

CITY OF HARARE
versus
AQUA-JETS (PVT) LTD
and
THE REGISTRAR OF DEEDS N.O

HIGH COURT OF ZIMBABWE
TAGU J
HARARE 18 May & 15 September 2021

Opposed application

R. Zinhema, for applicant
I. Kativhu, for 1st respondent

TAGU J: The factual background of this matter is largely common cause. Sometime in 1992 the applicant and the first respondent entered into an agreement in terms of which the applicant sold to the first respondent a piece of land situate in the District of Salisbury called Stand 14773 Harare Township of Salisbury Township Lands measuring 1 4221 hectares (the property). In terms of clause 7 of the agreement the first respondent was to develop the stand by commencing erecting buildings within six months from the date of infrastructure servicing and complete same within twelve months from such date. Pursuant to the agreement the applicant who was the owner of the property proceeded to transfer the property to the first respondent subject to the terms of the agreement. After the stand was serviced the first respondent breached the agreement by failing to construct and erect buildings on the property as provided for in the agreement entitling the applicant to cancel the agreement and claim re-transfer of the property. Despite being made aware of the breach in writing by the applicant and given several extensions of time to develop, the first respondent failed to rectify the position leaving the applicant with no option but to cancel the agreement and institute these proceedings for cancellation of the title deed registered in favour of the 1st Respondent.

Summons and declaration were issued on the 17th August 2020. The first respondent entered appearance to defend on 17 December 2020. On 10 March 2021 the first respondent filed its plea in bar. The first respondent averred that on the 25 August 2000 the applicant placed the

first respondent in *mora* but did not take any steps to cancel the agreement and to claim a re-transfer of the property only to do so over twenty years after the cause of action for the relief sought arose. It said the applicant's claim has prescribed in terms of s 15(d) of the Prescription Act [Chapter 8:11] as the period of three years within which the plaintiff was applicant was to bring the present claim prescribed in September 2001, three years after the applicant's cause had arisen.

The sole issue to be decided in this case is therefore, whether the running of prescription was interrupted by the acknowledgment of liability and/or requests for extensions which were granted. While the parties appreciated that *viva voce* evidence was required, as was properly held in the case of (1) *Jennifer Nan Brooker v Richard Mudhanda & The Registrar of Deeds* (2) *Adrienne Staley Pierce v Richard Mudhanda & The Registrar of Deeds* SC 5/18 they opted to proceed with the matter.

What is not in dispute is that the first respondent acknowledged liability through multiple requests for extensions of time which requests were granted by the applicant.

THE LAW

Section 16 of the Prescription Act [Chapter 8:11] provides that prescription begins to run as soon as a debt is due. Section 2 defines a debt as-

“Anything which may be sued for or claimed by reason of an obligation arising from statute, contract, delict or otherwise.”

While s 14(1) as read with s 15(d) of the Prescription Act fixes the prescription period for such a debt at three years, s 18(1) of that Act provides as follows-

“The running of prescription shall be interrupted by an express or tacit acknowledgment of liability by the debtor.”

Further, s 18(2) goes further to state that-

“If the running of prescription is interrupted in terms of subsection (1), prescription shall commence to run a fresh from the date on which the interruption takes place if at the time of the interruption or at any time thereafter the parties postpone the date of the debt, from the date upon when the debt becomes due again,”

ANALYSIS

In this case the first respondent argued that all the facts giving rise to the current complaints arose on or before 30 September 1998 when the first respondent allegedly failed to commence and complete the construction. In the alternative, the applicant's claim prescribed on or before 1 October 2000 if regard is had to the letter dated 25 August 2000.

On the other hand the applicant submitted that in the present case there is an exception to the general rule, when a debtor acknowledges liability. It said in *casu*, when the first respondent requested extensions of time to develop the property, such requests which were granted constituted acknowledgments of liability by the first respondent. This interrupted prescription upon parties agreeing for extensions of time. That substantially changed the nature of the cause of action on which the plaintiff's claim is premised. It said the authorities are clear that the cause of action arises when the last of the facts required to prove the claim and win it, become known to plaintiff, if acknowledgment of liability is an exception. It said since there was no exact period agreed by the parties (for the extensions), given that these were multiple requests and extensions shows that the parties continuously interrupted prescription thereby keeping the cause of action alive for the plaintiff to sue.

GUBBAY CJ considered the effect of s 18(1) in *FM Zimbabwe Ltd v Fortress Industries Investment (Pvt) Ltd & Anor* 2000(1) ZLR 221(S) and stated the following at 224D-H; 225A-C;

“The learned judge appreciated that by virtue of s 18(1) of the Act it is the debtor or the debtor's agent who must expressly or tacitly acknowledge an existing liability to the creditor's agent before the running of prescription is interrupted, acknowledgment to a third party being ineffective. See *Markham v South African Finance & Industries Co. Ltd* 1962(3) SA 669(A) at 676 F, *Pentz v Director of Local Government & Ors* 1981(2) 77 (W) 83A....Section 18(1) of the Act, like its counterpart s 14(1) of the South African Prescription Act 68 of 1969, does not provide examples of conduct constituting an acknowledgment of liability (compare s 6(1)(a) of the former South African Prescription Act (1943). Acknowledgment may therefore take the form of part payment of interest therein (see *Cape Town Municipality v Allie* 198(2) SA 1(C), or, the giving of security for payment of the debt (see *Markham v South African Finance & Industrial Co. Ltd supra* at 676(F). And an acknowledgment of partial liability for the debt interrupts prescription in respect of the entire indebtedness. The use of by the legislature of the word ‘tacit’ in s 18(1) is important. It signifies that the debtor's words and conduct should be taken into account. See *Cape Town Municipality v Allie supra* at 7D. However, conduct alleged to constitute a tacit acknowledgment of liability must be seen in proper context. See *Benson & Anor v Walter & Ors* 1984(1) SA 73(A) at 87C- 88A.

Finally, in the review of the general principles applicable to the interruption of prescription, it should not be overlooked that in the determination of whether an existing liability was acknowledged an objective assessment must be made of what the debtor's conduct conveyed in respect of whether or not it was subjectively intended to acknowledge liability. See *Agnew v Union West Africa Insurance Co. Ltd* 1977(1) SA 617(A) at 623B-C. That inquiry will always be a factual one. See *Petzer v Radford (Pty) Ltd* 1953 SA (4)(N) at 318E”

In the present case the first respondent did not deny that there were multiple requests and extensions. It is therefore clear from the above that the first respondent's conduct of requesting extensions of time constituted acknowledgment of liability. Such acknowledgment is not cast in stone but depends on the facts and circumstances of each case. It can either be express or tacit and therefore implied on a party. Clearly the plaintiff's claim has not prescribed.

IT IS ORDERED THAT

1. The 1st respondent (defendant in the main matter)'s plea in bar is dismissed with costs.

Gambe law Group, applicant's legal practitioners
Kantor & Immerman, 1st respondent's legal practitioners.