

MARVELLOUS TARUONA  
versus  
MISHECK BRINE ZVAREVADZA  
and  
DADIRAI MOSES  
and  
SHADRECK ZVAREVADZA  
and  
EMMANUEL ZVAREVADZA  
and  
DARIKAI BUTSA  
and  
COBRA SECURITY (PRIVATE) LIMITED  
and  
CONTROLLER OF PRIVATE INVESTIGATIONS  
AND SECURITY GUARDS NO  
and  
MINISTRY OF HOME AFFAIRS  
and  
REGISTRAR OF COMPANIES NO

HIGH COURT OF ZIMBABWE  
KUDYA J  
HARARE, 20 and 21 February 2012

**SPECIAL PLEA**

*S Deme*, for the plaintiff  
*T Mpofo*, for the first to sixth defendants

KUDYA J: The plaintiff has apart from the fourth and fifth defendants, been involved in legal combat with all the other parties in HC 2765/05. In HC 4096/96 he brought an application for his reinstatement as a director in sixth defendant against sixth defendant. He was reinstated. The sixth defendant got its act together and dismissed him as a director on 24 September 1996. He brought another application seeking reinstatement in HC 4157/97. It was contested. BARTLETT J dismissed that application with costs on 17 September 1997. The founding affidavit that launched the present matter is a carbon copy of the application he

filed in HC 2765/05 that he withdrew in June 2006. The present matter was set down on the opposed roll for hearing on 25 January 2011 where PATEL J directed as follows:

1. There are disputes of fact which cannot be resolved on the papers.
2. Accordingly it is ordered that the matter be referred to trial for determination on the basis of *viva voce* evidence as follows:
3. The founding papers shall stand as summons commencing action and the opposing papers as notice of appearance to defend by first to sixth defendants;
4. The applicant/plaintiff is directed to file his declaration on or before 8 February 2011 and the matter shall proceed thereafter in accordance with the Rules of Court.
5. The costs of this application to date shall be costs in the cause.

The plaintiff merely turned the founding affidavit into a declaration and substituted all reference to the applicant and respondent by the plaintiff and defendant. The plaintiff's declaration aptly fits into the description made by MAKARAU JP, as she then was, in *Mwanyisa v Jumbo & Ors* HH 3-2010 at p 1 cited with approval by MAWADZE J in *Morris v Morris & Anor* HH 71-2011 at p 2 as "a dog's breakfast." The six defendants' requested for further particulars; some of which were supplied. On 1 April 2011, the defendants raised special pleas of *res judicata* and prescription and pleaded over the merits. The matter was referred to trial at the pre-trial conference held on 14 June 2011. The six issues referred to trial were:

1. Whether or not the plaintiff's claim is prescribed;
2. Whether or not the plaintiff's claim was determined by a competent court and is therefore *res judicata*;
3. If the matter is *res judicata* whether the plaintiff is entitled to the relief sought;
4. Whether the second to fifth defendants are legitimate directors of the sixth defendant;
5. Whether the plaintiff is entitled to shares in the sixth defendant and if so how many shares or what fraction or proportion of shares;
6. Whether CR 14 forms filed with the ninth defendant dated 7 January 2003 and 14 September 2007 signed by the second defendant and fifth defendant respectively should be nullified.

Only the first three issues arise for determination from the special pleas raised. I deal with the special pleas in the manner that they were argued.

Mr *Mpofu*, for the defendants, submitted that the question of the plaintiff's directorship in the sixth defendant was finally and definitively determined in HC 4151/97 where the plaintiff's application for reinstatement as a director was dismissed. Mr *Deme*, for the plaintiff, counter submitted that the dismissal was with respect to the plaintiff's executive and not the non-executive directorship.

It is clear from HC 4151/97 that the plaintiff's prayer for reinstatement as a director was dismissed with costs. His dismissal was in accordance with article 17 of the articles of association of the sixth defendant. He was appointed director in terms of the articles of association and was dismissed from that position in terms of the self same articles. The appellation of executive or non-executive was irrelevant to his dismissal. That the plaintiff was aware that he had been dismissed was clear from paragraph two of his declaration in which he stated that: "The plaintiff is now a shareholder and a member of the sixth defendant through the first defendant's acts of fraud (*sic*)." In paragraph thirteen of the declaration he contradicts this averment by declaring that he was still a director of the sixth defendant in July 2004.

An authoritative discussion on the requirements of *res judicata* is set out by SANDURA JA in *Banda & Ors v Zisco* 1999 (1) ZLR 340 (S) at 341G-342E. They are that a final and definitive judgment by a competent court has been issued between the same parties or their privies, concerning the same subject matter and founded upon the same cause of complainant as the action in which the defence is raised.

In *City of Mutare v Mawoyo* 1995 (1) ZLR 258 (h) at 263-264 MALABA J, as he then was, stated that one of the exceptions recognised at common law is when a judgment or order has been obtained through fraudulent misrepresentation. In the present matter, the plaintiff did not allege that the judgment was obtained through fraudulent misrepresentation. Rather, he pleaded that the first defendant removed him from directorship fraudulently. The facts upon which he based the averment were the same facts he pleaded in HC 4151/97, though he used such words as "defective notice of meeting," "no compliance" with sections of the Companies Act, and "legal nullity".

I am satisfied that the issue of directorship between the parties was resolved by a competent court and was founded upon the same complaint in HC 4151/97.

Mr *Mpofu* further submitted that the issue of the plaintiff's shareholding was again determined by a CHIWESHE J, as he then was, a competent court on 27 September 2001 in HC 12 625/2000. Mr *Deme* disputed the averment that the issue of shareholding was resolved in the High Court and submitted that an appeal was still pending in that matter. The record of proceedings shows that the full reasons for the judgment only became available on 7 May 2007 because the Registrar did not place the request for reasons timeously before CHIWESHE J. In that matter, the plaintiff sought access to certain documents in the possession of the sixth defendant on the basis that he was a shareholder. It was held that he had failed to establish his shareholding on the papers. He, however, noted an appeal to the Supreme Court on 11 October 2001 in SC 288/01, which appeal is still pending. The record shows that a certificate certifying that the record was complete and ready for set down was signed by the appellant on 3 July 2008 and has not yet been signed by the other parties.

I agree with Mr *Deme* that the issue of the plaintiff's shareholding is not *res judicata*. Rather it is *lis pendens*.

The defendants also relied on prescription to non-suit the plaintiff. It was common cause that the plaintiff was dismissed as a director on 24 September 1996. He became aware of his dismissal by 7 May 1997 when he filed HC 4151/97. The Prescription Act [*Cap 8:11*] bears a wide definition of debt that includes the vindication of an obligation or right arising from statute, contract, delict or otherwise. In *Evins v Shield Insurance Co Ltd* 1979 (3) SA 1136 (W) at 1141F KING J stated that:

“The word “debt” in the Prescription Act must be given a wide and general meaning denoting not only debt sounding in money which is due, but also, for example, a debt for the vindication of property.”

Section 10(1) of the South African Prescription Act 68 of 1969 was worded in similar terms as s 14(1) of our Prescription Act. In *Standard General Insurance Co Ltd v Veroun Estates (Pty) Ltd* 1990 (2) SA 693(A) at 699B-C GOLDSTONE AJA stated that:

“The Prescription Act, if one has regard to s 10 (1), thereof, appears to have introduced throughout the concept of ‘strong’ prescription. It is expressly stated that after the lapse of the period which in terms of the relevant law applies in regard to the prescription of a debt, such debt ‘shall be extinguished’. As was pointed out by CORBETT JA (as he then was) in *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 842F, the lapse of the period of prescription ‘extinguished’ the debt and therefore also the right of action vested in the creditor.”

See also *Lipschitz v Dechamps Textiles GmbH & Anor* 1978 (4) SA 427(C) at 430E-F.

In Zimbabwe, CHIDYAUSIKU J, as he then was, in *Coutts & Co v Ford & Anor* 1997 (1) ZLR 440(H) at 443B stated of s 14 of our Act 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 subs (3), puts the above interpretation beyond doubt.”

The right of the plaintiff to claim directorship was extinguished three years after he became aware of his dismissal from the directorship of the sixth defendant. The actual date was not pleaded but as the pleadings in HC 4151/97 show, by 6 May 2000, his claim was extinguished by prescription. Once extinguished it could not be revived by the filing of an erroneous CR 14 form with the ninth defendant by officials of the sixth defendant on 30 June 2007.

The only claim of the plaintiff that is still alive is that based on his shareholding. It has not been extinguished by prescription. Section 7 of the Prescription Act shows that it is saved by the interruption of the pending appeal. I, however, cannot determine that claim for two reasons. Firstly, an appeal is pending in HC 12 625/2000. Secondly, the plaintiff did not claim his ownership of shares in the sixth defendant in the present matter. The purported amendment filed of record was not moved and runs foul of the sentiments expressed in *ZFC Ltd v Taylor* 1999 (1) ZLR 308 (H) at 310C-D where GILLESPIE J stated:

“There is a practice prevalent, born of indolence and ignorance of the rules, whereby parties purport to effect an amendment of process and pleadings by the unilateral issue of a so-called "notice of amendment". One frequently finds in applications for default judgments that such notices have been issued after the default or bar, as the case may be, and are not even served upon the defendant. This is entirely unprocedural. There are only two possible methods of procuring an amendment to process or pleadings after the issue of summons. One is by consent of the parties and the other is by order of court.”

I, accordingly, uphold the special pleas of *res judicata* and prescription raised by the first to sixth defendants.

I have been asked to issue a decree of perpetual silence against the plaintiff. It does not appear to me proper to emasculate him from approaching our courts seeing that there is

still the pending issue of his shareholding in the sixth defendant that might very well require judicial determination.

The defendants sought punitive costs against the plaintiff for abusing the court process by flogging a dead horse and putting the defendants to unnecessary expense. It seems to me that the plaintiff was not motivated by any desire to achieve justice on the question of directorship. Rather he was driven by malice and malevolence. Section 18 of the Legal Aid Act [*Cap 7:16*], reads:

“Notwithstanding any other law, a court shall not award costs against an aided person.”

Were it not for the provisions of s 18 of the Legal Aid Act, *supra*, I would have expressed my displeasure of the plaintiff’s conduct by mulcting him with cost on the scale of legal practitioner and client.

Accordingly, it is ordered that:

1. The special pleas raised by the first to sixth defendants be and are hereby upheld.
2. The plaintiff’s claims be and are hereby dismissed.
3. There shall be no order as to costs for both the application and the present action.

*The Legal Aid Directorate*, plaintiff’s legal practitioners  
*Mushonga & Associates*, the first to the sixth defendants’ legal practitioners