushed when the points are raised at the eleventh hour in the hearing.

I will deal first with the issue of prescription as I am of the view that if found to have been well taken and the matter is found to have prescribed, that is the end of the matter. It will not be necessary to deal with the other points raised.

Section 20 of the Prescription Act [*Chapter 8:11*] provides as follows:

“Prescription to be raised in pleadings.

(1) No court shall of its own motion take notice of prescription.

(2) A party to litigation who invokes prescription shall do so in the relevant documents filed of record in the proceedings;

Provided that a court may allow prescription to be raised at any stage of the proceedings.”

In *casu*, it is common cause the issue of prescription was not raised in the pleadings, it was raised at the commencement of the hearing. In view of the proviso to the above s 20 which gives the court a discretion to allow the raising of the issue at any stage of the proceedings, I exercise that discretion in favour of allowing the raising of the issue of prescription. The submission that it is in trial proceedings that the issue of prescription is to be specifically pleaded and not in applications where it can be raised at any time, went unchallenged.

As stated earlier, applicant is seeking that the Deed of Settlement entered into between applicant and respondent on 2 October 2018 be declared the only binding Deed of Settlement between the parties. Its not in dispute that there is another Deed of settlement “entered” into on 18 August 2020. However, as is clear from the relief being sought, the Deed in issue is that of 2 October 2018.

Applicant filed this application on 23 May 2023. This was way beyond the three-year period provided in the Prescription Act. As rightly submitted by respondent’s counsel, correctly so, applicant cannot debate the earlier Deed (2 October 2018) as that right has been extinguished by Prescription. Applicant, cannot therefore anchor his mast on this particular Deed as it has prescribed.

I find that this point was well taken and I uphold it. It therefore follows that; this application cannot stand and is to be struck off. In view of the above finding, I find it not necessary to deal with the rest of the points raised.

In the result, the following order is made that the application be and is hereby struck off with costs.

Wintertons, applicant's legal practitioners
C Nhemwa & Associates, respondent's legal practitioners