HC 1816/10

EFROLOU [PVT] LTD
versus
MRS MURINGANI

HC 3285/10

EMILY NTOMBIZODWA LUWACA
versus
EFROLOU [PVT] LTD
and
REGISTRAR OF DEEDS, BULAWAYO
and
THE MESSENGER OF COURT, KWEKWE

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 10 APRIL 2013

Interlocutory application

Mrs *S Matshiya* for the Plaintiff [First Defendant in HC 3285/10]
Mr *G C Manyurureni* for the Defendant [Plaintiff in HC 3285/10]

MAFUSIRE J: This is the judgment in the interlocutory application by Efrolou [Private] Limited, Plaintiff in the case under reference number HC 1816/10, and First Defendant in the case under reference number HC 3285/10 [hereafter referred to as "***Efrolou***"]

Efrolou's interlocutory application aforesaid sought an order granting an amendment to its plea in the claim by one Mrs Muringani under HC3285/10. The amendment sought to incorporate the special plea of prescription.

The facts of the matter are that on 24 March 2010, Efrolou issued a summons under HC 1816/10 against Mrs Muringani for her eviction from premises known as Lot 4 of Lot 9 of Chicago situate in the district of Que Que ["***the property***"].

The basis of the claim by Efrolou against Mrs Muringani, as pleaded in its declaration, was that Efrolou was the owner of the property which it had bought at an auction sale in 1996 following a judgment against Mrs Muringani's late husband; that

Efrolou had obtained title to the property on 14 May 1999 under deed of transfer number 2421/99 and that despite Efrolou's notice to her on 31 March 2010 Mrs Muringani had refused or neglected to vacate the property.

Mrs Muringani defended the claim. From her plea the defence was that Efrolou was not the lawful owner of the property; that Efrolou had obtained the title to the property fraudulently; that as the lawful beneficiary to the estate of the late Mr Muringani she had the right; title and interest in the property; that she had issued a summons against Efrolou and its directors to have the property transferred back to her late husband's estate and that she was entitled to occupation of the property until the dispute was resolved.

Mrs Muringani's plea in HC 1816/10 was filed on 18 May 2010. The day before, i.e. on 17 May 2010, Mrs Muringani had issued a summons under the name Emily Ntombizodwa Luwaca in HC3285/10 jointly against Efrolou, the Registrar of Deeds, Bulawayo, and the Messenger of Court, Kwekwe.

In her summons and declaration in HC 3285/10 afore said Mr Muringani sought an order setting aside the transfer of the property to Efrolou from her late husband, one Anthony Anesu Muringani [hereafter referred to as "***the deceased***"]. She also sought an order directing the Messenger of Court, Kwe Kwe, to sign all the necessary transfer papers.

In her declaration in HC 3285/10 Mrs Muringani alleged that the property had been illegally transferred by the Messenger of Court to Efrolou; that the deceased had not been aware of the purported sale and transfer; that the transfer bordered on fraud and that the Messenger of Court was not supposed to have made the transfer,.

Efrolou opposed Mrs Muringani's claim. In its plea filed on 15 June 2010 Efrolou essentially repeated the allegations in its declaration under HC 1816/10 that it had bought the property from an auction sale and had subsequently obtained title on 14 May 1999. It further alleged that there had been nothing illegal or improper about the sale; that the deceased must have known about the sale in execution and the subsequent transfer and that Mrs Muringani had not laid out any basis upon which the transfer of the property should be set aside.

The parties had subsequently filed further pleadings in the two matters. On 1 February 2011 the two matters had been consolidated at a pre-trial conference and had been referred to trial on three issues, namely:

[1] whether the purchase [of the property] by, and the subsequent transfer to Efrolou was tainted by fraud,

[2] whether the transfer should be set aside,

[3] whether Efrolou was entitled to eviction,

On 26 November 2012 Efrolou filed a document titled Notice of Amendment in terms of Rule 132 of the High Court Rules. This was to amend its plea to include the plea of prescription. In essence it was alleged that Mrs Muringani's claim had become prescribed; that the sale in execution had taken place in 1996; that transfer had been effected as far back as 1999; that it had been more than three years since that transfer and that in terms of the Prescription Act the claim had become prescribed.

The matter, as consolidated, came up for trial before me on 18 March 2013. Mrs Muringani was no longer represented. The two records were not in order. I adjourned the matter to 8 April 2013 to enable Efrolou to sort out the record and to allow Mrs Muringani to respond to the notice of amendment.

When the trial resumed on 8 April 2013 Mrs Muringani was now represented. I heard argument on the propriety of Efrolou's notice of amendment and the merits of the new defence of prescription.

Very briefly, Mrs *Matshiya*, for Efrolou, submitted that a party to the proceedings may amend its pleadings at any time before judgment if the amendment does not cause prejudice to the other party; that Efrolou was entitled to amend its plea as there would be no prejudice to Mrs Muringani; that the registration of transfer of the property by the registrar of deeds on 14 May 1999 was constructive notice to the whole world, including the deceased and Mrs Muringani that title in the property had duly passed to Efrolou and that it was now too late for Mrs Muringani to try and have the transfer reversed.

Mr *Manyurureni* accepted that a party can amend its pleadings at any time before judgment if this does not cause prejudice to the other party. However he submitted that

according to Mrs Muringani, neither she nor the deceased had been aware of the sale of the property; that the sale had been "*fictitious*", the transfer documents "*fictitious*" and the resultant transfer fraudulent.

Mr *Manyurureni* further submitted that Mrs Muringani was challenging the authenticity of the court judgment that preceded the sale in execution, the authenticity of the transfer documents signed by the messenger of court and the authenticity of the distribution schedule that the messenger of court had prepared showing, among other things, that after payment to his creditors the deceased had been paid the balance of the purchase price, amounting to $137 327-28.

In terms of Order 20 Rule 132 the court or a judge may at any stage of the proceedings allow a party to alter or emend its pleadings. The alteration should be on such terms as may be just and for the purpose of determining the real question in controversy between the parties. The Rule is worded as follows:

> "***132. Court may allow amendment of pleading***
>
> *"Subject to rules 134 and 151, failing consent by all parties, the court or a judge may, at any stage of the proceedings, allow either party to alter or amend his pleadings, in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real question in controversy between the parties*."

The general rule is that an amendment of a pleading in an action will always be allowed unless the application is *mala fide* or the amendment would cause an injustice or prejudice to the other side which cannot be compensated by an order of costs; see *Commercial Union Assurance Co Ltd v Waymark NO* 1995 [2] SA 73; *UDC Ltd v Shamva Flora [Pvt] Ltd* 2000 [2] ZLR 210 [H].

The court has a wide discretion to grant or refuse an amendment. The discretion has to be exercised judiciously.

In the *UDC Ltd v Shamva Flora [Pvt] Ltd* case above CHINHENGO J, whilst pointing out that the approach of our courts is to allow amendments quite liberally, went on to add that this liberal approach is affected where, among other things, there is no prospect of the point raised in the amendment succeeding.

In the present case the point raised in the notice of amendment is not *mala fide*. If it succeeds it will virtually decide the case in HC 3285/10. If Mrs Muringani's claim is prescribed, then she cannot persist with seeking a reversal of the transfer.

I do not see any prejudice as would be caused by allowing the amendment as such. Mr *Manyurureni* has not pointed out any. That if the point of the amendment succeeds will put paid to Mrs Muringani's claim is not such prejudice as will stem from the amendment itself.

The defence of prescription was available when Efrolou filed its main plea on 15 June 2010. No meaningful explanation has been given why it was not pleaded at that time. In terms of Rule 119 the defendant is required to file his plea, exception or special plea within ten days of the service of the plaintiff's declaration. Mrs Muringani's summons and declaration having been served on 19 May 2010, the special plea of prescription having been filed on 26 November 2012 it means there has been a delay of over 30 months.

However, it cannot be the position that because the special plea was not raised then it cannot be raised now. It has not been suggested that Efrolou waived its right to raise it or that it is now barred from doing so. At any rate in terms of Rule 4C [a] a court or judge may condone a departure from any provision of the Rules where this is required in the interest of justice. I will allow the amendment.

As pointed out already, I heard argument on the merits of the special plea.

In terms of s15 of the Prescription Act, [*Cap 8: 11*], a debt other than one secured by a mortgage bond, or a judgment debt, or a tax debt under an enactment or one owed to the state in the circumstances prescribed by that section, or a debt arising from a bill of exchange, becomes prescribed after the lapse of a period of three years.

In terms of s16 of the Prescription Act, prescription begins to run as soon as the debt is due.

The term "*debt*" is defined in section 2 to include anything which may be sued for or claimed by reason of an obligation arising from statute, contract, delict or otherwise. In this case Mrs Muringani's claim for a reversal of the transfer that was registered on 14 May 199 is plainly a debt. It is any other debt. Therefore the applicable period of prescription is three years.

Mr *Manyurureni* submitted that Mrs Muringani's claim has not prescribed because she became aware of the judgment against the deceased, of the sale in execution and of the subsequent transfer only in 2008 when Efrolou initiated moves to evict her from the property. He further submitted that Mrs Muringani having issued her summons in 2010, the period of prescription had not completed.

In terms of s19 of the Prescription Act, the running of prescription is interrupted by the service on the debtor of any process by the creditor claiming the debt. Thus if Mrs Muringani's summons for the reversal of the transfer had been served on Efrolou within the three years of her becoming aware of the transfer then the running of prescription would have been interrupted.

Section 16[3] of the Prescription Act provides that a debt shall not be deemed to be due until the creditor becomes aware of the identity of the debtor and of the facts from which the debt arises.

In my view Mrs Muringani became aware of the transfer of the property from the deceased's name to Efrolou in 1999 when transfer was registered. Apart from the fact that Efrolou maintains that the property was sold by public auction following a court judgment, in terms of which, among other things, the sale in execution would have been advertised to the public, the transfer was registered by the registrar of deeds, a public official, through the deeds office, a public office.

Section 14 of the Deeds Registries Act, [*Cap 20:05*], provides that the ownership of land may be conveyed from one person to another only by means of a deed of transfer executed or attested by the registrar.

Registration of title in the deeds office is a transfer of real rights in a property from one person to another. The transferee becomes the owner of those rights in the property. He or she can now enforce his or her rights against the whole world. The registration of transfer is constructive notice to the whole world of the change of ownership. HARRY SILBERBERG *The Law of Property*, Durban Butterworths, 1975, at p 67, says:

> "*The registration of a real right protects its holder and the public alike. As far as the former is concerned, he is entitled to rely on the doctrine of constructive notice which means that every person is deemed to have knowledge of the existence of a duly registered real right. In other words, once a real right has been registered it becomes enforceable*

against the world at large, provided only that it has been obtained in good faith. Conversely, every member of the public is – subject to certain exceptions – entitled to rely on the deeds register being correct"

At pages 67 – 68 the learned author criticises HOEXTER JA for seemingly contradicting himself on the point in his judgment in *Frye's [Pty] Ltd v Ries* 1957 [3] SA 575 [AD]. In that judgment the learned judge of appeal seemed to accept in one instance that the registration of title in the deeds office is intended to protect the real rights of those persons in whose names such rights are registered and that such are maintainable against the whole world. However, in another instance the judge dismissed the defendant's reliance on the doctrine of constructive notice holding that "*... that does not mean that every person in the world must be deemed to know the ownership of every real right registered at the Deeds Office*."

SILBERBERG respectfully submits that this is exactly what the doctrine of constructive notice does mean. I agree.

There is also another basis for upholding the special plea of prescription. In her claim for a reversal of the transfer in HC 3285/10 Mrs Muringani does not sue in her individual capacity. She sues in her capacity "*As the Executrix Dative in the Estate of the Late Anthony Anesu Muringani*". Therefore, it does not really matter when she herself became aware of the change of title. It is the knowledge of the deceased that matters.

Apart from the doctrine of constructive notice I am satisfied that the deceased was actually aware, or ought to have been actually aware of the transfer. That aspect was ventilated during argument. Among other things, there was a judgment against him which appears not to have ever been challenged. That judgment had been followed by an auction of the property. The only challenge that was mounted by the deceased seems to have been in relation to the auction price.

The deceased seems to have succeeded in that challenge because the magistrate had subsequently directed a sale by private treaty for a higher amount. That had been done. The revised purchase price had subsequently been paid and distributed amongst the deceased's creditors. The balance amounting to 82% had been remitted to the deceased.

The bid price at the auction had been $120 000. The sale by private treaty had been in the sum of $160 000. The messenger of court's schedule of distribution to the

creditors had been on 18 September 1997. As pointed out already, the transfer was on 14 May 1999.

The above facts are virtually common cause. Just before the commencement of the trial, that is to say on 12 March 2013, Mrs Muringani filed a supplementary synopsis of evidence. In it she stated that she had had sight of the documents relating to the sale of the property. She went on to narrate the sequence of events in some detail. She covered the above points.

Mrs Muringani approach was to doubt the series of the events and the transactions starting with the court judgment right up to the transfer. She denied that the deceased had received the balance of the purchase price. She alleged that the transfer was "*tainted with fraud*".

I am mindful of the fact that the aspect of fraud is one of the issues for trial. I did not canvass it in any greater detail during the interlocutory application. However, I am satisfied that even *ex facie* the documents in these two consolidated matters, Mrs Muringani's claim has become prescribed. To accept her argument to the contrary I would need to ignore the judgment that was never rescinded; I would need to believe that the sale in execution never happened; I would need to ignore the subsequent sale by private treaty; I would need to ignore the fact that that sale had subsequently been confirmed and I would need to believe that Efrolou had never paid the full purchase price despite the documents to the contrary. That would be stretching it too far.

Even from her own documents it appears that the transfer documents were signed by the messenger of court who went on to prepare a schedule of distribution from which the deceased 82% of the sale proceeds. However, in argument it was submitted that the transfer was fraudulent.

Prescription goes to the root of a claim or defence. In terms of Rule 137 it is a special plea in bar. It is taken where the matter is one of substance which would not involve delving into the merits of the case. If a special plea is allowed it disposes of the case.

I will allow the plea of prescription on the merits. In the premises Mrs Muringani's claim in HC 3285/10 is hereby dismissed.

However, her claim having been consolidated with HC 1816/10 the costs in respect of the issue of prescription in HC 3285/10 shall be costs in the cause in HC 1816/10.

Mtetwa & Nyambirai, plaintiff's legal practitioners [1st defendant's legal practitioners in HC 3285/10]
Manyurureni & Company, defendant's legal practitioners [plaintiff's legal practitioners in HC 1816/10]