

ZIMRE PROPERTY  
versus  
SAINTCOR (PVT) LTD t/a V-TRACK  
and  
JOHN SHUMBA

IN THE HIGH COURT OF ZIMBABWE  
MATANDA-MOYOJ  
HARARE, 7 and 10 February 2014 and 14 January 2015

**Civil trial**

*H. Nkomo*, for the plaintiff  
*Advocate Mahere*, for the defendant

MATANDA-MOYO J: At the onset of the proceedings the plaintiff raised a point *in limine* that the matter had prescribed. Defendants argued that at the time of the institution of these proceedings on 19 October 2012, plaintiff's claim had prescribed. Defendants submitted that the last acknowledgement they made for liability of rental was on 5 August 2009 wherein they acknowledged owing rentals in the sum of \$30 000-00. Thereafter the defendants denied ever authorizing any other person to acknowledge rent arrears.

Plaintiff on the other hand opposed defendant's claim on prescription. Defendants based its opposition on a letter written by Annet Mbedzi allegedly on behalf of defendants, which letter plaintiff said they received on 22 October 2009. In that letter Mr Annet Mbedzi acknowledged owing rent arrears and undertook to settle same by 10 November 2009. Plaintiff argued therefore that the debt had not prescribed at the institution of these proceedings.

Defendants called one witness to testify on their behalf. This witness was John Shumba, the second defendant in the matter. John Shumba testified that as the Managing Director of first defendant he entered into a lease agreement with the plaintiff. The lease agreement was for the lease of plaintiffs' property namely Shop No.5 Zimre Centre, Cnr Kwame Nkrumah Avenue and Leopold Takawira Street, Harare by the first defendant. It was this witness's testimony that first defendant failed to pay rentals in respect of the above property as from December 2008 to about

August 2009. He wrote a letter to the plaintiff acknowledging the arrear rentals and promising to pay on several occasions. He testified that the last such letter was written on 5 August 2009. It was his testimony that only Fungai Danha, first defendant's accountant was authorized to acknowledge rentals in his absence on behalf of first defendant. No other person had the authority to do so. Through this witness the letter of 5 August 2009 was admitted as exhibit 1. Such letter read;

“RE: OUTSTANDING ARREARS FOR ACCOUNT NO. 10004.

We refer to our discussion held this morning. We acknowledge the outstanding debt of US\$30 000,00. We propose to make a deposit payment of US\$10 000-00 on or before the 14 August 2009, upon which the office premises shall be opened, as per discussion. The balance of US\$20 000-00 shall be settled by 28 August 2009.-----.

John S. Shumba”

Under cross examination he stuck to his story that indeed the above letter was the last acknowledgement of debt by the defendants. He refused ever authorizing one Mbedzi to acknowledge rental arrears on behalf of first defendant. He however admitted that he knew Annette Mbedzi. He denied that Annet Mbedzi was ever an employee of first defendant. He said he knew Annet Mbedzi as a relation to one of plaintiff's directors – a Solomon Tembo. He suspected the letter by Mbedzi was manufactured by plaintiff after defendants raised the defence of prescription. He said such letter was not dated, had first defendant's address wrong, was not written on first defendant's letterhead, had conciliation which was not counter signed, used bad English, had so many spelling errors and described Mbedzi as first defendant's Financial Director. He said first defendant only had two directors that is himself and his brother Gabriel Shumba. His brother was the Financial Director and not Mbedzi. He urged the court to disregard the said letter as not authentic. John Shumba admitted under cross examination to have met Annet Mbedzi once after learning of the existence of the letter. It was his testimony that he gave him his phone number and asked him to call.

The plaintiff called one witness Mr Edson Muringi the Managing Director of ZIMRE Properties. He testified that he dealt with defendants in respect of the rental arrears. This witness testified that he received a letter Exhibit 3 on 22 October 2009. This letter forms the crux of this preliminary point. It is pertinent to quote the letter verbatim. It provides;

“SAINTCOR HOLDINGS  
Zimre Centre  
Cnr Leopold Takawira Street / Kwame Nkrumah  
Harare

Zimre Properties  
P.O. Box 4839  
Harare.

Attention Mr Muvingi

Dear Sir,

Re: Outstanding payments for rentals at Zimre Centre.

We hereby submit this letter to appeal on our long standing debt as per previous letter which payments were supposed to have been paid by now, we were misled by our debtor we have made new arrangements, with Genesis Global Botswana who is going to settle the full amount owed to yourselves by the 10 November 2009, we assure you this amount will be paid by the date said on this letter, the writer of this letter as the financial director of the holding company. I guarantee yourselves payment will be done. As you are aware of we have been renting these premises for along time we ask your authority that we still need to continue doing business at the same premises, may you give grace to continue operations at the same thank you very much for your long understanding position in this matter, which has put you in uncomfortable position.

Yours faithfully

Annet Mbedzi for Saintcor Holdings  
Financial Director Contact Number 0913156096”

It was this witness evidence that he believed the above letter was authentic as he had met Annet Medzi at the meeting of 5 August 2009. Annet Mbedzi came for the meeting with second defendant, Mr Kasvingo and Mr Danda. This witness testified that second defendant introduced the above three as the team from first defendant. He did not recall whether Mbedzi made any contributions during the meeting. He described Mbedzi as tall, medium built and dark but not very dark. This description of course did not help the court much as such Mbedzi was never brought before the court. This witness testified that he saw Mbedzi thereafter more than two times. Whenever he met Mbedzi, the two would discuss outstanding rentals and payment plan and the continued occupation of number 5. Zimre Centre by the first defendant. This witness

testified that at all times Mbedzi was representing second defendant who was away in South Africa on business.

This witness acknowledged receiving a letter from second defendant which is on page 20 of plaintiff's bundle of documents. He acknowledged that he spoke with second defendant when he was in South Africa and agreed that payment of arrear rentals would be done by 15 September 2009.

This witness admitted Solomon Tembo was a non-executive director of plaintiff. He denied knowledge of any relationship between Annet Mbedzi and Tembo. He testified that Tembo would only know of cases as this one when they are in court. He believed Tembo became aware of this case around October 2012. He said he had no reason to lie against defendants. Under cross-examination he admitted the letter by Mbedzi was not dated. He admitted he did not know the date it was written. He admitted signature was signed in blue ink and cancellation of "Muringani" and replacement of Muringi was in black ink. Mr Muringi admitted that as at August 2009 they had already evicted defendants from the premises. Asked why the letter used the address from which they had been evicted he said it was because premises were still empty. He admitted Saintcor Holdings does not exist.

This court is called upon to determine whether exhibit 3 is authentic and whether it constitutes an acknowledgement of debt by the defendant which has the effect of interrupting prescription. The inquiry is always a factual one- see *Petzer v Radford (Pvt) Ltd* 1953 (4) SA 314 N at 318 E. Mr *Nkomo* in his address aptly captured the position that if this court finds that the letter marked as exhibit 3 is authentic the defendant's point *in limine* falls apart. If on the other hand this court finds the letter is not authentic, then the defendants' claim on prescription succeeds.

Firstly the court had to look at the said letter and scrutinize it to determine its authenticity. Was the letter written by the defendants and on the face of it, is it genuine? I noted firstly that the letter was not written on any letterhead. It is common cause that all the other letters written of behalf of first defendant appeared on a letterhead of first defendant and another on V-Track (Private) limited letter head. Such other letters from first defendant had first defendant's address as Block No.5 Zimre Centre, Cnr L. Takawira/Kwame Nkrumah Ave PO Box A 1894 Harare and telephone numbers. Again all the other letters addressed their letters to plaintiff at 6<sup>th</sup> Floor

Fidelity Life Towers, 5 Raleigh Street Harare but the letter marked Exhibit 3 used a box number, that is , “P.O.Box 4839 Harare”. Exhibit 3 is not on any letterhead and it is written on behalf of Saintcor Holdings, Zimre Centre. Both parties agreed such company does not exist. Exhibit 3 was written to Mr Muringani and later cancelled in black ink to put the name Muringi. It is common cause that there is not Muringani at Zimre Properties. The defendants had been dealing with Mr Muringi. It is baffling how plaintiffs who has been dealing with first defendant for such a long time would accept such letter as genuine.

The lease agreement was produced before me. The lessee who is first defendant is clearly spelt out as “SAINTCOR PRIVATELIMITED’’. Suddenly on p 19 exhibit 3 a different entity is brought in – SAINTCOR HOLDINGS. Saintcor Holdings in that letter is acknowledging unspecified debt on behalf of itself. Nowhere in that letter is it suggested that the unspecified rentals are acknowledged on behalf of Saintcor Private Limited. In the same breadth the said Annet Mbedzi wrote as the Financial Director of Saintcor Holdings. He does not claim to be a financial director of Saintcor Private Limited. The question is whether the conclusion drawn by plaintiff would be reasonable that Annet Mbedzi was a Financial Director of Saintcor Private Limited and that the letter was written on behalf of Saintcor Private Limited. Such conclusion would be unreasonable. With the educational backgrounds of Mr Muringi he could have easily picked up the anomalies in the letters. Under cross-examination he failed to answer simple questions.

The defendants suggested the letter i.e exhibit 3 was written with the collusion of plaintiff. The evidence before me could not lead this court to make that conclusive finding. However it is my finding that exhibit 3 is not a letter written on behalf of the first defendant. It is clear it was written on behalf of Saintcor Holdings which company does not exist. The letter is not specific as to which debt is being acknowledged and is not an acknowledgement of debt as envisaged under the Prescription Act.

In the result the defence of prescription succeeds and plaintiff’s claim is dismissed with costs.

*Mesrrs Muringi Kamdefwere*, plaintiffs’ legal practitioners  
*Mtetwa &Nyambiri*, defendant’s legal practitioners