

MATHEW MAUNGA  
versus  
ALOIS MAGASA  
and  
LEONARD MASHORANO  
and  
MOONWAVE ASSET PROPERTY MANAGEMENT PVT LTD  
and  
REGISTRAR OF DEEDS HARARE NO

HIGH COURT OF ZIMBABWE  
TSANGA J  
HARARE, 17 November & 16 December 2015

### **Opposed Application**

*S Musapatika*, for the applicant  
*W Muchengeti*, for the 1<sup>st</sup> respondent  
*No appearance for the 2<sup>nd</sup> & 3<sup>rd</sup> respondents*

TSANGA J: The order ultimately sought in this matter by the applicant as alleged purchaser, is for one Dadirai Nazareth to sign certain documents necessary to enable transfer or cession of certain property known as Stand 2285 Bluffhill Township, Harare, within seven days of the granting of the Order, failing which the Deputy Sherriff be ordered and authorised to do so on behalf of the first respondent, who is the seller of the property in question.

Dadirai Narareth is his mother and is said to have sold the property in question on his behalf. She denies doing so and says she was duped into signing the agreement in question upon which the applicant relies. It is therefore argued on behalf of the first respondent as the purported seller that there are clear disputes of fact and that the matter should not have been brought by way of application.

More significantly, it is argued as a point *in limine* by the first respondent that the matter is decidedly prescribed. The facts are these. On 1 November 2006, the applicant, Mathew Maunga entered into an agreement of sale in terms of which he purchased the above mentioned property from one Leonard Mashorano (Mashorano), the second defendant. Mashorano had in turn purportedly purchased it from Alois Magasa (the seller) who had done

so through Dadirai Nazareth by virtue of a power of attorney. He had however, not received title and relied on his agreement of sale with Alois Magasa to sell the property to Mashorano. The subsequent sale to the applicant by Mashorano was effected through an estate agent, Moonwave Asset Property Management. They are the third respondent in this matter. Neither Mashorano nor the estate agent filed any papers in this matter. The property remains registered in Alois Magasa's name.

### **Whether the matter is prescribed**

The current proceedings were instituted in 2011. The cause of action being the sale of the purported sale of the property to Mashorano by Magasa in 2006, who in turn later sold the same property before transfer to him had taken place, it was argued by Mr *Muchengeti* on behalf of the first respondent that the matter was prescribed. The basis of his argument is that in terms of s 15 (d) of the Prescription Act [*Chapter 8:11*] the applicant had three years until 1 November 2009 to institute proceedings.

Mr *Musapatika* the applicant's counsel, argued that the prescription argument was without merit on the basis of the following context. When the applicant failed to obtain transfer of the property, he brought civil proceedings in 2007 under case No. HC 2488/07. The respondents in those proceedings were Mr Alois Magasa said to be represented by his agent Mrs Magasa; Mr Mashorano, Moonwave Asset Property Management Private Limited and The Registrar of Deeds. In essence the parties were essentially the same as in the present matter.

The applicant however subsequently withdrew these proceedings following the filing of a notice of opposition in that matter by Dadirai Nazareth in which she stated that she had never used the name Mrs Magasa. Also at this hearing Mr *Musapatika* indicated that the matter had been withdrawn as Dadirai Nazareth was just an agent, hence the focus of this case is on the actual owner/seller Mr Magasa. In 2008 the applicant also brought criminal proceedings against the estate agent in the magistrate's court. At the heart of the applicant's argument against prescription is that it was on the basis of the criminal proceedings as well as the attempted civil proceedings in 2007 that he had finally gotten to know the true identity of the seller. He draws life for these current proceedings from s16 (3) of the Prescription Act which provides 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. Discoverability of the debtor is therefore core to when the debt becomes due. However, the proviso to this section is

that the creditor is deemed to have become aware if he could have acquired knowledge thereof by exercising reasonable care.

Mr *Muchengeti* argued vehemently that the applicant could not heard to say that he did not know the identity of the debtor until 2008, given that the agreement of sale upon which Mashorano purported to have sold the property to him, clearly identified Alois Magasa as the seller of that property and that Dadirai Narareth was acting on the strength of a power of attorney. That agreement was part of the proceedings in HC 2488/07. The agreement in question reads on its face as follows:

“MEMORANDUM OF AGREEMENT OF SALE  
Made and entered into by and between  
DADIRAI NARAZARETH (born 9 September 1954)  
Acting on behalf Power of attorney granted by ALOIS MAGASA dated 10 October 2000  
And  
LEONARD MASHORANO.....”

Since the applicant at all material times was in possession of the agreement it being the basis of his purchase from Mashorano, it was argued that he had absolutely no excuse for not knowing who the parties were. Furthermore, he highlighted that when the civil proceedings which were later withdrawn were instituted in 2007, Alois Magasa was clearly identified in those proceedings. He argued that if there was any confusion as to identity then it was clarified in 2007 and that it is difficult to see whose identity the applicant was not aware of at the time. He stated that the claim therefore should have been instituted at the latest by November 2009 and is therefore prescribed. He observed that the applicant was simply tardy in bringing his claim. He emphasised that in terms of s7 (3) (a) of the Prescription Act, ownership shall not be interrupted “if the person claiming ownership in the thing in question does not prosecute the claim under the process in question to final judgment.” (See *Catherine Chiwawa v Apostolos Mutzuris 2009 (1) ZLR 72*) Whilst Mr *Musapatika* conceded that a matter withdrawn before finality does not interrupt prescription, he maintained that the identity of the debtor remained an issue.

I share Mr *Muchengeti*'s view that the identity of the debtor could not have been any issue since it was clearly spelt out in the agreement which Mashorano relied on to sell the property to the applicant. The applicant himself clearly states that at the time of the purchase the property was not yet registered in Mr Mashorano's name. All the more reason why he would have asked for concrete proof of the basis upon which Mr Mashorano sought to sell

the property to him. This would have been the agreement in question which referred to Mr Alois Magasa as having granted the power of attorney in question to Dadirai Nazareth. In any event, this is a classic instance where the proviso to s16 would be applicable, namely, that the creditor is deemed to have become aware if he could have acquired knowledge thereof by exercising reasonable care. As such, I therefore find that the argument that the applicant did not know the true identity of the debtor holds no merit.

Mr *Musapatika* also raised a point of law in support of his case, this being that it had emerged from the opposing affidavit filed by Josephat Vambe, that the debtor had come into Zimbabwe in 2010 to check on building progress. He said by virtue of s17 (c) of the Prescription Act [*Chapter 8:11*], this was a clear indication that the debtor was out of the country. He therefore contended that although the agreement was entered into in 2006, the real person to be sued was out of the country and prescription cannot commence to run whilst the debtor is out of the country. Section 17 (c) is framed as follows:

“If

- a).....
- b).....
- c) the debtor is outside Zimbabwe; or
- d).....
- e).....

and the period of prescription would, but of this subsection, be completed before or on, or within one year after, the date on which the relevant impediment referred to paragraph (a), (b), (c), (d) or (e) has ceased to exist, the period of prescription shall not be completed before the expiration of the period of one year which follows that date.”

Section 17 (c) does not freeze the running of prescription entirely. It merely provides, among other scenarios, that where a matter has prescribed or would have prescribed because the debtor was outside the country then if the debtor is subsequently in the country, prescription is essentially delayed by a year. (*See Tarwireyi v Kunene & Anor HH 19/2008*)

In response to this argument, Mr *Muchengeti* emphasised that the proceedings in 2007 had been instituted regardless of where the Alois Magasa was based and that the proceedings in 2011 had also been instituted regardless of his location. Both suits were argued to be perfectly valid. He pointed out that it was only now that the issue of the first respondent being out of the country was being raised as an excuse for the tardiness in failure to institute the proceedings timeously.

I am again in agreement with Mr *Muchengeti* regarding the fact that proceedings had been successfully instituted regardless of Mr Magasa being outside the country. In

HC 2488/07 he had been cited and had accepted the jurisdiction of this court even though he was out of the country. Furthermore, he had also appointed someone to receive the process on his behalf. As held in the case of *Silhouette Investments Ltd v Virgin Hotels Group Ltd 2009 (4) 617 (SCA)*, which examined a similarly worded provision to our s17 (1) (c) relating to a debtor being outside the country, even if a debtor is outside the country in the sense of being physically absent, if such debtor has consented to jurisdiction of the court in respect of a creditor's claim, and had a representative authorised to accept process, it could not be said that the debtor was out of the country.

Also as stated in that case, the impediment of the debtor being outside the country such as that captured in terms of our s17(1) (c) of the Prescription Act, relates to the legal and practical problems that make it difficult or undesirable for a creditor to institute proceedings for the enforcement of his claim against the debtor. However, where, as in the facts of this case, the debtor consented to the jurisdiction of the courts in both cases filed against him, and also agreed to accept process, then as emphasised in the *Silhouette*, case no such problem arises.

In total, I therefore find no basis on which the applicant had solidly argue that the matter was not prescribed. There is thus no need to delve into the merits.

Accordingly, it is held that the applicant's matter is dismissed with costs as the claim is prescribed.

*Danziger & Partners*, applicant's legal practitioners  
*Muchengeti & Company*, respondent's legal practitioners