HOMEFILL (PVT) LTD
versus
FARAI CHINDABATA
and
MWATSAMWEYI CHARLEAN MUCHIRAHONDO
and
WATSON MACHIMWENYIKA GARA
and
THE AVONLEA EXTENSION TRUST

HIGH COURT OF ZIMBABWE
MANYANGADZE J
HARARE, 17 October 2022 & 28 June 2023

Opposed Matter

Mr *I Gonese*, for the plaintiff
Ms *P Phillips,* for the 1st and 2nd defendants

MANYANGADZE J:

INTRODUCTION

The plaintiff issued summons against the defendants claiming that:

(a) The deed of cession and assignment entered into by the defendants on the 3rd of November 2021 with regards Stand Number 4300 Avonlea Extension be and is hereby declared null and void.
(b) The 1st and 2nd defendants be and are hereby evicted from Stand Number 4300 Avonlea Extension.
(c) The 1st, 2nd and 3rd defendants, jointly and severally, shall pay the plaintiff costs of suit at an attorney and client scale.

Alternatively;

(a) The 1st and 2nd defendants be and are hereby ordered to return possession of Stand Number 4300 Avonlea Extension to the plaintiff.
(b) The 1st, 2nd and 3rd defendants, jointly and severally, shall pay the plaintiff costs of suit at an attorney and client scale.

The first and second defendants raised a special plea and an exception to the plaintiff's claim, leading to the matter being placed on the opposed roll. The special plea is predicated on two averments. These are that;

(i) The plaintiff's claim has prescribed
(ii) The plaintiff has no *locus standi* to bring the action it has instituted.

FACTUAL BACKGROUND

At the centre of the dispute between the plaintiff and the defendants is a certain immovable property known as Stand No. 4300 Avonlea Extension, measuring 1000 square metres, being a subdivision of Lot 1 Zisalisali and remainder of Lot 1 Marlborough Township held under deed of transfer number 004918/2009 (''the property").

The plaintiff entered into an agreement of sale for the said property with an entity known as Stanax Holdings (Pvt) Ltd ("the 1st agreement"). That agreement was executed on 9 October, 2017. According to a copy of the agreement filed of record as part of the pleadings, Mr Watson Gara, third defendant *in casu*, was the representative of the seller. The purchaser was represented by Mr Alexio Mubaiwa.

Sometime in November 2021, the third defendant sold the same property to the first and second defendants, and entered into a deed of cession to that effect ("the 2nd agreement"). Pursuant to the 2nd agreement, the first and second defendants moved onto the property, and began construction work. This prompted the plaintiff to issue summons, seeking eviction of the first and second defendants from the property. The plaintiff avers that the purported sale of the property by the third defendant to the first and second defendants was fraudulent and must be declared null and void *ab initio*. The third defendant had no rights in the property and as such had no legal authority to alienate it in any manner.

On the other hand, the first and second defendants aver that they lawfully acquired rights in the property from the third defendant. It is the plaintiff who lacks the requisite authority to evict them from the property. In resisting the plaintiff's claim, the defendants raised the special plea and exception which are the subject of this opposed matter.

PLAINTIFF'S PRELIMINARY POINTS

The plaintiff has raised some points *in limine,* on the basis of which it seeks to vitiate the special plea and exception. These are that;

(i) The issues raised in the special plea are *res judicata*
(ii) The exception is not in compliance with the rules of court

Since the plaintiff's preliminary points are impugning the validity of the defendants' special defences, they ought to be dealt with first. These special defences i.e. special plea and exception, can only be considered after it is determined that they are properly before the court.

Res judicata

Under this point, the plaintiff avers that the issues the first and second defendants are raising are the same as those they raised in an urgent chamber application the plaintiff filed under Case No. HC 4932/22. In that case, the first and second defendants opposed the urgent chamber application on the basis of the same issues they are relying on in their special plea, *viz* that the plaintiff's claim is prescribed and that the plaintiff lacks *locus standi.* The application concerned the same subject matter, being the alleged unlawful occupation of Stand No. 4300 Avonlea Extension. The parties are the same.

On the other hand, the first and second defendants contend that there is no *res judicata*. The main basis for their contention is that what was granted in the urgent chamber application was a provisional order. The judge did not dispose of the special plea. This was to be dealt with at the time the summons matter would be dealt with.

The law on *res judicata* is well established. The fundamental requirements for a plea of *res judicata* to succeed are that the matter must;

(a) have been between the same parties or their privies
(b) have concerned the same subject matter
(c) have been founded on the same cause of action

In the case of *Kamupariro* v *Musendo & Anor* HH 196/17, MATANDA – MOYO J expressed the law in the following terms, at p3 of the cyclostyled judgment:

> ." The principle of *res judicata* is simply a term used for a matter already judged, a case in which there has been final judgment and is not a subject of appeal. Generally the legal doctrine is meant to preclude continued litigation of a case on same issues between the same parties. The matter especially is barred from being heard against either in the same court or in a different court. A court will use the principle of *res judicata* to refuse to rehear and

> reconsider the matter. The principle prevents litigants from multiplying judgments and subsequently causing confusion.
> In order to succeed a party claiming *res judicata* must show that the earlier judgment is identical to the present in the following;
>
> (1) Same parties
>
> (2) Same cause of action
>
> (3) Same relief sought"

See also *Kawondera* v *Mandebvu* 2006 (1) ZLR 1105 (S), *Towers* v *Chitapa* 1996 (2) ZLR 261 (H).

Turning to the instant case, the first port of call should be the judgment by TSANGA J in HC 4932/22. It is the case in which the plaintiff avers that the special plea was disposed of. It must be noted that at the time the instant matter was heard, on 17 October 2022, what was available was only an order issued by TSANGA J on 28 July 2022. It was a provisional order interdicting the first and second defendants from constructing or developing anything on the property, pending determination of the parties' substantive rights over the property on the return date. Terms of the final order were a declaration that the plaintiff is the lawful owner of the property and the eviction of the first and second defendants from the same. From this order, one cannot say that the issues raised in the special plea were disposed of.

The judge subsequently issued reasons for the said order, on 12 December 2022, which are in the form of an unreported judgment referenced HC 4932/22. In the brief judgment, the judge indicates that it was issued following a request by the defendants' (then respondents) legal practitioners for the purpose of advising their clients.

Needless to say, at the time the instant matter was argued, the reasons for judgment were not yet available. Had they been available, I doubt whether the plaintiff would have raised its preliminary point against the special plea. It is clear from this judgment that the judge did not deal with the issues constituting the special plea. She confined herself to what she indicated as the "*narrower and more immediate quest*" for a provisional order to stop construction, leaving all the other issues to the confirmation hearing. In this regard, the learned judge stated, at p2 -3 of the cyclostyled judgment:

> "Even though prescription was raised as a preliminary issue, it would require evidence to be led. It was not for me to determine the issue of prescription at that point in an application for a provisional order since a final order would have had to be sought.
> The first and second respondents also raised issues of material non – disclosure on the ownership of the stand, issues of material disputes of facts, the issue of ***l****ocus standi* as well as the issue of defective service and that of a pending matter. All these were in my view merely

> deflective points. I say this because the true ownership of the stand where a *prima facie* right has been established , would have been the subject matter of the confirmation hearing as indeed would be any issue relating to disputes of fact or *locus standi* to bring the matter relating to the ownership of the stand.....
> What was before me was simply the quest for a provisional order to stop construction and hence the issue of a pending matter was irrelevant to this narrower and more immediate quest."

The above – cited remarks put the matter to rest. There is no way it can be contended that the judge dealt with the issues in the special plea. She clearly stated that these, among other issues raised, were or should be the subject of the confirmation hearing, and should not be the subject of the urgent application for a provisional interdict that was before her. There is therefore no *res judicata* to talk about. The issues highlighted i.e. prescription and *locus standi,* were not determined.

In the circumstances, the plaintiff's point *in limine* on the special plea cannot be upheld and is accordingly dismissed.

Procedural defect

The plaintiff's second preliminary point relates to the exception. It seeks to vitiate the exception on a procedural aspect. The plaintiff avers that the exception is fatally defective, in that it is not in compliance with rule 42(3) of the High Court Rules, 2021. This rules requires the first and second defendants, who are raising an exception, to first call upon their opponent, by written letter, to remove the cause of the complaint they are raising. The plaintiff contends that the provision is couched in mandatory terms and must be complied with. Failure to do so renders the exception fatally defective.

In countering the plaintiff's averment, the first and second defendants insist that their exception is valid. Ms *Phillips* contended, on behalf of the first and second defendants, that they filed a request for further particulars. That request is a form of communication to the plaintiff to enable the defendants to plead. She contended that the request for further particulars carried exactly what a letter would have contained.

Further to that, Ms *Phillips* pointed out that a letter was eventually written and there was therefore compliance with the rules.

Mr *Gonese,* on behalf of the plaintiff, pointed out that the defendants were now rewriting the rules. They cannot have a request for further particulars deemed to be a letter in terms of rule 42 (3).

I am in agreement with the submissions by the plaintiff. Rule 43 is expressed in clear and un-ambiguous terms. The language is also peremptory. It is a procedure for an exception, and is separate and distinct from the procedure for further particulars. It is not clear why the defendants are mixing the two procedures. Rule 42(3) reads as follows:

> "Before filing any exception to a pleading or making a court application to strike out any portion of a pleading on any grounds, the party complaining of any pleading shall, within the time allowed for filing a subsequent pleading, by written letter to his or her opponent state the nature of his or her complaint and call upon the other party to remove the cause of the complaint within twelve days of the complaint."

Rule 42 sub - rules (8) and (9) further provide for the filing of heads of argument and the setting down of the matter for argument following the filing of a special plea, exception or application to strike out. All this goes to show that this is a procedure that takes a different route from a request for further particulars.

The assertion by the first and second defendants that they eventually wrote the required letter does not save the day for them. The said letter was written on 24 August 2022, after the exception had already been filed, and after the plaintiff indicated that the exception was afflicted by a procedural defect. In the letter, the first and second defendants' legal practitioners are in fact insisting that they have done nothing wrong by not writing the letter, and that their request for further particulars constitutes compliance with the rules. They then conclude the letter by stating that for the plaintiff's convenience, the same may be treated as the letter envisaged under rule 42 (3). Put differently, the defendants are telling the plaintiff that, "We do not agree with you that we have to write the letter you are talking about. Our request for further particulars is sufficient. However, if you insist, then you might as well take this letter as the one required y the rules."

Rule 42(3), cited above, states clearly what procedure to follow if a party raises an exception. The first and second defendant cannot choose their own procedure. In the case of *Gloria Nyamakura* v *Corporate Twenty Four Hospital Group (Pvt)Ltd & Ors* HH 483/15, MATHONSI J (as he then was) highlighted the need to write a letter of complaint before raising an exception. Although he was dealing with an exception raised by the plaintiff to the defendant's plea, his remarks apply with equal force *in casu*, where it is an exception raised by the defendants to the plaintiff's claim. The learned judge stated, at page 3 of the cyclostyled judgment:-

> "While it is true that r 140(1) is a directory provision, a practice has evolved in this jurisdiction for legal practitioners to first dispatch a letter of complaint to the other legal practitioner calling upon him to remove the source of complaint and putting him on terms to do so, before filing an exception. Professional etiquette therefore demands that it be done and r 140(1) lays the foundation for such conduct to be adhered to. This is particularly so bearing in mind that in the majority of cases, an exception does not dispose of the matter but would, if upheld, invariably result in the offending pleader being given an opportunity to amend the offending pleading to bring it in line with the attendant order for costs of course.
>
> Where an exception of this nature is upheld, the party whose pleading is complained of would be allowed to amend the pleading. The remedy available to the excipient is not an outright dismissal of the claim or defence but an order for the amendment to be effected within a fixed period of time: *Zimbabwe Manpower Development Fund* v *Muza & Nyapadi & Ors* HH 500/14; *Auridiam Zimbabwe (Pvt) Ltd* 1993(2) ZLR 359 (H) 373 C-D; *Adler* v *Elliot* 1988(2) ZLR 283 (S) 292B; *Trope & Ors* v *SA Reserve Bank* 1993(3) SA 264 (A) 269 G-I.
>
> The mistake counsel for the plaintiff has made is to think that he can race to judgment against the third defendant merely on the basis of an exception. This explains the zeal and vigour with which Mr *Nyamucherera* has pursued the exception even after an appropriate amendment was made in recognition of the complaint raised in the exception. In doing so, a lot of time has been wasted in the filing of pleadings when this matter should have progressed to pre trial conference and indeed to trial by now."

It is noted that MATHONSI J was dealing with the provisions of s 140 (1) of the old High Court rules, which were couched in directory, rather than peremptory language. Nevertheless, the judge emphasised the need to write the letter of complaint first, and explained the rationale for it. The expediency of such a letter is succinctly explained in the above quotation. I need not elaborate it further. The current rule, 42 (3), uses peremptory language. Thus, *a fortiori*, an obligation to comply with the procedure outlined therein is placed on the party seeking to rely on an exception.

In the circumstances, I find that there is considerable merit in the point *in limine* raised by the plaintiff in regard to the exception. It is fatally defective for non-compliance with the rules and must be dismissed. The effect of this is that the exception, which sought to vitiate the plaintiff's claim, has itself been vitiated by the upholding of the plaintiff's preliminary point. Had the other preliminary point been upheld, *viz* the one that sought to vitiate the special plea, that should have been the end of the matter. I would have simply held that the plaintiff's claim stands as per the summons and the pleadings filed so far. However, having dismissed the plaintiff's preliminary point relating to the special plea, I must proceed to deal with the special plea on the merits.

SPECIAL PLEA

As already indicated, the special plea is predicated on two issues, being prescription and *locus standi*.

Prescription

On prescription, the defendants have referred to ss 14 to 19 of the Prescription Act [*Chapter 8:11*], which contain provisions on the extinguishing of debts by prescription. For debts not specified in para(s) (a) to (c) of section 15, the applicable provision is s 15 (d), which stipulates a period of three years within which a claim must be made. Section 16 is of particular relevance in this matter, as it provides for the commencement of the running of prescription. It reads:

> "(1) Subject to subsections (2) and (3), prescription shall commence to run as soon as a debt is due.
> (2) If a debtor wilfully prevents his creditor from becoming aware of the existence of a debt, prescription
> shall not commence to run until the creditor becomes aware of the existence of the debt.
> (3) 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:
> Provided that a creditor shall be deemed to have become aware of such identity and of such facts if he could
> have acquired knowledge thereof by exercising reasonable care."

The first and second defendants aver that the debt *in casu* became due upon the signing of the 1st agreement of sale in 2017. That is when prescription began to run. Further to that, the defendants point out that the definition of a debt is so wide that it covers a contract for the sale of land. The defendants' position is summed up in paragraphs 4 and 5 of their heads of argument in the following terms:

> "It is our humble submission that a contract of sale of land is a debt for all intents and purposes. In the case of **River Ranch Ltd v Delta Corporation Ltd HH – 01 – 10** it was held that,
> *Section 2 of the Act defines the word debt as follows: without limiting the meaning of the term, includes anything which may be sued for or claimed by reason of an obligation arising from statutes, contract, delict or otherwise"....It is abundantly clear from this definition that in a contract for the sale of land the purchaser's right to sue for transfer or demand specific performance by the seller is a debt which may be sued for or claimed by reason of an obligation arising from contract.*" (our emphasis)
> (See also **Desai N.O. Desai & Others 1996 (1) SA 141 (A)**

> Since the plaintiff is suing the defendants more or less for vindication, its suit falls squarely within the ambit of anything which may be sued for. What this means is that a claim for vindication of property amounts to a claim for a debt in terms of the Prescription Act. "It therefore follows as a matter of common sense that the applicant's suit being a claim for vindication, in legal parlance it is a debt which is subject to prescription in terms of the Act....Once prescription has run its course it deprives the aggrieved party of the remedy or relief sought regardless of whether or not one has a valid claim on the merits." **(Conrad Trust v Federation of Kushanda Trust 17 – SC – 012)** (*sic*). It is therefore our submission that the Plaintiff's claim has prescribed and it should be dismissed."

In countering the defendants' submissions, the plaintiff avers that its claim has not prescribed. The plaintiff points out that the debt or obligation in question arose when the first and second defendants occupied its property without authority in 2021. In other words, the cause of action on which the obligation or debt is premised arose in 2021. That is the year when the first and second defendants unlawfully took possession of the plaintiff's property, and entered into the deed of cession which the plaintiff seeks to impugn.

The facts of this matter show that the deed of cession which the plaintiff wants cancelled was executed in 2021. That much is common cause. It was entered into between the first and second defendants on the one hand, and the third defendant on the other hand. It was executed in respect of property which is the subject of a sale agreement concluded in 2017. That sale agreement was entered into by the plaintiff and a company called Stanax Holdings (Pvt) Ltd. The third defendant acted as the representative of the company. The seller was the company. There is nothing on record showing that this agreement was cancelled or for any reason nullified.

It is not clear on what basis the third defendant sought to alienate the property by selling it to the first and second defendants. There is nothing to show that the seller who concluded an agreement of sale with the plaintiff in 2017 is the one who alienated the property. Even if such seller sought to do so, it would first have to deal with the subsisting sale agreement which would be still binding on the parties who entered into it. In all their submissions, the first and second defendants have not addressed the pertinent question of the legal relationship between the third defendant and Stanax Holdings. They have not attempted to explain why the third defendant is acting as if he is one and the same person with the corporate entity that executed the sale agreement of 2017.

In my view, the cause of action should not be confined or restricted to the 1st sale. The first and second defendants are restricting it to that sale so that the claim falls outside the prescription period, thus extinguishing it. The set of facts upon which the cause of action is

founded must extend to, and include the second sale. It is this sale that instigated the plaintiff's suit. In the case of *Cathrine Chiwawa* v *Apostolis Mutzuris & Ors* HH 7/09, MAKARAU JP (as she then was), had occasion to clarify what constitutes a cause of action. The learned judge stated, at p5 of the cyclostyled judgment:

> "It may be pertinent at this stage to observe that the term "cause of action" as used by advocate *Zhou* above has been the subject of many court decisions. 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. (see *Shinga* v *General Accident Insurance Co (Zimbabwe) Ltd* 1989 (2) ZLR 268 (HC) at 278 a- c)."

As I have indicated, no issue has arisen between the plaintiff and Stanax Holdings with regards to the first sale. The issue has arisen between the plaintiff and first, second and third defendants, with regards to the second sale. It is this sale which has prompted the quest for a declaratur nullifying it, and the consequent eviction of the first and second defendants from the property. *That sale occurred in 2021*. I do not see how it is defeated by prescription. Its validity or otherwise is the subject of the pending action in respect of which the plaintiff has issued summons.

In the circumstances, it is my considered view that the plea of prescription is misplaced and cannot be upheld.

Locus standi

This issue need not detain the court. The gist of the first and second defendants' contention is that the plaintiff does not have any rights in the property, either of ownership or possession, to enable it to sue the defendants. According to the defendants, the plaintiff has no legal interest in the matter justifying the suit it has instituted.

The plaintiff, on the other hand, asserts that it has the right to sue the defendants. It concluded the sale with Stanax Holdings (Pvt) Ltd. The first and second defendants have moved onto the property in the face of that sale, on the basis of a deed of cession with the third defendant, *who is not Stanax Holdings (Pvt) Ltd.*

The basic principle in determining *locus standi* is that of direct or real and substantial interest. The party suing or defending an action must show that they have a real and substantial interest in the subject matter of the suit. This is in fact a trite position of the law which has been underscored in the authorities. See *Allied Bank Limited* v Celeb *Dengu &*

Anor SC 52/16, *Zimbabwe Teachers Association & Others* v *Minister of Education* 1990 (2) ZLR 48, *Stevenson* v *Minister of Local Government and National Housing & Ors* SC 38/02.

In *Allied Bank Limited* v *Celeb Dengu, supra*, MALABA DCJ (as he then was) stated, at p 6 of the cyclostyled judgment:

> "The principle of *locus standi* is concerned with the relationship between the cause of action and the relief sought. Once a party establishes that there is a cause of action and that he/she is entitled to the relief sought, he or she has *locus standi*. The plaintiff or applicant only has to show that he or she has direct and substantial interest in the right which is the subject-matter of the cause of action. In the case of *Ndlovu* v *Marufu* HH-480-15, the court had the following to say concerning the concept of *locus standi*:
>
> "It is trite that *locus standi* exists when there is direct and substantial interest in the right which is the subject matter of the litigation and the outcome thereof. A person who has *locus standi* has a right to sue which is derived from the legal interest recognised by the law. In the case *of Stevenson* v *Minister of Local Government and National Housing and Ors* SC 38-02, the court in outlining *locus standi in judio* stated that in many cases the requisite interest or special reason entitling a party to bring legal proceedings has been described as "a real and substantial interest" or as a direct and substantial interest."

In casu, there is in my view, no gainsaying the fact that the plaintiff has a direct and substantial interest in the property concerned. It is a party to the first agreement of sale. The property in that sale is being alienated, without reference to the rights plaintiff acquired as purchaser. The third defendant has to explain on what basis he entered into an agreement of sale with the first and second defendants, in the face of an existing agreement of sale between the plaintiff and Stanax Holdings (Pvt) Ltd, over the same property.

DISPOSITION

In the circumstances, I find no merit in the special plea. It is my considered view that it is not in the interests of justice to have this matter disposed of on the basis of the defendants' special plea. The merits thereof must be fully ventilated, based on the summons and declaration and any subsequent pleadings that may be filed in terms of the rules.

In the result**, IT IS ORDERED THAT:**

1. The first and second defendants' special plea be and is hereby dismissed.
2. The first and second defendants' exception be and is hereby dismissed.
3. The first and second defendants bear the plaintiff's costs jointly and severally, the one paying the other to be absolved.

Lawman Law Chambers, plaintiff's legal practitioners
Phillips Law, first and second defendants' legal practitioners