

SIBUSISIWE DUBE  
versus  
JAN HENRI ADELINE VAN BEL

HIGH COURT OF ZIMBABWE  
MAXWELL J  
HARARE, 1 March and 31 March 2022

### **Opposed Application- Special Plea**

*Manuel*, for the excipient (defendant)  
*Chivavarirwa*, for the respondent (plaintiff)

MAXWELL J: On the 11<sup>th</sup> of June 2021, the Respondent (Plaintiff in the main action) (Plaintiff) sued out summons claiming distribution of immovable and movable property following the dissolution of an unregistered customary law union between her and the Excipient (Defendant in the main action) (Defendant). She stated in her Declaration that the union was entered into sometime in 1994. She also stated that she had agreed with the Defendant that they stay together, not only as husband and wife, but as partners for a continuous period of ten years pulling resources together for the benefit of their union. She further stated that the parties agreed to mutually dissolve the union and that the properties subject of the summons remained in the Defendant's possession. In the summons, Plaintiff sought a fifty percent share of the properties in question.

In Further Particulars, Plaintiff stated that the parties agreed to stay together on the 1<sup>st</sup> of December 1994 until the year 2004. She further stated that an agreement spelling out the terms of their union was recorded in writing at the offices of Ralph and Thomas Esquire, Commissioner of Oaths on 9 January 1998. According to her, Defendant is in possession of the written agreement. Plaintiff stated that the union broke down sometime in 2007 but the parties continued to stay together until sometime in 2009 when she decided to leave. She alleged that Defendant undertook to pay her out with a garden flat which undertaking Defendant did not honour. In Further and Better Particulars, Plaintiff indicated that the undertaking to pay out with a garden flat was made in 2009.

Defendant filed a Special Plea on 1 October 2021. He stated that the cause of action arose in 2007 when the relationship between the parties broke down. As such, a period of more than ten years has passed since the cause of action arose. He asserted that by the time the summons was issued on 11 June 2021, the claim had prescribed and it therefore cannot be sustained. Defendant prayed for the dismissal of the Plaintiff's claim with costs on a legal practitioner and client scale.

In her Replication to the Special Plea, Plaintiff stated that the union ended in 2009 and Defendant proposed to buy her out that same year, and at the beginning of 2018. She asserted that Defendant interrupted the running of prescription by way of tacit acknowledgement of liability.

Counsel for Defendant argued that the Replication to the Special Plea introduced the averment that an undertaking to pay out the Plaintiff with a garden flat was made in 2018 which was inconsistent with the position taken by the Plaintiff in particulars furnished to the Defendant. In her view, the averment was an afterthought in an attempt to salvage the matter. She argued that Plaintiff's claim does not arise from the alleged undertaking but from the union itself. In response, Counsel for the Plaintiff argued that when the union terminated, there was no obligation on Defendant to act as there was no court order compelling sharing of property. As such, she argued, no debt can be pointed out and therefore there is no prescription to talk about.

Section 16(1) of the Prescription Act says that prescription shall commence to run as soon as a debt is due. The Prescription Act [Chapter 8:11] defines a debt as:

“‘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.”

In *Contract General Principles* 4<sup>th</sup> edition by Van der Merwe and Others, the authors state on page 2 that:

“The concept of an obligation is well illustrated by the common situation where one person (the creditor) is legally entitled to claim that another person (the debtor) shall deliver to him a specific thing at a future date. In terms of this obligation the creditor has a right that the debtor shall perform by delivering the thing at the specific date, and the debtor has a corresponding duty to perform.” (underlining for emphasis)

I find that in the circumstances of this case, the “special thing” has not been identified. That ‘special thing’ would be the cause of action. A cause of action was described in *Abrahams & Sons v SA Railways and Harbours* 1933 CPD 626 by WATERMEYER J who stated at 637 that:

“The proper meaning of the expression ‘cause of action’ is the entire set of facts which gives rise to an enforceable claim and includes every act which is material to be proved to

entitle a plaintiff to succeed in his claim. It includes all that a plaintiff must set out in his declaration in order to disclose a cause of action.”

What is the enforceable claim in the circumstances of this case? In my view, it would be the right to have a defined share of the properties acquired during the union. Such a right could arise from an agreement between the parties on how the property would be shared or a court order to that effect. There is no indication of what share the Plaintiff was entitled to on the dissolution of the union. For that reason I do not find that a debt has been established.

The Act provides that prescription starts running as soon as a debt becomes due. Section 16 of the Act reads:

**“16 When prescription begins to run**

(1) Subject to subsections (2) and (3), prescription shall commence to run as soon as a debt is due.

(2) If a debtor wilfully prevents his creditor from becoming aware of the existence of a debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt.

(3) A debt shall not be deemed to be due until the creditor becomes aware of the identity of the debtor and of the facts from which the debt arises:

Provided that a creditor shall be deemed to have become aware of such identity and of such facts if he could have acquired knowledge thereof by exercising reasonable care.”

In the light of a finding that a debt has not been established, there is no prescription to talk about. There was no basis for the special plea and I accordingly dismiss it. However, the costs shall be in the cause.

*Atherstone & Cook*, excipient’s legal practitioners  
*Hove Legal Practice*, Respondent’s legal practitioners