

RICHARD MUDHANDA
versus
JENNIFER NAN BROOKER
and
REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 10 June 2015 & 22 July 2015

Opposed application

N Chikono, for the plaintiff
D Ochieng, for the 1st defendant

MUREMBA J: On 25 November 2014 the plaintiff issued summons for an order compelling the first defendant to sign papers for the transfer of stand numbers 285 and 286 Colne Valley Township held under Deeds of Transfer numbers 1788/69 and 1688/69 in the plaintiff's favour. The plaintiff also wants an order directing the second defendant to process the envisaged transfer.

In the declaration, the plaintiff said that in 2002, he entered into a sale agreement in respect of these two stands with the first defendant. The plaintiff says that he complied with all his obligations, but when he wanted to have the stands registered in his names the first defendant opposed the overture.

The first defendant entered an appearance to defend the claim and later filed a special plea to the effect that even if the plaintiff's averment that he personally acquired rights in respect of the two properties on 6 August 2002 was correct (although it is denied), the consequent obligations owed to him by the first defendant were extinguished after 3 years by reason of s 14 and 15 of the Prescription Act [*Chapter 8:11*]. The first defendant's counsel argued that prescription begins to run when the debt becomes due and a debt is due from the moment the cause of action is complete i.e. when the facts from which the claim arises have all occurred. To support his submission he cited the case of *Peebles v Dairibord Zimbabwe (Pvt) Ltd* 1999 (1) ZLR 41 (H) at 44 H-45F. On this basis the first defendant prayed for the

dismissal of the plaintiff's claim. It is the issue of prescription that I am supposed to determine.

In opposing this special plea of prescription Mr *Chikono* argued that in 2009 the plaintiff once had the two properties registered in the name of his company, Humworthy Investments (Pvt) Ltd. He argued that when the two properties were registered in the plaintiff's company's name in 2009 transfer of ownership was deemed to have been effected. He submitted that as such the debt had been settled and prescription was no longer running.

It is not in dispute that in 2009 the plaintiff had the two properties registered in his company's name. The name of the company is Humworthy Investments (Pvt) Ltd. It is also common cause that on 18 July 2011, the first defendant made an application in this court under case number HC 6909/11 for the cancellation of the transfers of the two immovable properties to Humworthy Investments (Pvt) Ltd which application was granted on 27 October 2014.

Mr *Chikono* argued that during the time the properties were registered in the name of the plaintiff's companies there was no cause of action as both parties believed that the contract had been performed fully. He submitted that the cause of action only arose after the nullification of the title deed in 2014. Mr *Chikono* argued that the prescription period therefore started to run on the date this court pronounced an order nullifying the registration of the properties in the name of the company which is 27 October 2014. He argued that from 27 October 2014 three years have not yet lapsed. Mr *Chikono*'s argument gave the impression that the registration of the properties which happened in 2009 had been done by the consent of the first defendant and the plaintiff and that what caused the cancellation of the registration of the properties in the name of Humworthy Investments (Pvt) Ltd was that the properties had been wrongly registered in the name of the plaintiff's company instead of the plaintiff.

In response the first defendant's counsel, Mr *Ochieng* argued that the plaintiff having signed the agreement of sale himself, he could not have been mistaken as to the identity of the person who was supposed to obtain transfer of the properties between himself and his company. Mr *Ochieng* further argued that the mistake of having the properties registered in the name of the plaintiff's company in 2009 was completely unreasonable and since it was a mistake as to the identity of the creditor and not the debtor, it is therefore irrelevant to the question of prescription. He submitted that that mistake did not interrupt the running of prescription.

I could not really appreciate why Mr *Ochieng* was drawn into this argument about the properties having been registered in the names of a wrong person. The argument made it appear as if the transfers were cancelled on the basis that registration had been wrongly made in favour of the plaintiff's company instead of the plaintiff, yet this is not correct.

In making the application for the cancellation of the transfers, the first defendant averred in her affidavit that the plaintiff (Richard Rudhanda) who claimed to represent her in terms of a power of attorney in order to have the stands transferred into the name of Humworthy Investments (Pvt) Ltd had used a forged power of attorney. She averred that the stands were transferred without her knowledge and consent. That registration and transfer of the properties had been made in favour of the plaintiff's company instead of the plaintiff was not the basis of the first defendant's application to have the transfers cancelled. The file shows that the plaintiff opposed the application arguing that the power of attorney was not forged and that the transfers were done with the full knowledge and consent of the first defendant. However, according to the submissions made by the first defendant's counsel, which submissions were not disputed by the plaintiff, the plaintiff later abandoned his opposition of the application. On 27 October 2014, this court in terms of s 8 of the Deeds Registries Act [*Chapter 20:05*], granted an order cancelling the transfers of the two properties to Humworthy Investments (Pvt) Ltd. The court order shows that on the day it was granted the plaintiff was in attendance, but the court order does not say that it was granted by consent.

In the same court order, the court also ordered that its order be submitted to the Prosecutor General by the Registrar of this court in order that the Prosecutor General may decide whether or not there should be a criminal investigation into the matter since the second defendant had made allegations that the plaintiff had had the transfers of the properties done fraudulently.

Considering that the cancellation order was granted uncontested by the plaintiff, I would therefore say that in a way the plaintiff made a concession that he had had the transfers made to Humworthy Investments (Pvt) Ltd without the knowledge and consent of the first defendant. So Mr *Chikono's* argument that the registration of the properties in the name of Humworthy Investments (Pvt) Ltd in 2009 were a mistake common to both parties is misplaced and misleading. The cancellation of the transfers was not made on the basis that the properties had been wrongly registered in the name of the plaintiff's company instead of the plaintiff as an individual. In any case at law, a purchaser of an immovable property is at

liberty to have the purchased property registered even in the name of a third party that he nominates. The Deeds Registries Act does not say registration must only be made in favour of the purchaser himself or herself. Registration of a property in the name of a nominee would therefore not be a sound reason for cancellation of registration.

Section 16(1) of the Prescription Act says that prescription shall commence to run as soon as a debt is due. The crucial question in the present matter is when did the debt become due? In other words when was ownership supposed to be transferred from the seller (first defendant) to the buyer (plaintiff)?

To begin with, it must be realised that an agreement of sale is not an agreement to transfer ownership. Mackeurtan *Sale of Goods in South Africa* at p1 states that there are 3 essential elements of a contract of sale. They are (i) the agreement (*consensus ad idem*) (ii) the thing sold (*merx*) and (iii) the price (*pretium*). The parties enter into a contract with a view to exchange the thing for a price. If the three elements are there, there is a sale. Neither delivery nor the payment of the purchase price is necessary for the creation of the contract. Delivery and payment fall within the category of the performance of the contract.

A contract of sale merely obliges the seller to pass *vacou possessio*. As a result, it is not a pre requisite of the contract of sale that the seller be the owner of the *merx*. In other words a non-owner of a property can enter into a valid agreement of sale. This means therefore that the signing of an agreement of sale does not automatically result in ownership being transferred to the buyer. Parties should therefore agree on when transfer should be effected. If they agree on the date of transfer, it is on that agreed date that the debt becomes due in terms of s 16 (1) of the Prescription Act. Prescription begins to run as from that date as the seller (debtor) would have been placed in *mora*.

Looking at the purported sale agreement which the plaintiff relies on which forms part of file number HC 6909/11 which the parties referred me to, there is no reference as to when ownership should have passed from the seller to the buyer. The agreement only makes reference to the issue of the seller (the first defendant) giving vacant possession of the property to the buyer (the plaintiff) on or before the date of transfer.

The relevant clause reads,

“Occupation, Risk and Profit

The seller shall give vacant possession of the property on or before the date of transfer. Risk and Profit shall pass on to the purchaser on the date of occupation or transfer whichever is the earlier”

Other than the above clause there is no other clause which deals with the issue of transfer of ownership. It is clear from the above clause that it does not say when exactly transfer of ownership should be effected. In the absence of an agreed date of transfer of ownership, the first defendant's submission that prescription began to run on 6 August 2002 cannot be said to be correct. It cannot be correct because the debtor who is the seller was never placed in *mora*. The seller was never made aware that she was now supposed to effect transfer of ownership. It is wrong to say that since the parties signed the agreement of sale on 6 August 2002 therefore the seller should have passed ownership with effect from that date and that as such prescription began to run from that date. There is no basis for making that averment. In order for prescription to begin to run there is need for the creditor to place the debtor in *mora* first. In *Asharia v Patel & others* 1991 (2) ZLR 276 (SC) at p280 GUBBAY CJ said

“The general applicable rule is that where time for performance has not been agreed upon by the parties, performance is due immediately on conclusion of their contract or as soon thereafter as is reasonably possible in the circumstances. But the debtor does not fall into *mora* ipso facto if he fails to perform forthwith or within a reasonable time. He must know that he has to perform. This form of *mora*, known as *mora ex persona*, only arises if, after a demand has been made calling upon the debtor to perform by a specified date, he is still in default. The demand, or *interpellatio*, may be made either judicially by means of a summons or extra-judicially by means of a letter of demand or even orally; and to be valid it must allow the debtor a reasonable opportunity to perform by stipulating a period for performance which is not unreasonable. If unreasonable, the demand is ineffective.”

In the circumstances of this case whereby the parties did not make it clear in the agreement of sale when transfer was supposed to be made, the purchaser should have placed the seller in *mora* by demanding transfer of the properties. After the demand for transfer, prescription would have begun to run from the date the parties agreed transfer should be effected. That date would have been the date when the debt became due.

The papers before me do not say when plaintiff demanded transfer of ownership of the two properties, but it is common cause that in 2009 the plaintiff had transfer of ownership effected in the name of his company, although the registrations were later cancelled by this court on 27 October 2014.

The first defendant having averred that her properties were transferred fraudulently without her knowledge and consent and obtained judgment in her favour cancelling the registrations, I will completely disregard the whole period when the two properties were registered in Humworthy Investments (Pvt) Ltd's name. Since the transfers were said to have

been done fraudulently, I will take that period as a non-event, as if no transfer of ownership ever happened.

As I have already stated, following the agreement of sale the purchaser (plaintiff) ought to have demanded transfer of ownership from the seller (first defendant) thereby placing the debtor (first defendant) in *mora*. Although the plaintiff in his summons says that he demanded transfer of ownership, nothing in the papers shows when this demand for transfer was done. With this, the court cannot tell when prescription began to run.

Submissions were made by the first defendant to the effect that the agreement of sale that the plaintiff is relying on is fraudulent. It must be noted that the court order of 27 October 2014 only nullified the transfers of ownership which were allegedly done fraudulently, but it did not cancel the purported agreement of sale of 2002. I must point out that I am not here to decide on the authenticity or otherwise of the agreement of sale, but the special plea of prescription. So I will not delve into that issue. It is an issue which should be determined by the court which will deal with the issue of transfer of ownership of the properties from the first defendant to the plaintiff.

In the absence of evidence showing when exactly the first defendant was placed in *mora* by the plaintiff for transfer of ownership of the properties from the first defendant to the plaintiff, I am not inclined to grant the first defendant's special plea.

In the result, it be and is hereby ordered that:

- 1) The special plea of prescription raised by the first defendant is dismissed.
- 2) The first defendant is to pay costs.

Ngarava, Moyo, Chikono, plaintiff's legal practitioners
Wintertons, 1st defendant's legal practitioners