

Judgment No. HB 114/10  
Case No. HC 511/09  
Xref No. HC 1999/06, 1479/06  
Xref No. HC 826/09 &531/09

**MARIA SINGO**  
**(as Executive Dative of the Estate Late**  
**Phillimon Singo)**

**PLAINTIFF**

**AND**

**ROSE SITHOLE**  
**(in her capacity as the executrix dative of**  
**The estate late Ernest Phillip Sithole) of 153**  
**Dulibadzimu, Beitbridge**

**1<sup>ST</sup> DEFENDANT**

**And**

**BEITBRIDGE RURAL DISTRICT COUNCIL**  
**OF BEITBRIDGE**

**2<sup>ND</sup> DEFENDANT**

**AND**

**THE MINISTER OF NATIONAL HOUSING AND**  
**CONSTRUCTION OF Makombe Building, Harare**

**3<sup>RD</sup> DEFENDANT**

**AND**

**THE ADDITIONAL ASSISTANT MASTER, BEITBRIDGE**  
**OF Magistrate COURT, Beitbridge**

**4<sup>TH</sup> DEFENDANT**

IN THE HIGH COURT OF ZIMBABWE  
MATHONSI J  
BULAWAYO 28 SEPTEMBER 2010 AND 30 SEPTEMBER 2010

*Mr. N. Mlala* for plaintiff  
*Advocate Nkiwane* instructed by *Miss L. Chipateni* for 1<sup>st</sup> Defendant

Civil Trial

**MATHONSI J:** At the commencement of trial in this matter *Advocate Nkiwane* who appears for the first Defendant moved an application for an amendment of the first

Defendant's plea to consolidate the special pleas filed and the plea on the merits as well as to amend the issues for trial that had been agreed at the pre-trial conference. The said application had been filed on the 16<sup>th</sup> August 2010 through the chamber book but was not placed before a Judge for unknown reasons.

The plaintiff, through her counsel, *Mr Mlala* consented to the application and I granted the application by consent. The impart of that is that the issues for trial now stand as:

1. whether or not plaintiff's claims in the main and/or in the alternative in HC 511/09 are prescribed;
2. whether or not plaintiff in HC 511/09 has locus standi to institute this action;
3. whether or not the alleged contract, if proved, is void or whether or not it is enforceable;
4. whether or not plaintiff in HC 511/09 is entitled to the relief claimed in the alternative, and, if so, the basis and quantum of that relief; and
5. whether or not Ernest Phillip Sithole sold house No 1651 Dulibadzimu to Philimon Singo.

*Advocate Nkiwane* then raised a preliminary point that the Plaintiff's claim is prescribed in terms of the Prescription Act and should therefore fail on that basis alone. He did not pursue the other points raised in the special plea electing to argue only the issue of prescription.

The background of the matter is that the Plaintiff was appointed executrix of the estate of the late Philimon Singo by the Additional Master on the 4<sup>th</sup> April 2007. The first Defendant was appointed executrix of the estate of the late Ernest Phillip Sithole who died on 29<sup>th</sup> October

1996, on the 18<sup>th</sup> May 2006. The Plaintiff issued summons in this matter on the 3<sup>rd</sup> April 2009 seeking an order;

- (a) Confirming as valid and enforceable, the sale agreement entered into between the late Philimon Singo and the late Ernest Phillip Sithole in 1995 involving house number 1651 Dulubadzimu, Beitbridge;
- (b) Directing the first Defendant in her capacity as executrix dative of the estate of the late Sithole to sign transfer papers passing transfer of that house to the estate of the Philimon Singo; and
- (c) Alternatively, payment of damages in the sum of R200 000-00 as the replacement value of the house in question.

In that summons Plaintiff claims that the purchase price was paid in full in 1995 and that the late Singo took occupation immediately thereafter. For some reason transfer was not given to Singo until the late Sithole died aforesaid in 1996. In paragraphs 6 and 7 of the declaration, Plaintiff avers that the late Singo lodged a claim against the estate late Sithole before his death but the fourth Defendant disregarded that claim as a result of which a review application was lodged in this Court as case number HC 1479/06.

In her replication to the first Defendant's plea, the Plaintiff alleges, inter alia that the claim had not prescribed because the cause of action "arose late in 2006 when the first Defendant threatened to evict the plaintiff's tenant." I shall return to deal with that issue later in this judgment.

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The claim is opposed by the first Defendant who, as already stated has raised the issue of prescription. In support of that preliminary point, which I allowed to be raised at commencement of trial in terms of the proviso to subsection (2) of Section 20 of the Prescription Act [Chapter 8:11], *Advocate Nkiwane* submitted that the cause of action arose when the purchase price was paid in 1995 and therefore the claim prescribed at the expiration of the period of 3 years in terms of section 15(d) of the Act.

*Advocate Nkiwane* further argued that even if it could be said that the death of both the creditor and the debtor interrupted the running of prescription, the claim should have been made within a period of 1 year after the appointment of the executrix of the late Sithole's estate on 18 May 2006 and even that of the late Singo on 4<sup>th</sup> April 2007. Whichever way when the summons was served on 22 June 2009, the claim had prescribed. This is particularly so, as by Plaintiff's own admission the cause of action arose in 2006.

In response, *Mr Mlala* for the Plaintiff has argued that the claim has not prescribed because we should reckon the period of 3 years from 2006 when first Defendant threatened to evict the Plaintiff's tenant. He further submitted that the sale agreement between the parties was subject to a suspensive condition, namely that the late Sithole was to secure the consent of the third Defendant to transfer title to the late Singo. As this was not possible until the money due to the third Defendant had been paid in full, which was only done in 2006, after the late Singo sold his cattle, prescription did not commence to run until 2006.

The law on when the cause of action arises has been stated very clearly in a number of decided cases. In *Chiwawa v Mutzuris and Others* HH 7/09 (as yet unreported) at page 5 of the cyclostyled report, MAKARAU JP (as she then was) stated thus:

“It is now the settled position in our law, in my view, that the term refers to when the plaintiff is aware of every fact which it would be necessary for him or her to prove in order to support his or her prayer for judgment. It is the entire set of facts that the Plaintiff has to allege in his or her declaration in order to disclose a cause of action but does not include the evidence that is necessary to support such a cause of action.”

I am not persuaded that prescription started running in 1995 because then the participants still had issues to resolve with third Defendant. In my view the Plaintiff's claim became extant in April 2006 when first Defendant and his family made it clear they were not going to honour the late Sithole's undertaking. From then on prescription started running.

It has been argued half-heartedly that the lodgement of a claim against the estate by Singo interrupted prescription. By her own admission, the Plaintiff says the claim was rejected (paragraph 7 of Plaintiff's declaration). This could not interrupt prescription. A further argument has been advanced that the review application filed as HC 1479/09 was interruptive.

Section 19 of the Prescription Act provides:

- “(2) The running of prescription shall, subject to subsection (3) be interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt
- (3) unless the debtor acknowledges liability, the interruption of prescription in terms of subsection (2) shall lapse and the running of prescription shall not be deemed to have been interrupted, if the creditor;
  - (a) does not successfully prosecute his claim under the process in question to final judgment.
  - (b) ----.”

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Case No. HC 1479/06 was not successfully prosecuted. In fact after a notice of opposition was filed, the application was abandoned. This should put that argument to bed really but even if I am wrong on that point, that review application cannot be said to have interrupted prescription in the sense of the subject matter of this action. This is because what was sought there was a review of the decision of the fourth Defendant to reopen the estate late Sithole and not the relief now being sought.

What remains is for me to deal with the issue of whether the death of Singo interrupted prescription as to bring the matter under the provisions of Section 17(1) (e) of the Prescription Act.

Section 17(1) (e) provides:-

“If the creditor or the debtor is deceased and an executor of the estate in question has not been appointed and the period of prescription would, but for this subsection, be completed before or on, or within one year after the date on which the relevant impediment referred to in 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.”

The Plaintiff was appointed executrix of the estate late Singo on 4<sup>th</sup> April 2007. Computing the prescription period from April 2006 as I have already determined, the period of prescription would have been completed on the 30<sup>th</sup> April 2009. For that reason it would not have been completed “before, on or within one year after the impediment had ceased to exist.” In fact it ceased to exist two years before prescription was due to be completed.

A simple interpretation of that provision means that the Plaintiff does not have the benefit of an extra year in this matter because the running of prescription was not interrupted at all.

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Can it be said that there was judicial interruption of the running of prescription as envisaged by Sections 7 and 19 of the Act? The 2 sections are almost identical.

Section 19(2) is a peremptory provision admitting no variation whatsoever. It specifically provides that prescription shall only be interrupted by “service on the debtor of any process whereby the creditor claims payment.” Section 7(2) is worded the same in respect of a claim for ownership.

In the premises, the issuance of the Summons in this matter on the 3<sup>rd</sup> April 2009 did not interrupt the running of prescription which continued to run until completion on the 30<sup>th</sup> April 2009. I have used the last day of April 2009 because the exact date in April 2006 when the Plaintiff, or is it the late Singo, became aware of the dispute has not been stated.

Accordingly, when the summons was served on first Defendant on the 22<sup>nd</sup> June 2009 the Plaintiff’s claim had prescribed in terms of the Prescription Act, [Chapter 8:11] and therefore unenforceable. Prescription strikes at the root of the Plaintiff’s allegation of a right by asserting that such a right permanently ceased to be enforceable. See *Reuben v Meyers* 1957 (4) SA 57 at page 58 F-G. It merely bars the Plaintiff’s remedy although it does not extinguish the cause of action.

In the result I make the following order; that

1. The first Defendant’s plea in abatement on the basis of extinctive prescription be and is hereby upheld.
2. The costs of this action shall be borne by the estate late Philimon Singo.

*Messrs Cheda and partners*, plaintiff’s legal practitioners  
*Messrs T. Hara and partners*, 1<sup>st</sup> Defendant’s legal practitioners