ROBERT MATOKA
versus
SUSAN TM DUBE
and
THE MASTER OF HIGH COURT

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 16 September 2021 & 4 August 2022

Opposed Application

G Makina, for the applicant
D Dracos, for the respondent

MANGOTA J: I heard this matter on 16 September 2021. I delivered an *ex tempore* judgment in which I:

(i) dismissed the defendant's exception and directed the plaintiff to file and serve his amended summons and declaration upon the defendant within ten (10) working days of the date of this order;
(ii) dismissed the defendant's special plea of prescription;
(iii) upheld the defendant's special plea of *res judicata* only to the extent of the plaintiff's claim for $ 50 000 and dismissed the same in respect of his claim for $ 30 000 – and
(iv) ordered that costs be in the cause.

On 20 September, 2021 the first defendant ("the defendant") wrote to the registrar of this court. She requested full reasons for my decision. My reasons are these:

On 20 May, 2011 one Daniel Dube, who is now deceased ("the deceased"), sold to the plaintiff Stand number 106 Quinnington Township of Subdivision K of Quinnington of Borrowdale Estates ("the property"). The property is held under deed of transfer number 6366/00. It is 8397 square meters in extent.

The plaintiff paid to the deceased full purchase price of $ 50 000. He paid a further sum of $ 30 000 to develop the property after he took occupation of the same. He did so with the consent of the seller.

The defendant who is the executrix dative of the estate late Daniel Dube successfully challenged the sale of the property. She did so under HC 860/13 (HH 504/17). She premised her challenge on the ground that the seller was not mentally sound when he sold the property.

Plaintiff's claim, following the challenge, was/is that the estate of the deceased was unjustly enriched by payment of the purchase price and the improvements which he effected onto the property. He, accordingly, moved for a declaratur which is to the effect that the estate of the deceased, the property in particular, was unjustly enriched to the tune of $80 000 which is made up of the purchase price of $ 50 000 and the further payment of $ 30 000 which he made later. He urged the court to direct the defendant to repay the stated sum of money to him within seven days which are reckoned from the date of the grant of the order for unjust enrichment.

The defendant excepted to the plaintiff's summons and declaration. She also raised the defences of prescription and *res judicata*. She invited me to consider as well as determine the position of the parties in line with those defences.

It is pertinent for me to consider the defences which the defendant placed before me, each in turn. An exception, upon which she predicated her first defence, is a pleading in which a party states his objection to the contents of a pleading of the opposite party on the ground that the contents are vague and embarrassing or lack averments which are necessary to sustain the specific cause of action or specific defence relied upon. …..The aim of the exception procedure is to avoid the leading of unnecessary evidence and to dispose of a case in whole or in part in an expeditious and cost-effective manner: **Herbstein & van Winsen**, The Civil Practice of the High Courts of South Africa, Vol.1, 5th edition, p 630.

In our jurisdiction, the exception procedure is provided for under r 42 (1) (b) of the High Court Rules, 2021. This reads:

> " As an alternative to pleading to the merits, a party may, within the period allowed for filing any subsequent pleading :-
>
> (a)……;
>
> (b) except to the pleading or to single paragraphs thereof if they embody separate causes of action or defence as the case may be where the pleading is vague and embarrassing or lacks averments which are necessary to sustain an action or defence as the case may be".

Subrule (3) of r 42 of the rules of court is relevant. It makes it mandatory for the party which intends to file an exception to a pleading to write to his opponent stating the nature of his

complaint and calling upon the offending party to remove the cause of complaint within twelve (12) days of the complaint. It is clear, from a reading of the cited subrule, that the court is loath to uphold an exception unless it is shown that the party against whom the complaint is raised has been accorded the opportunity to remove the cause of complaint and has failed to do so**.**

Herbstein & van Winsen state to an equal effect in their above-mentioned written work. They state, at page 631 of their learned text, that:

> "….where a party intends to take an exception that a pleading is vague and embarrassing , he shall within the period allowed as aforesaid by notice afford his opponent an opportunity of removing the cause of the complaint within 15 days…".

The defendant *in casu* took the exception. There is, however, no evidence which shows that she complied with subrule (3) of r 42 of the rules of court. The probability is that she did not. She did not profer any explanation as to why she failed to comply with the mandatory rule of court. Her non-compliance with the stated rule of court places the exception which she took into question. One cannot state, with any degree of certainty, that the same was properly or validly taken. The probability is that the exception is fatally defective on account of its non-compliance with the mandatory rule of court.

The plaintiff rests his claim on the law of unjust enrichment. The court defined the meaning and import of the concept of unjust enrichment. It states the five elements which the plaintiff must establish to prove unjust enrichment. The elements, as the court defined them, are:

(i) an enrichment;

(ii) an impoverishment;

(iii) a connection between enrichment and impoverishment;

(iv) absence of justification for the enrichment- and

(v) absence of a remedy provided by law: *Callander Enterprises (Private) Limited* v *Makomborero Muza*, HH 232/ 2018.

The abovementioned five elements which relate to unjust enrichment were re-stated, with some appreciable emphasis, in *Nyamunokera* v *Makkosi & Anor*, HH 28/ 2021 wherein it was stated that:

> " ….The requisite for liability for this action are :
> a) the defendant must be enriched ;
> b) the plaintiff must have been impoverished by the enrichment of the defendant;
> c) the enrichment must be unjustified;

d) the enrichment must not come within the scope of one of the classical enrichment actions-and
e) there must be no positive rule of law which refused an action to the impoverished person."

It is on the strength of *dicta* which the court enunciated in the abovementioned case authorities that the defendant takes an exception to the plaintiff's pleadings as contained in his summons and declaration. She insists that the plaintiff failed to state, clearly and concisely, his grounds and cause of action. He, she claims, failed to plead the elements which are required to found an action on unjust enrichment. He, she alleges, violated r 11 (C) of the repealed rules of court which states that:

> "Before issue, every summons shall contain-
>
> ……
>
> …….
>
> (C) a true and concise statement of the nature, extent and grounds of the cause of action and of the relief or remedies sought in the action".

The defendant places reliance in respect of this aspect of her case on what **Herbstein and van Winsen** were pleased to state in The Civil Practice of the Supreme Courts of South Africa, 4th edition (1997) Juta & Co Ltd: Cape Town wherein the learned authors remarked that:

> " The object of a summons is not merely to bring the defendant before the court; it must also intimate to the defendant the nature of the claim or demand that the defendant is required to meet. Consequently, it is insufficient to state in the summons merely the relief claimed; the plaintiff must also set out what the cause of action is and on what it is based".

The plaintiff's statement is to the contrary. He states that a reading of his summons and declaration reveals his cause of action. He claims that the declaration makes reference to the agreement of sale which the deceased and him concluded in May, 2011. The declaration, he insists, shows that the deceased died after the latter had received from him purchase price for the property and after he had paid a further sum of money to the deceased for improvement of the property. He claims that the successful challenge of the sale of the property to him, as contained in his declaration, gave rise to his claim for unjust enrichment. He insists that he disclosed the cause of action as well as the relief which he is seeking from the defendant.

It is not, in my view, the contention of the defendant that the plaintiff should have pleaded the elements of unjust enrichment which the court defined in the abovementioned case authorities. The elements constitute the law of unjust enrichment. They cannot therefore be pleaded. The

plaintiff cannot plead the law in his summons and declaration. The elements which the cases make mention of refer to what the plaintiff must establish for him to succeed in his claim under the law of unjust enrichment. He must prove, without mentioning them in his summons and declaration, the five elements for his claim which he rests on unjust enrichment to succeed.

A cursory reading of the plaintiff's summons and declaration shows that he pleaded that the defendant was unjustly enriched by the sum of $ 80 000 which he passed on to the defendant in pursuance of the contract of sale which the latter and him concluded. The stated matter constitutes his cause of action. The summons and declaration state his prayer. He moves that the sum of $80 000 which he parted with be returned to him as the contract which gave rise to him parting with the money has been terminated by the defendant.

It requires little, if any debate, for any person who reads the plaintiff's summons and declaration to discern that the relationship which existed between the plaintiff and the defendant arose from the sale of the property to the plaintiff by the defendant. It is on the strength of their contract of sale that the plaintiff paid the purchase price of $ 50 000 for the property and expended a further sum of $ 30 000 on the property. It stands to reason that the nullification of the contract of sale by the defendant compelled the plaintiff to sue, under the law of unjust enrichment, for the return to him of the money which he parted with in terms of a contract which never came to be.

The question which begs the answer is: but for the contract of purchase and sale, would the plaintiff have parted with his $ 50 000? Would he, in other words, have allowed the stated sum of money to find its way into the pocket of the deceased or that of the defendant? A corollary question which stems from the first question is: but for his possession or occupation of the property, would the plaintiff have expended a further sum of $ 30 000 on a property which did not/ does not belong to him? Would he, in other words, have made up his mind to effect improvements on a property which belonged to the deceased or the defendant? Both questions, it is observed, would be answered in the negative. The last question which arises is: can the defendant justify her retention of the plaintiff's sum of $ 80 000 which is made up of the purchase price of $ 50 000 and the sum of $ 30 000 which he expended on improving the property which has reverted to its original owner? The answer to that question is also in the negative.

The defendant, it is obvious, cannot retain both the money and the property without violating the principles of the law of unjust enrichment. It is for the mentioned reason, if for no

other, that the plaintiff sued for a return of the money which he parted with on the ground of unjust enrichment. He stated his cause of action and the relief which he claims in a clear, cogent and concise manner. This leaves the defendant with no choice but to plead to it. The defendant cannot, *ex facie* the summons and declaration, be heard to complain that the plaintiff's pleadings are vague and embarrassing. If they were, as she would have me believe, nothing prevented her from writing complaining about what was unclear to her and urging the plaintiff to remove the source of her complaint. Alternatively, she could easily have requested for further particulars from the plaintiff. The rules of court allow her that leeway which she failed to employ for reasons which are best known to herself. All she was able to do was/ is to take an exception where none was warranted.

During submissions, counsel for the plaintiff urged me to direct that the latter be accorded the opportunity to amend his summons and declaration in line with the complaint of the defendant. Although there was nothing for the plaintiff to amend, as far as his pleadings were/are concerned, I accorded the opportunity to the plaintiff to amend his summons and declaration, in line with his intention, and serve the same on the defendant within ten (10) working days of the date of the order. I, in the mentioned regard, placed reliance on what the Supreme Court stated in *Adler* v *Elliot*, 1988 (2) ZLR 283 at 292 B wherein it remarked that:

> " A claim should not be dismissed on an exception where it is possible that the party affected may be able to allege further facts that would disclose a cause of action".

On a conspectus of the point which the defendant took in respect of the exception, therefore, I remain satisfied that the exception was without merit and I dismissed it with amendments which the plaintiff moved me to grant to him.

The defendant's contention in her second defence is that extinctive prescription set in. It, she claims, bars the plaintiff from suing her. In stating as she is doing, she places reliance on the Prescription Act [*Chapter 8:11*] ("the Act"). This provides, in s 15, that any debts which are not specifically referred to therein prescribe after three years. The Act defines a debt to include anything which may be sued for or claimed by reason of an obligation which arises from statute, contract, delict or otherwise. Subsections (2) and (3) of the Act state that prescription shall commence to run as soon as a debt is due. The same provide that a debt shall not be deemed to be due until the creditor becomes aware of the identity of the debtor and the facts from which the debt arises.

The question which begs the answer is when did the plaintiff's cause of action arise? The defendant's statement on the same is that it arose on 3 August, 2017 when the court set the agreement of sale of the property aside. She insists that, on the mentioned date, he became aware of the material facts for him to sue on the basis of unjust enrichment.

The plaintifff's counter-argument is that his cause of action arose on 20 February, 2020 when the appeal which he filed under SC 618/17 was dismissed. He disputes that prescription started to run on 4 August, 2017. He insists that it started to run on 21 February, 2020. He argues, in the alternative, that, even if it were to be accepted that prescription started to run on 4 August, 2017 its running was interrupted by the appeal which he filed against the court *a quo's* decision which terminated his contract of sale with the defendant.

If the submissions of the defendant were anything to go bye, as she insists that they hold, I would have had no difficulty in singing in her corner. I would have done so on the basis that the plaintiff would have filed his claim some eighteen (18) months outside the three-year period which is stipulated in s 15 (d) of the Act. The fact of the matter, however, is that the court cancelled the parties' contract on 3 August, 2017. The plaintiff appealed that decision to the Supreme Court. The appeal, it is trite, suspends the decision of the court *a quo*. The suspension remains extant until the appeal is either withdrawn or heard and determined. Before that hearing and/or determination, therefore, prescription cannot run. It remains in suspension pending the Supreme Court's conclusion of the appeal. The appeal interrupts the running of prescription.

It is for the mentioned reason, if for no other, that I remain of the correct view that extinctive prescription cannot be said to have barred the plaintiff from suing to recover the money which he parted with pursuant to the contract which the court set aside on 3 August, 2017. It is only after his appeal was dismissed that the plaintiff became aware of the debt which was / is due to him as well as the identity of the debtor and the facts from which the debt arises.

However this matter is considered, prescription did not run its course. It could not run its course from 3 August, 2017 because the appeal which the plaintiff filed interrupted its running. It did not run its course from 20 February, 2020 to 31 March, 2021 when the plaintiff filed the present suit against the defendant. That the plaintiff did not lodge any claim with the defendant in terms of s 43 of the Administration of the Estates Act cannot come into the equation of prescription which the defendant raised as a defence to his claim. When the defendant gave public notice to

creditors who had claims against the estate of the deceased, the plaintiff was already before the court. There was therefore no need on his part to pursue his remedies outside the avenue which he had chosen for himself. The defendant's statement which she made under the Administration of Estates Act is, therefore, irrelevant to the circumstances of the present matter.

Prescription, as has already been observed, is not available to the defendant. Her defence on that aspect of the case is, accordingly, dismissed.

The defendant's last line of defence is that of *res judicata*. CHIDYAUSIKU C J outlined the elements of this defence. He did so in *Flowerdale Investments (Pvt) Ltd & Anor* v *Bernard Construction (Pvt) Ltd & Others*, 2009 (1) ZLR 110 (S) at 116 E wherein he remarked that:

> "The essential elements of res judicata are –
> The two actions must be between the same parties;
> The two actions must concern the same subject-matter; and
> The two actions must be founded upon the same course of action".

The defendant claims that the plea of *res judicata* is available to her. She states that the same parties who were before the court in *Susan Taurai Mapunde Dube N.O* v *Robert Matoka & 2 Others* are before the court *in casu.* She claims that, whilst the stated was/is the position, *the parties' roles were/ are reversed*.

The statement of the defendant which is to the effect that the roles of the parties who appeared before the court in *Susan Taurai Mapunde Dube N.O* v *Robert Matoka & 2 Ors* were reversed is self-revealing. The plaintiff's cause of action could never have been the same as that of the defendant's cause of action. The two must have been diametrically opposed to each other. The requirement which states that the two actions must be founded upon the same cause of action which is a *sine qua* non aspect of the plea of *res judicata* is therefore not met in the instant set of circumstances. It is on the mentioned basis that it cannot be suggested that the defence of *res judicata* is available to the defendant. It is not. It is not because one of its three elements is absent from the case of the parties.

The defendant's statement on the defence of *res judicata* is that NDEWERE J who determined the case of *Susan Taurai Mapunde Dube N.O* v *Robert Matoka & 2 Ors* made a finding which was to the effect that the plaintiff did not pay to the defendant the sum of $ 50 000 for the house. It stands to reason that the plaintiff's claim is, to the extent of the $ 50 000 upon which the court

made a finding, *res judicata*. That is so because the claim encompasses all the three requirements of the defence of *res judicata*. These are:

a) two actions which are between the same parties;
b) two actions which relate to the same subject-matter – and
c) two actions which are founded upon the same cause of action.

What has been stated in regard to the finding of NDEWERE J on the issue of payment of $ 50 000 by the plaintiff to the defendant remains inapplicable to the plaintiff's claim for $ 30 000 for improvement of the house. That matter was never before the court. It is a new and stand-alone matter to which the plea of *res judicata* does not apply. The defendant's defence of *res judicata* therefore succeeds in one part and fails in the other. It succeeds to the extent of the plaintiff's claim for the refund of $ 50 000. It fails to the extent of the plaintiff's claim for the refund of $ 30 000 which he paid for the improvement of the house which reverted to its original owner.

In the circumstances of the present matter, therefore, the following order obtains:

i) The defendant's exception is dismissed with directions for the plaintiff to file and serve his amended summons and declaration upon the defendant within the ten (10) working days of the date of this order;
ii) The defendant's special plea of prescription is dismissed;
iii) The defendant's plea of *res judicata* is upheld in respect of payment by the plaintiff of $ 50 000 and is dismissed in respect of payment by the plaintiff of $ 30 000.

Mugiya and Muvhami Law Chambers, plaintiff legal practitioners
Honey and B Lankenberg, first defendant's legal practitioners