

CHIRINDA
versus
KONRAD VAN DER MERWE
and
MINISTER OF LANDS & RURAL RESETTLEMENT

HIGH COURT OF ZIMBABWE
CHIWESHE JP
HARARE, 24 May 2012 & 19 February 2013

Mr *G. Mlotshwa*, for the plaintiff
Mr *D. Ochieng*, for the respondents

CHIWESHE JP: In this action the plaintiff seeks the eviction of the first defendant and all those claiming occupation through him from the immovable property known as subdivision 1 of Reinfield, situate in Makonde, Mashonaland West Province. The plaintiff also claims costs of suit as against the first defendant only.

The plaintiff's declaration is to the following effect. Reinfield Farm is what is commonly referred to as "gazetted" land. On 17 October 2005 the plaintiff was offered this land by the 2nd defendant. The plaintiff accepted the offer and took occupation of the farm in November 2005. The first defendant, the former owner, however remains in illegal occupation and use of a portion of the farm. The first defendant, according to the plaintiff, has no lawful authority to remain in occupation of the farm. The plaintiff states that he is recently aware of his ability to seek the eviction of first defendant following a Supreme Court judgment to that effect.

The first defendant entered an appearance to defend the matter on 20 April 2011. The second defendant has not opposed this action.

The first defendant filed a special plea in abatement on the grounds that the plaintiff's claim has been extinguished by prescription. The present claim, argues the first defendant, is a "debt" as defined in s 2 of the Prescription Act. The cause of action is a right of occupation acquired in 2005 at the time of acceptance of the offer letter. The summons was served on the first defendant on 7 April 2011. As more than three years have lapsed since the cause of action arose, the debt has been extinguished by operation of law. For that reason, it is argued,

the first defendant's special plea should be allowed and the claim against him dismissed with costs.

Section 2 of the Prescription Act [*Cap 8:11*] defines the term "debt" as follows: "debt", without limiting the meaning of the term, includes anything which may be sued for or claimed by reason of an obligation arising from statute, contract, delict or otherwise." It is agreed by the parties that the right to sue for eviction constitutes a "debt" as defined by the Act.

Section 16 (1) of the act provides:

"Subject to subsection (2) and (3), prescription shall commence to run as soon as a debt is due".

It is therefore trite that prescription runs from the date that a debt becomes due. A debt becomes due when the creditor becomes aware of the identity of the debtor and the facts giving rise to the cause of action. The cause of action in any action or claim is "the entire set of facts which give rise to an enforceable claim and includes every act which is material to be proved to entitle a plaintiff to succeed in his claim " - see *Abrahamse and Sons vs South African Harbours* 1933 CPD 626. See also *Mukahlera vs Clerk of Parliament and Ors* 2005 (2) ZLR 365.

The plaintiff's defence to this exception is to the effect that before the pronouncements of the Supreme Court in *Commercial Farmers Union and Ors vs Minister of Lands and Rural Settlement & Ors* SC 31/10 handed down on 26 November 2010, the identity of the debtor was not known to him. Although he knew the first defendant as the person who had refused to vacate a portion of the farm offered him by the 2nd defendant, the High Court persistently and in many cases brought before it ruled that the recipient of an offer letter had no *locus standi* to sue for the eviction of the former owner or occupier of Gazetted Land. Only the State could mount such a suit.

The position however changed when the Supreme Court in the *Commercial Farmers Union* case *supra* ruled to the contrary. At p 29 of the cyclostyled judgment para 8 CHIDYAUSIKU CJ had this to say:

"(8) While s 3 (5) of the Act confers on a criminal court the power to issue an eviction order against a convicted person, it does not take away the Minister's right or the right of the holder of an offer letter, permit or land settlement lease to commence eviction proceedings against a former owner or occupier who refuses to vacate acquired land. The holder of an offer letter, permit or land settlement lease has a clear right, derived from an Act of Parliament, to take occupation of acquired land allocated to him or her in terms of the offer letter, permit or land settlement lease. No doubt the

legislature conferred on the holder of an offer letter, permit or land settlement lease, the *locus standi*, independent of the Minister, to sue for the eviction of any illegal occupier of land allocated to him or her in terms of the offer letter, permit or land settlement lease”.

I therefore find acceptable the plaintiff’s explanation that until 26 November 2010 he did not know the first defendant to be his debtor in terms of the Prescription Act and that, if he might have known, he was dissuaded from suing the defendant by the various judgments of this honourable court wherein it was stated categorically that the holder of an offer letter would not have the requisite *locus standi* to do so. Whilst some judges might have held differently, the least that could be said as a result is that the position of the holder of the offer letter was uncertain by virtue of the conflicting judgments emanating from this court. Indeed the position has since been clarified by the Supreme Court in the *Commercial Farmers Union* case *supra*.

In any event the plaintiff’s right of use and occupation is one given by the 2nd respondent, representing the State, the owner of the property. The 2nd defendant has not opposed this application nor has he withdrawn the offer letter or otherwise cancelled the plaintiff’s right of occupation. It is therefore doubtful whether the owner’s right to determine who occupies its property at any given time could be curtailed, be it indirectly, by a plea of prescription against the authorised occupier.

For these reasons I would, as I hereby do, dismiss the exception. The first defendant shall pay the costs.

G.N. Mlotshwa & Co, plaintiff’s legal practitioners
Kevin J. Arnott, first defendant’s legal practitioners