

DONALD CHARLES FERNOUGHTY  
versus  
NATHAN CHATAIKA  
and  
MAX MANAGEMENT (PRIVATE) LIMITED  
and  
MILTON GARDENS ASSOCIATION

HIGH COURT OF ZIMBABWE  
**MAXWELL J**  
HARARE, 3 November, 2021 & 12 January 2022

**OPPOSED APPLICATION-SPECIAL PLEA**

*B. Mahuni*, for Plaintiff  
*P. Mwandura*, for Defendant

MAXWELL J

The order sought in this matter is that First Defendant's Special Plea be and is hereby upheld and that the Plaintiff's claim is dismissed with costs on a legal practitioner and client scale. In the main action, Plaintiff claimed the eviction of First Defendant and all those claiming occupation through him from stand number 905 of Newark of Hilton of Subdivision A, Waterfalls, Harare. He also claimed damages in the sum of USD 2500.00 for future demolition and removal of structures constructed by First Defendant on the property.

The plaintiff's declaration is that on 1 August 2006, he entered into an agreement of sale with Second Defendant in terms of which Second Defendant sold stand number 905 of Newark of Hilton of Subdivision A, Waterfalls, Harare to him. The property is also known as stand number 905 Forbes Road, Uplands, Waterfalls, Harare. It was an undeveloped stand. Plaintiff stated that he paid the purchase price in full and has been paying service charges for the property to the developer. Second Defendant subsequently went on to execute a deed of cession of the property in Plaintiff's favour. The cession transferred all the rights, title and interest in the property to

plaintiff and he became the beneficial owner of the property. Sometime in September 2010, plaintiff discovered that First Defendant had occupied his property. He approached Third Defendant who had assumed rights and obligations for the entire Subdivision A. Third Defendant wrote to First Defendant demanding that he vacates the property and affirmed plaintiff's rights in it. First Defendant refused to vacate the property and instituted court proceedings seeking a declarator that he was the lawful owner of stand 905. The court application was dismissed for want of prosecution. Sometime in January 2021 plaintiff discovered that First Defendant had once more taken occupation of his property and had erected structures on it. As at the date of filing summons, the construction and excavation of culverts was in progress. All attempts to stop First Defendant's unlawful actions have been in vain.

First Defendant filed a Special Plea on the basis that Plaintiff's claim has prescribed. He submitted that Plaintiff discovered that he was in occupation of the property in September 2010 and that by Plaintiff's own admission First Defendant continued in occupation of the property to the date of filing the Special Plea. He further submitted that to the extent that Plaintiff failed to act within the statutory three-year period, he has abandoned his claim.

In his Replication, Plaintiff stated that there was judicial interruption of prescription when First Defendant instituted proceedings for a declarator under HC 6275/13 which was filed on 2 August 2013 when the prescribed three years were yet to run out on 7 September 2013. He also stated that by instituting proceedings before prescription had run its course, First Defendant waived the right to rely on prescription. He further stated that the cause of action arose in January 2021 when he discovered that First Defendant was now constructing permanent structures on the property. This was the erection of a perimeter wall and the digging of culverts which constituted fresh interference with plaintiff's rights. In the alternative, Plaintiff claimed that the present action is based on the judgment in HC 6275/13 wherein First Defendant's claim to the property was dismissed. Since a judgment prescribes after 30 years in terms of section 15 of the Prescription Act [*Chapter 8:11*] the claim has not prescribed.

The 1<sup>st</sup> issue to consider in this case is when the cause of action arose. According to First Defendant, the cause of action arose in September 2010 or December 2010. He argued that by that time Plaintiff had identified the debtor and had all the facts necessary to prove his claim. He claims that Plaintiff admitted that First Defendant was in occupation of the property, persisted in such

occupation and that he did not have access to the property due to First Defendant's occupation. Plaintiff alleged that the cause of action arose on 11 January 2021 when he discovered that First Defendant had once more taken occupation of his property and proceeded to erect structures on it. He further alleged that before January 2021 he had inspected the property and there was no one in occupation.

In a special plea, the Defendant must take the plaintiff's declaration as it is. See *Sabina Altaf Ahmed v Joina Development Company (Private) Limited* HH 242/20. The Plaintiff's *causa* in the declaration is the erection of structures, construction and excavation of culverts which he said was in progress at the time of the filing of the summons. As stated above, Plaintiff alleged that First Defendant "*had once more taken occupation of his property*" giving an impression that First Defendant had vacated the property at some point. In his Special Plea, First Defendant is reverting to September 2010 and alleging that he persisted in occupation. There is therefore a dispute of allegations which cannot be resolved without resort to evidence. In *Brooker v Mudhanda & Anor* SC 5/18 the Court observed that when regard is had to the nature of the plea of prescription, it must by implication become obvious that a factual dispute must be decided as to when the cause of action arose. I find that it will be inappropriate to determine when the cause of action arose without hearing *viva voce* evidence.

Even though both parties prayed for costs on a higher scale in their pleadings, no justification was given either orally or in heads of argument. Ordinary costs will meet the justice of the case.

In the result the special plea is dismissed with costs.

*Scanlen and Holderness*, Plaintiff's Legal Practitioners.  
*Wintertons*, 1<sup>st</sup> Defendant's Legal Practitioners