CLAUDIOUS MAPEDZAMOMBE
versus
EMILY MHINI
and
COMMERCIAL BANK OF ZIMBABWE
and
REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 11 March 2014 and 19 March 2014

Civil trial

Plaintiff, in person
L. Uriri, for the 1st defendant
T.S Manjengwah, for the 2nd defendant
3rd defendant, in default

MATHONSI J: When the plaintiff defaulted before GARWE J (as he then was) on 30 June 1999, in an application brought by the first defendant seeking a decree of perpetual silence almost 15 years ago, not only had he been to the Supreme Court and back, he had also achieved the remarkable feat from about 1992, of filing not less than 18 cases out of this court against the first defendant and other parties over the same dispute. It was a display of a never-say-die attitude that may still rank as a record in this country's legal history, only that perhaps no one has ever bothered to document.

The source of the plaintiff's disquiet and agitation has always been the sale in execution of his princely property, known as Stand 606 Northwood Township 4 of Sumben in the District of Harare, by the second defendant. The defendant was the unfortunate beneficiary of that sale and has been on the receiving end of the endless litigation since then. The second defendant had taken judgement against the plaintiff and moved to sell his property in execution. The sale took place on 18 November 1994 and was confirmed by the Sheriff on 8 March 1995, despite spirited efforts by the plaintiff to prevent it.

In his attempt to reverse the sale of the property to the first defendant, the plaintiff found himself at the Supreme Court where in *Mapedzamombe v Commercial Bank of*

Zimbabwe and Anor 1996 (1) ZLR 257 (S) the apex court delivered judgement against him on 4 March 1996 virtually upholding the sale and transfer of the property to the first defendant. At 260 E-G GUBBAY CJ pronounced that:

> "When the sale of the property not only has been properly confirmed by the Sheriff but transfer effected by him to the purchaser against payment of the price, any application to set aside the transfer falls outside r 359 and must conform strictly with the principles of the common law. This is the insurmountable difficulty which now besets the appellant. The features urged on his behalf, such as the unreasonably low price obtained at the public auction and his prospects of being able to settle the judgement debt without there being the necessity to deprive him of his home, even if they could be accepted as cogent, are of no relevance. This is because under the common law, immovable property sold by judicial decree after transfer has been passed, cannot be impeached in the absence of an allegation of bad faith, or knowledge of the prior irregularities in the sale by execution, or fraud."

At 261B, the court concluded that:

> "It follows therefore that the registration of the property in the name of the second respondent must be allowed to stand."

It was those findings and conclusions made by the Supreme Court which may have informed the plaintiff's resilient conduct in years that followed including his private prosecution of the first defendant in the criminal court and his endless probing of the manner in which the sale was conducted. He sought to prove bad faith, irregularities and then return to court. In the process he filed a number of claims in this court as I have already said culminating in the judgement of GARWE J (as he then was) in *Mhini v Mapedzamombe* 1999 (1) ZLR 561 (H) where at 566C-D the court lamented:

> "From the above, it is apparent that the respondent has been involved in a persistent and calculated course of conduct to institute proceedings even after the Supreme Court had thrown out his appeal. It is clear that in most of the proceedings the relief sought remains the same, namely the setting aside of the sale in execution. Later the respondent included an element of damages the proceedings. Almost invariably, the course of action has not been properly pleaded. Bald allegations of fraud, bribery, corruption and perjury have been made. In some instances, the person cited as defendant is not the same person called upon to enter appearance. Proceedings are instituted, but once there is opposition they are abandoned."

It is as if the learned Judge was making reference to the pleading in the current action the plaintiff instituted against the defendants. It is afflicted by the same irregularities, even after the judgement of ZHOU J delivered on 6 September 2012 which gave the plaintiff a life line to amend his pleadings. The amendment that followed has done very little to help the

plaintiff. Coming back to the judgement of GARWE J (as he then was) he issued the following order;

"Accordingly it be and is hereby ordered as follows that:

1. the respondent (the plaintiff herein) be and is hereby restrained from instituting any proceedings in this court against the applicant or her employee or her agents relating to the applicant or her agents which proceedings relate directly or indirectly to the purchase by the applicant of certain immovable property known as Stand 606 Northwood Township 4 of Sumben without leave of this Honourable Court first being applied for and obtained.

2. the respondent be and is hereby restrained from setting down any matter already filed or commenced with this court without the leave of this Honourable Court first being applied for and obtained.

3. any application for leave to institute proceedings or to set down any matter shall be made upon notice to the applicant.

4. the respondent is to pay the costs of this application on a legal practitioner and client scale."

The inconvenience of the above court order could not stand in the way of another excitement in court, for the plaintiff again filed this summons action seeking an order for payment of US$ 2 315 000-00 damages arising from the alleged connivance of the defendants in transferring the property to the first defendant, an order declaring the sale in execution of the property null and void and directing the Registrar of Deeds to transfer the property to his name on the pain of attorney and client costs.

Both the first and second defendants have taken 3 points *in limine* firstly that the action instituted by the plaintiff is bad at law and he cannot be heard at all as the action was instituted without prior leave of this court in breach of the decree of perpetual silence. My attention has also been drawn to the judgement of MAKONI J in *Mapedzamombe v Mhini* HH 90/13 in which the learned judge dismissed with costs on a legal practitioner and client scale, an application made by the plaintiff for leave to institute proceedings.

Mr *Uriri*, for the first defendant submitted that the decree is still in force and the attempt to obtain leave having come to naught, the application should be struck off. Mr *Manjengwah* for the second defendant associated himself with that submission adding that the decree also applies to the second defendant as the plaintiff seeks relief arising from the sale in execution.

In response, Mr *Mapedzamombe*, who appeared unrepresented, submitted that he did not require leave because the order of GARWE J (as he then was) was secured through perjury. He maintained that he had been so advised by the Honourable Judge President and produced a letter dated 5 September 2013from him to support that assertation. The letter that the plaintiff refers to does not come anywhere near suggesting that the Honourable Judge President informed him that he does not require leave. It reads;

"**RE**: **COMPLAINT: CLAUDIUS MAPEDZAMOMBE V EMILY MHINI**

I refer to your letter dated 5 August 2013. In response thereto the Honourable Mrs Justice MAKONI has commented as follows:

> 'I can confirm that I heard the above matter on 28 February 2013 and postponed the matter to 7 March 2013 for a ruling on a point *in limine*. On the 7th of March 2013 Mr Mapedzamombe did not attend court. In default of his appearance, an application to dismiss his application was made and I granted it. The above is confirmed by the judgement I rendered reference HH 90/13. I would also want to comment that I am not in any way related to either Advocate Uriri or his wife.'

Yours faithfully

Honourable Mr Justice G.M. CHIWESHE

JUDGE PRESIDENT

Cc Honourable Mrs Justice MAKONI."

The order of GARWE J (as he then was) remains in force. The plaintiff cannot litigate on the issue of the transfer of Stand 606 Northwood Township 4 of Sumben without the leave of this court. He attempted to seek leave but had his application dismissed with punitive costs. He still proceeded to institute proceedings, seeking the very same relief prohibited by the court order. Clearly, he is improperly before the court. I would have struck the matter off for that reason, but for, the fact that 2 other preliminary points were taken which can dispose of the matter as well.

Mr *Uriri* took the second point that the plaintiff's claim was prescribed in terms of the Prescription Act [*Cap* 8:11]. The set of facts upon which the plaintiff relies in this action arose when the first defendant purchased the property on 18 November 1994 and completed when the sale was confirmed on 8 March 1995. Mr *Uriri* submitted that the plaintiff took action seeking to set aside the sale within the prescribed period of 3 years but his action was

dismissed. Any further action outside the prescriptive 3 year period must of necessity be prescribed. I agree. If the plaintiff's claim is prescribed then the outcome should be an outright dismissal of the action.

The policy of the law of prescription is that there must be finality in litigation and that the law should not assist the tardy litigant. I associate myself fully with the sentiments of CHIDYAUSIKU J (as he then was) on the provisions of s 14 of the Act, in *Coutts & Co v Ford & Anor* 1997 (1) ZLR 440 (H) 443B that:

> "Thus the clear intention of the legislature as expressed in the above provision is to make prescription a matter of substantive law as opposed to procedural law. The above provision clearly extinguishes the debt as opposed to merely barring the remedy. The wording of the exception to the provisions namely sub(s) (3), puts the above interpretation beyond doubt."

Public policy demands that creditors should not be allowed to permit claims to grow stale because by so doing they embarrass the debtor and it is generally upsetting to the social order that the financial relations of the debtor towards third parties should suddenly be disturbed by a demand for payment of a totally forgotten claim. See Wessels *The Law of Contract in South Africa*, Vol II para 2766.

MARAIS AJ embraced that view in *Cape Town Municipality v Allie N.O.* 1981 (2) SA 1 (C) at 5 when he stated:

> "..... it cannot be denied that society is intolerant of stale claims. The consequence is that the creditor is required to be vigilant in enforcing his rights. If he fails to enforce them timeously he may not enforce them at all."

See also *Maravanyika v Hove* 1997 (2) ZLR 88 (H) 95C where MALABA J (as he then was) pronounced:

> "This is as it should be. There should be legal certainty and finality in the relationship between parties after a lapse of a period of time. It would be against public interest for a person who holds a complete course of action against his or her debtor to refrain from exercising the right of action indefinitely."

In *casu*, the plaintiff acquired a complete course of action at the time the first defendant purchased the property and the sale was confirmed by the sheriff. It has now been 19 years since the set of facts forming the basis of the present claim arose. Surely the plaintiff cannot be allowed to return to court now when clearly his claim is prescribed. Doing so would cut against all concepts of legal certainty and finality in the relationship of the parties. What the plaintiff has persistently done amounts to harassment of the defendants which should not be tolerated.

Which brings me to the third point taken to the plaintiff's claim, namely that it is *res judicata,* it having been determined by a court of competent jurisdiction. Again I agree with that submission. The Supreme Court upheld the sale and indeed the transfer of the property to the first defendant as far back as 1996. It pronounced that the registration of the property in the first defendant's name should be allowed to stand. The matter should have ended there, as that Supreme Court decision remains extant and binding on this court.

There is no way the plaintiff can be allowed to have a second bite at the cherry as it were. His attempt to bring in new allegations of fraud and or perjury does not help him at all. The matter remains determined by the highest court on the land. He is best advised to accept that as a reality of life and direct his energy at other endeavours, instead of remaining trapped in a time warp. It will not help him.

In respect of the issue of costs, I agree that this is a case calling for punitative costs to be granted against the plaintiff as a seal of the court's displeasure at such flagrant abuse of its process.

The defendants have been tied up in footling court proceedings with no chance in the world for success by a persistent and unrepentant litigant with nothing else to do, who appears to take litigation as his favourite pastime.

In the result the plaintiff's claim is hereby dismissed with costs on the scale of legal practitioner and client.

Uriri Attorneys-At- Law, first defendant's legal practitioners
Wintertons, second and third defendants' legal practitioners