

SEACREST INVESTMENTS (PRIVATE) LIMITED
versus
INCHDALE INVESTMENTS (PRIVATE) LIMITED
and
STANDARD CHARTERED BANK OF ZIMBABWE LIMITED

HIGH COURT OF ZIMBABWE
BHUNU J
HARARE, 17 March 2009 and 8 July 2009

Mr *Gunje*, for the plaintiff
Ms *Njerere*, for the second defendant
No appearance for the first defendant

Civil Trial – Special Plea

BHUNU J: Sometime in October 1999 the plaintiff purchased a certain piece of undeveloped land from the first defendant, commonly known as Number 1 Rosedeane Gardens, Ashdown Park Harare.

Before the plaintiff had obtained title, the second defendant obtained judgment against the first defendant and had the property sold in execution to one Jotwell Matshazi who has since taken title.

It is common cause that the plaintiff became aware of the sale in execution sometime in January 2003 when he issued a court application in case number HC 366/03 seeking cancellation of the sheriff's sale.

The plaintiff's bid to have the sheriff's sale set aside failed both in the High Court and the Supreme Court on appeal. The plaintiff did not at that stage raise the alternative claim of damages for breach of contract which claim was open to it on the same set of facts. By the same token it did not raise the delictual claim open to it on the same set of facts against the second defendant.

Despite having had knowledge of the sheriff's sale way back in January 2003, the plaintiff only issued summons against both defendants on 19 April 2007 claiming cancellation of the agreement of sale and damages for breach of contract in the sum of three billion five hundred million dollars (\$3 500 000 000-00. The summons was served on the second defendant on 24 April 2007.

The plaintiff also issued court process under case number HC 1421/07 but withdrew the same under challenge.

The first defendant has not appeared to defend the action whereas the second defendant has appeared to raise in the main the special plea of prescription. It has also excepted to the plaintiff's declaration arguing that it raises no cause of action. It has also raised the special defence of *lis alibi pendens* that is to say, the matter is pending in another court.

The cardinal issue for determination is however, whether or not the plaintiff's claim has prescribed. The other defenses appear to be mere make weights.

Prescription

Section 15(d) of the Prescription Act [*Cap 8:11*] as read with s 16 provides that debts of this nature are extinguished by prescription after a period of three years from the date the debt becomes due.

In the case of *Maravanyika v Hove* 1997 (2) ZLR 88 at p 95E MALABA J as he then was held that for a debt that does not arise from contract prescription does not begin to run until the creditor has knowledge of the debt and of the facts giving rise to the debt.

In this case the plaintiff had knowledge of the debt and the facts thereof at the latest in January 2003 when he issued summons under case number HC 366/03. The prescribed three year period was therefore due to expire in January 2006. I consider it idle talk for the plaintiff to suggest that the defendant only became aware that it was owed damages for breach of contract when it lost its case against the defendants in the Supreme Court on 29 November 2006.

This can hardly be true because the plaintiff's claim for cancellation of the sheriff's sale was based on the same cause of action that is to say the alleged breach of contract. At that early stage the plaintiff must have known and therefore did know that if the defendants were in breach of contract it was entitled to damages.

Under the circumstances it does not make sense to say that the plaintiff only realized that it was entitled to a claim for damages when the Supreme Court upheld the High Court's decision refusing to set aside the Sheriff's sale. This is for the simple reason that the plaintiff knew all along that the defendants had breached the contract of sale and as such it was entitled to damages.

The mere fact that the plaintiff elected not to claim damages at that early stage is not to detract from the fact that it was aware that it was owed damages for breach of contract.

It was however, strenuously suggested on the plaintiff's behalf that the running of prescription was interrupted in terms of s 19 (2) by the issuing of court process under case number HC 366/03.

While it is correct to say that the issuing of court process interrupts the running of prescription s 19 (3)(a) provides that unless the debtor acknowledges liability, the interruption of prescription in terms of subs (2) shall lapse and the running of prescription shall not be deemed to have been interrupted, if the creditor does not successfully prosecute his claim under the process in question to final judgment.

It is common cause that the plaintiff did not successfully prosecute any of his previous claims against the defendants. He lost case number HC 366/03 both in the High Court and in the Supreme Court and he withdrew case number HC 1421/07 under challenge.

It is an established fact that under case number HC 366/03 the plaintiff was not claiming payment of the debt which he is now claiming but cancellation of the sheriff's sale. As the claim under case number HC 366/03 was materially different from the present claim the issuing of court process in that case did not interrupt the running of prescription in relation to the debt which he is now claiming.

I am of the firm view that where one has an alternative claim arising from the same set of facts and he chooses not to raise the alternative claim in his summons as happened in this case, the issuing of such summons does not interrupt the running of prescription against the alternative claim. One cannot wait until the main claim has been dismissed by the court on the same set of facts so that he can have a second bite at the cherry by raising the alternative claim as a fresh cause of action.

That being the case I hold that the plaintiff's claim against the second defendant both in contract and delict, has prescribed.

Exception

The plaintiff issued summons against the second defendant claiming damages for breach of contract in circumstances where there was never any contract between them. When the plaintiff excepted, the defendant like a chameleon changing its colours filed an amendment

to its declaration on 26 October 2007, now claiming delictual damages for breach of duty of care.

It is needless to say that the amendment whether valid or invalid does not help the plaintiff's case as it is based on a prescribed cause of action.

Lis alibi pendens

I consider that it is no longer necessary to determine the validity or otherwise of this defence considering that the plaintiff's claim against the second defendant has been extinguished by prescription.

In the result the plaintiff's claim having been extinguished by prescription, it is accordingly ordered, that the plaintiff's claim against the second respondent be and is hereby dismissed with costs.

Gunje Chakasara Law Firm, plaintiff's legal practitioners
Honey & Blanckenberg, 2nd respondent's legal practitioners