

**ROBERT BRUCE MOFFAT**

**Versus**

**SIBONGILE SHAVA**

**And**

**THE MINISTER OF LANDS, AGRICULTURE  
AND RURAL RESETTLEMENT N.O**

IN THE HIGH COURT OF ZIMBABWE  
MOYO J

BULAWAYO 1 NOVEMBER 2021 AND 18 NOVEMBER 2021

**Opposed Application**

*J. Tshuma*, for the applicant  
*Advocate S. Siziba* for the 1<sup>st</sup> respondent

**MOYO J:** This is an application for leave to appeal to the Supreme Court against the decision of this court dismissing a special plea of *res judicata* and prescription. The application is premised on the fact that the court erred in dismissing the special plea of *res judicata* since the issues to be determined by the High Court in HC 2725/19 have already been finally determined by the Magistrate's Court in CRB 104/16.

Applicant submits that the matter before the Magistrate's Court necessarily related to declaration of status or title in respect of the property forming the subject matter of those proceedings and that in deciding same the Magistrate's Court dealt with applicant's rights of occupation of the property albeit under the auspices of the Gazetted Lands (Consequential Provisions) Act Chapter 20:28.

1<sup>st</sup> respondent argues that the special plea of *res judicata* should not be granted as clearly in terms of section 278 of the Criminal Law Codification and Reform Act (Chapter 9:23), an acquittal in criminal proceedings does not bar subsequent civil proceedings. I am inclined to be persuaded by the 1<sup>st</sup> respondent's argument in this matter as I hold the view that section 278 of the Code is very clear and unambiguous.

Applicant also raised a plea of prescription and argues that the court erred in dismissing his plea of prescription and submits that 1<sup>st</sup> respondent's claim is founded on the offer letter dated 6<sup>th</sup> June 2014 and that 1<sup>st</sup> respondent's claim falls within the definition of a debt as per the definition of debt in the Prescription Act Chapter 8:11. Applicant further submits that in terms of section 15 of the Prescription Act, a debt prescribes within 3 years. Applicant thus contends that 1<sup>st</sup> respondent's cause of action arose on 6<sup>th</sup> June 2014 and that 1<sup>st</sup> respondent failed to enforce her rights within the 3 years allowed by the Prescription Act.

1<sup>st</sup> respondent's counsel argues that 1<sup>st</sup> respondent must have been first placed *in mora* by the applicant for prescription to start running in terms of the Prescription Act and that 1<sup>st</sup> respondent's claim is infact a declaratur which is not subject to prescription as it is to do with future and contingent rights.

1<sup>st</sup> respondent's counsel submitted that the application should be dismissed for lack of prospects of success. I hold the view that in the absence of case law and Supreme Court pronouncements on the issue especially of prescription and its applicability to this case, perhaps a finding by the Supreme Court on this point would resolve this issue once and for all. I hold the view that applicant should be allowed to take the matter up with the Supreme Court

so that there are definite pronouncements by that court. I do not hold the view that applicant's contentions especially on the issue of prescription are entirely hopeless. The area of the law of prescription although governed by the Statute, is an area that requires interpretation and findings on how a particular case relates to the aspect of prescription. I thus find that the door cannot be slammed shut since this technical point may indeed be subject to different interpretation warranting that a higher court pronounces itself on the subject matter. It is for these reasons that I am persuaded to grant leave to appeal. I would not award costs against the 1<sup>st</sup> respondent for opposing the application as I hold the view that the opposition is not totally without merit. I am simply granting leave to appeal as I hold the view that the Supreme Court needs to provide guidance on the pertinent issues raised by both sides.

I accordingly grant the application in terms of the draft as amended.

*Webb, Low & Barry Inc. Ben Baron & Partners*, applicant's legal practitioners  
*Ndlovu Dube and Associates*, 1<sup>st</sup> respondent's legal practitioners