

MIKE MUTUMHE

versus

CITY OF MASVINGO

HIGH COURT OF ZIMBABWE
WAMAMBO J
MASVINGO, 28 July 2020 & 5 February, 2021

Opposed Application

J.G. Mpoeri, for the applicant
C. Ndlovu, for the 1st respondent

WAMAMBO J. The defendant has entered a special plea of prescription.

The facts of the matter are as follows:-

On 9 June 1997 plaintiff and defendant entered into an agreement for plaintiff to lease Stand 4334 Westview Industrial Area, Masvingo on condition that he built buildings to the value of not less than \$192 675.00 (Zimbabwean dollars) (Clause 4). The lease was for a period of one year and 6 months, from 1 June 1997 (Clause 1).

The other relevant clause is clause 18 which provides that if plaintiff completed the buildings referred to in clause 4 as read with clause 5 he shall have the option of purchasing the property at \$436 623.00 (Zimbabwean dollars).

Clause 5 provides that the lessee should commence erecting buildings in terms of clause 4 not later than 9 months after the commencement of the lease. Further that the lessee should

complete the erection of the buildings before expiration of the lease. The clause further gives the lessor the discretion to vary the commencement date of the erection of the buildings if satisfied the lessee has through causes beyond his control been prevented from commencing to build or completing the buildings within the period as set out in the agreement.

In February 2017 plaintiff was served with an eviction letter by defendant. He made representations to the Minister of State for Provincial Affairs, Masvingo and Minister of Local Government, Public Works and National Housing and as a result defendant was advised to stop the eviction.

On 6 July, 2017 defendant evicted plaintiff from the premises and seized plaintiff's moveable property.

Plaintiff avers that he fully paid for the stand and, made improvements thereto. Further that defendant never cancelled the agreement, at law and that he was never refunded the purchase price.

Plaintiff claims an order declaring the agreement between him and defendant valid and enforceable and also an order declaring him as the lawful owner of the stand in question and restoring of the stand in question to him. He also seeks defendant to be ordered to return all the moveable property seized on 6 July, 2017.

Arising from the above facts defendant alleges that on 5 August, 1999 and 30 August 2000 it advised plaintiff of its breach of contract by failing to erect buildings within the agreed time frame. On 11 August 2010 defendant wrote to plaintiff advising him of the repossession of the stand. Plaintiff acknowledged the breach and wrote to defendant seeking to have the repossession set aside on compassionate grounds.

Plaintiff was advised of the repossession in 2010. 3 years has lapsed since plaintiff signed an acknowledgement in November 2016.

Effectively defendant argues that plaintiff's right to challenge the repossession of the stand in issue was supposed to be made within 3 years from 11 August 2010.

The alternative argument by defendant is that in any case plaintiff through his letter appearing at page 18 of the record and marked Annexure "C" acknowledged that he had breached the contract. The defendant's stamp on Annexure "C" is 30 November, 2016.

Plaintiff opposes the application. He avers as follows:-

Although defendant alleges she informed plaintiff of the breach on 5 August 1999 the manner of so advising plaintiff is unknown and proof of such notice has not been availed. In terms of section 88 of the Urban Councils Act [*Chapter 29:15*] defendant is obliged to keep minutes of her proceedings.

There is no proof of the notices of 5 August 1999 and letter of 30 August, 2000 and proof of receipt by plaintiff.

The fact that defendant approved plaintiff's development plan in 2001 is proof that the time within which to commence and complete construction of the buildings was extended.

The letter dated 11 August 2010 does not reflect that it was served on plaintiff. Defendant was quite from 30 August 2000 to 11 August 2010 inspite of claims that Plaintiff was advised of the breach. The said letter does not refer to previous correspondence nor reasons for the repossession.

Defendant continued to receive payment of rates and other charges from Plaintiff. Plaintiff through a call became aware of the repossession in November 2016.

Meetings were held from December 2017 to 26 March, 2019 to resolve the matter.

Plaintiff argues that the cause of action arose in February 2017 and prays for a dismissal of defendant's special plea.

A closer look at the Prescription Act [*Chapter 8:11*] (the Act) may help illuminate the issues at hand. Section 16 of the Act reads as follows:-

16(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.

Section 2 of the Act defines 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.

In *Hodgson v Granger & Anor* 1991 (2) ZLR 10 (HC) GREENLAND J at 14 E – H had this to say:-

“From all of the above may be abstracted the following propositions which commenced themselves as sound –

(a) the word “debt” is in part defined in S2 of the Act as meaning anything which may be sued for

(b) this meaning is complemented by meanings ascribed judicially because of the words “without limiting the meaning of the term” which appears in the definition

(iia) in terms of judicial pronouncement the word ‘debt’ is synonymous with what is generally accepted as cause of action”

(iiaa) “cause of action” and “debt” therefore for all intents and purposes mean the entire set of facts which give rise to an enforceable claim and includes every fact which it is material to plead and prove so as to sustain an action successfully.”

The summons seeks to enforce the agreement and restore possession to plaintiff as well as declaring him as the lawful owner of the disputed stand. Further he seeks the return of his moveable property.

Mr Mpoperi started his oral submissions by basing his argument on the letter of November 2016 Annexure “C”. The letters of 5 August 1999 and 30 August 2000 as contained in the defendant’s papers was not pursued in oral argument.

Apparently he may have realised that Annexure ‘A’ dated 11 August 2010 does not reflect proof of service to the plaintiff.

I will thus concentrate on Annexure “C” which reflects the following.

It was received by the defendant on 30 November 2016. It reflects that defendant was aware of a telephonic communication between himself and defendant.

The communication was about the repossession of the “the stand due to poor development.”

Plaintiff confirms that he paid \$4 367, 30 under the mistaken belief that the premises were now his.

Plaintiff offers profound apologies for what he calls on “unexpected condition”.

Plaintiff refers to his late wife’s illness from 2004 – 2008 and the challenge of funding his children’s university education.

The above clearly shows that as at 10 November, 2016 plaintiff was knowledgeable about the complete cause of action. That is why after acknowledging the repossession of the stand he makes a long explanation of why he finds himself in such an “unexpected condition”.

To use the words of section 16(3) of the Act applicant was clearly aware of the debt and the facts from which the debt arose.

If one traverses the agreement between plaintiff and defendant which gave plaintiff only a 1 ½ year lease and spells out the effects of not adhering thereto plaintiff can be considered as a person who “could have acquired knowledge by exercising reasonable care”.

It becomes clear that plaintiff acquired knowledge of the cause of action on or before 30 November, 2016.

The period from that date to 5 December 2019 is in excess of 3 months as provided for in the Act.

Plaintiff’s lawyers made concerted efforts to reverse the repossession see Annexure “D” (page 29). D3 (page 31) D8 (page 38). This was however water under the bridge.

There were attempts by the Ministers of State for Provincial Affairs and Local Government, Public Works and National Housing to halt the eviction of Plaintiff. These interventions came in the form of letters dated 8 March and 28 August 2017.

These were all political and administrative attempts to resolve a situation that had already gone out of control.

In fact the letter from the then Minister of State for Provincial Affairs reflects that the Minister was appealing (obviously fighting in plaintiff’s corner) for plaintiff “to start the construction of the filling station early this year.”

In 2017 about 20 years from the signing of the agreement even the Minister could only talk of starting to build a filling station.

I find in the circumstances that defendant has discharged his onus in proving on a balance of probabilities that by 30 November 2016 plaintiff had acquired (knowledge actual or constructive) of the facts from which the debt arose.

In the circumstances I order as follows:-

The special plea of prescription is upheld and the claim is dismissed with costs.

Ndlovu and Hwacha, plaintiff's legal practitioners

Saratoga, Makausi Law Chambers, defendant's legal practitioners