

REPORTABLE (5)

(1) JENNIFER NAN BROOKER
vs
RICHARD MUDHANDA AND THE REGISTRAR OF DEEDS
(2) ADRIENNE STALEY PIERCE
vs
RICHARD MUDHANDA AND THE REGISTRAR OF DEEDS

**SUPREME COURT OF ZIMBABWE
GOWORA JA, HLATSHWAYO JA & BHUNU JA
HARARE: JUNE 6, 2016 & FEBRUARY 5, 2018**

D. Ochieng, for the appellants

**Judgment No. SC 5/18
Civil Appeal No. SC 457 & 458/15**

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N. Chikono, for the first respondent

No appearance for the second respondent

GOWORA JA: This is a composite judgment in respect of two appeals which were, at the request of the parties, consolidated and heard at the same time. The appeals are against two separate judgments by the High Court dismissing special pleas of prescription raised by the appellants in respect of a claim for specific performance launched by the respondent.

The following are the salient facts to the dispute. The two appellants are sisters. In November 2014, the first respondent, (hereinafter referred to as the respondent) issued summons under separate case numbers against the appellants in the High Court claiming transfer of certain immovable properties from the appellants on an individual basis.

Under Case No HC 10410/14 in which the respondent sued the first appellant, the respondent alleged in the declaration that the first appellant had sold to him two immovable properties, namely Stands 285 and 286 Colne Valley Township, held under Deed of Transfer numbers 1788/69 and 1688/69 respectively.

In respect of the second appellant, under Case No HC 10411/14, the respondent alleged that the former had sold to him Stands 296 and 297 Colne Valley Township held under Deed of Transfer numbers 1597/69 and 1602/69.

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In both declarations, which, with the exception of the names of the defendant and the identity of the stands in dispute, were identical, the respondent alleged that after the sale he had sought to consolidate his title over the properties by way of registration at the offices of the Registrar of Deeds. He had then realized that the appellants were opposed to the registration.

Each of the appellants entered an appearance to defend the claims. Subsequent to this they filed special pleas. I set out hereunder the plea by the first appellant:

“1. Even if Plaintiff’s averment that he personally acquired his rights in respect of the two [properties on 6 August 2002 was correct (although it is denied), the consequent obligations allegedly owed to him personally by First defendant were extinguished after three years elapsed, by reason of s 14 and 15 of the Prescription Act [*Chapter 8:11*].

2. The defence raised in Paragraph 1 above is one of substance which does not involve going into the merits of the case and which, if allowed, will dispose of the case.
3. Plaintiff's averment that until 2015 he mistakenly believed that the rights flowing from the Agreement of Sale of 6 August 2002 were owed to his company, rather than himself, does not assist his supposed cause of action and is irrelevant.

Wherefore first defendant prays that the plaintiff's claim be dismissed with costs of suit. “

The second appellant filed an identical plea, the only difference being the dates as to when prescription was alleged to have set in. Neither filed a plea on the merits.

Thereafter the two matters were set down on separate dates for hearing before the same judge who issued two separate judgments. In the court *a quo*, the finding was that the agreement did not state when ownership should have passed to the purchaser, and that in the absence of an agreed date the purchaser should have placed the seller in *mora*. In both cases the court held that from the papers it was not clear whether demand had been made if at all and therefore it could not make a finding that the claim had prescribed. It proceeded to dismiss the special plea in both cases.

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The first appellant contends that the court *a quo* erred in the following respects: -

- in not finding that the respondent's supposed cause of action for the transfer of the properties arose on signature of the alleged agreement on 4 May 2002 and hence prescribed on 4 May 2005;
- in finding that a demand for transfer was an ingredient in the respondent's supposed cause of action and not merely a step in the enforcement of the purported claim;

- alternatively, in not finding that the first respondent himself impliedly claims to have made such demand in 2009, such that even on the reasoning that is respectfully criticized in the second ground of appeal, the claim would have prescribed sometime in 2012;
- in not finding that the first respondent's claim was prescribed and in not dismissing the action.

In my view the issues in the appeal are two pronged. The first issue is concerned with the question of cause of action as determined by the court *a quo*. The second issue is related to the manner in which the court *a quo* arrived at its determination that the debt had not prescribed resulting in the dismissal of the two pleas filed by the appellants.

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At issue before the court *a quo* was whether or not the claims mounted against the appellants by the respondent had prescribed. The party who alleges prescription must allege and prove the date of the inception of the period of prescription. Generally, prescription starts to run as soon as the debt becomes due.

In order to determine the question of prescription the court first had to make a finding on the cause of action upon which the respondent's claim was premised and when specifically the cause of action arose. What constitutes 'a cause of action' was described in *Abrahams & Sons v SA Railways and Harbours* 1933 CPD 626. At 637 WATERMEYER J stated:

"The proper meaning of the expression 'cause of action' is the entire set of facts which gives rise to an enforceable claim and includes every act which is material to be proved to

entitle a plaintiff to succeed in his claim. It includes all that a plaintiff must set out in his declaration in order to disclose a cause of action.”

In *casu*, the cause of action is the right of the respondent to transfer of the properties in terms of the alleged agreements of sale. The court *a quo* dealt with the issue in the following terms;

“Other than the above clause there is no other clause which deals with the issue of transfer of ownership. It is clear from the above clause that it does not say when exactly transfer of ownership should be effected. In the absence of an agreed date of transfer of ownership, the first defendant’s submission that prescription began to run on 6 August 2002 cannot be said to be correct. It cannot be correct because the debtor who was the seller was never placed in *mora*. The seller was never made aware that she was now supposed to effect transfer of ownership.”

The clause relating to transfer in the alleged agreement of sale read as follows:

“OCCUPATION, RISK AND PROFIT
Seller shall give vacant possession of the property on or before the date of transfer. Risk and profit shall pass on to the Purchaser on the date of occupation or transfer whichever is the earlier.
....
....
PAYMENT OF PURCHASE PRICE
The purchase price shall be paid after transfer.”

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In paras 5 and 6 of the declaration in both actions the respondent set out his cause of action for an order for specific performance. Both read:

- “5. Sometime in 2002, the plaintiff and defendant entered into a sale agreement relating to the two stands. Plaintiff thereafter complied with all his obligations in terms thereof.
6. Plaintiff subsequently sought to consolidate his title via registration through second Defendant’s office and realized that the first defendant was in fact opposing such overtures.”

Generally, the making of a contract of sale does not *per se* pass ownership in the thing sold. The authorities are clear that the signing of an agreement does not automatically translate to the transfer of property but that transfer can be effected at an agreed time or upon demand. In *Smart v Rhodesian Machine Tools Ltd* 1950 (1) SA 735(SR), TREDGOLD J (as he was then) accepted the general rule that where a contract fixes no time for performance, the debtor is not in *mora* until a reasonable time for performance has elapsed and the creditor has demanded performance.

This principle as stated above was also highlighted in *Asharia v Patel & Ors* 1991(2) ZLR 276(S), wherein GUBBAY CJ outlined the applicable principle where the time for performance in an agreement has not been agreed in the agreement itself. He stated:

“The general rule is that where the time for performance has not been agreed upon by the parties, performance is due immediately on conclusion of their contract or as soon thereafter as is reasonably possible in the circumstances. But the debtor does not fall into *mora ipso facto* if he fails to perform forthwith or within a reasonable time. He must know that he has to perform. This form of *mora*, known as *mora ex persona*, only arises if, after a demand has been made calling upon the debtor to perform by a specified date, he is still in default. The demand, or *interpellatio*, may be made either judicially by means of a summons or extra-judicially by means of a letter of demand or even orally; and to be valid it must allow the debtor a reasonable opportunity to perform by stipulating a period for performance which is not unreasonable. If unreasonable, the demand is ineffective.”¹

The appellants allege that the cause of action would have arisen in 2002, with the respondent contending that demand was necessary to place them in *mora* for failure to abide by their obligation in terms of the alleged agreements of sale. Absent such demand, it was contended by the respondent that there would have been no cause of action. It was further contended by the respondent that the appellants had failed to show when such demand placing

¹ At p 280

them in *mora* was made. To this end, it was argued that they had both failed to show when exactly prescription began to run.

The term debt refers to anything that is owed or due, such as money, goods or services which one person is under an obligation to pay or render to another. Debt is defined in the Prescription Act as follows:

2 Interpretation

In this Act—
“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.

Going by the definition of debt as contained in the Prescription Act the right of the purchaser to place a seller in *mora* is itself a debt in favour of the purchaser which debt can prescribe. In the context of this dispute, debt would constitute the right to have transfer into the respondent’s name. Critically, the Act provides that prescription starts running as soon as a debt becomes due. Section 16 of the Act reads:

16 When prescription begins to run

- (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 issue before the High Court was centered on the date that the debt became due. In considering the issue, the court *a quo* drew a distinction between a debt due under an agreement of sale and an agreement for the transfer of property. The court held that the issue of transfer of an immovable property was a separate issue which ought to have been agreed between

the parties. The alleged agreements of sale which were placed before the court *a quo* were silent as to when transfer was supposed to have been effected. In *casu*, no date had been agreed upon in the alleged agreements and no evidence was led by any of the parties regarding the issue as whether demand had been made or not, and if it had, when such demand had been made.

The question centered on when the cause of action was alleged to have arisen and the matter therefore has to be decided in the context of the pleadings filed in the *court a quo*.

For purposes of calculating the relevant time when prescription begins to run in respect of a debt regard must be had to the date when the cause of action arose.

In opposing the prayer for the upholding of a plea of prescription the respondent filed written submissions. The facts relied upon by the respondent were, contrary to the law, set out in the heads. It is pertinent to set the submissions in detail:

- (i) The debt was paid through the transfer made in favour of the plaintiff's company. Both parties believed that the obligation has been though erroneously, properly extinguished. Under the circumstances there was no knowledge that there was a debt which needed to be paid because parties believed they had performed the contract fully. Therefore, from the time the properties were registered to the nullification of the title deed, the creditor had no knowledge of the debt and prescription could not be said to be in operation; and
- (ii) The debt only arose after this Honourable Court cancelled the deed in terms of Case Number HC 6909/11. It is from this period that the plaintiff/creditor

became aware of the debt, that is the time the cause of action was created. Three years have not yet elapsed from the day the court granted an order cancelling the title deed.

- (iii) It is respectfully submitted that by signing the power of attorney to pass transfer and declarations the first defendant was tendering payment of the debt, that is, performing the obligations in terms of the contract. The only issue is that payment was made to a proxy. The plaintiff believed that his rights were properly secured by his proxy, that is, the company. Clearly, under the circumstances, it cannot be said plaintiff knew that the debt was still owing.

It is trite that after demand is made for transfer prescription would have commenced to run. The court declined to grant the plea in the absence of evidence as to when the appellants were placed in *mora* for the transfer of ownership in the stands in question.

From the grounds raised by the appellants, the issue that arises for determination in this court is whether or not the court *a quo* erred in finding that the respondent's claims against the appellants had not been hit by prescription. To this end it was argued on behalf of the appellants that the respondent was entitled to demand transfer upon signing the agreement and in the absence of such demand the claim had prescribed.

The court *a quo* correctly found that for prescription to start running there was need for the respondent to place the appellants in *mora* by demanding transfer. Having found that

the cause of action must be triggered by a demand the court was obliged to then determine whether or not there was such a demand and if so whether or not prescription was established. It could only have dismissed or upheld the plea upon a correct finding of the above two issues.

Generally, a plea is the answer by a defendant to the claim by the plaintiff as set out in particulars of claim or in a declaration as the case may be. In addition to a plea which raises a defence on the merits of a claim, a defendant may also raise a special plea which has its object either to delay the proceedings or to quash the action altogether.

The defence of prescription should not be raised by way of exception but must be specifically pleaded. The plea must set out sufficient facts to show on what the defence is based. However, due to its nature, the plea of prescription is a special plea. Such a plea is provided for in the High Court Rules 1971. Order 21, r 137 specifies the manner in which a party wishing to rely on a special plea may raise such. It provides:

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SPECIAL PLEAS, EXCEPTIONS, APPLICATIONS TO STRIKE OUT AND APPLICATIONS FOR PARTICULARS

137. Alternatives to pleading to merits: forms

(1) A party may—

- (a) take a plea in bar or in abatement where the matter is one of substance which does not involve going into the merits of the case and which, if allowed, will dispose of the case;
- (b) except to the pleading or to single paragraphs thereof if they embody separate causes of action or defence as the case may be;
- (c) apply to strike out any paragraphs of the pleading which should properly be struck out;
- (d) apply for a further and better statement of the nature of the claim or defence or for further and better particulars of any matter stated in any pleading, notice or written proceeding requiring particulars.

[Subrule amended by s.i. 120 of 1995]

In dismissing the special plea filed by the first appellant the court said:

“As I have already stated, following the agreement of sale the purchaser (plaintiff) ought to have demanded transfer of ownership from the seller (first defendant) thereby placing the

debtor in *mora*. Although the plaintiff in his summons says that he demanded transfer of ownership, nothing in the papers shows when demand was done. With this the court cannot tell when prescription began to run...in the absence of evidence showing when exactly the first defendant was placed in *mora* by the plaintiff for transfer of ownership of the properties from the first defendant to the plaintiff, I am not inclined to grant the first defendant's special plea."

The second appellant's plea also got similar treatment with the court remarking as follows:

"The problem I am faced with is that I cannot tell from the papers when plaintiff demanded transfer of ownership of the stands following the agreement of sale. The plaintiff simply said that when he demanded transfer of ownership the first respondent refused to effect it. However he does not say when he demanded transfer. On the other hand the defendant disputes that the parties ever entered into an agreement of sale *vis-à-vis* the two stands. So under the circumstances there is no way the plaintiff could ever have demanded transfer of ownership from the defendant. What this simply means is that the first defendant is saying that she was never placed in *mora*. If I go by the plaintiff's submissions all I can say is that although demand for transfer was made thereby placing the first defendant in *mora*, the date on which transfer should have been made is not stated and therefore that is unknown. Under the circumstances I cannot tell when prescription should have begun to run. For these reasons it cannot be said that the plaintiff's claim is prescribed."

The court *a quo* found that the parties had not made it clear in the agreement of sale as to when transfer was to be effected. The court was correct. However, it then went onto find that the purchaser should have put the seller in *mora* by demanding transfer and that that is the date from which the debt would have become due. I think the court *a quo* cannot be faulted in concluding as it did that the cause of action as related to the obligation to transfer where an agreement of sale does not specify a time, such obligation only arises upon demand by the purchaser.

In a plea of prescription the *onus* is on the defendant to show that the claim is prescribed but if in reply to the plea the plaintiff alleges that prescription was interrupted or waived, the *onus* would be on the plaintiff to show that it was so interrupted or waived. This principle was clearly set out in *Cassim v Kadir* 1962(2) 473 (NPD), at 475H-C as follows:

“In regard to the second answer to the plea of prescription, namely that there has been interruption, the evidence falls very far short of what is required. It is true that the plaintiff in his evidence verbally admitted signing the deed of donation, and that he had, at some time or other admitted that he was liable to transfer the property to the plaintiff. Even if I am to assume at this stage, for present purposes only, that plaintiff’s evidence is true, I am quite unable to determine from that evidence the date when such admission of liability was made. It is clear that defendant, according to plaintiff’s own evidence, maintained in 1955, or thereabouts, that plaintiff was not entitled to transfer, and disputed plaintiff’s alleged right to transfer of the property now claimed. He said, to use the plaintiff’s own words, in evidence, that plaintiff “had nothing”, meaning, quite clearly, that plaintiff had no right to the property which he seeks to claim. As I understood him, however, Mr Raftesath did not seriously urge that this interruption had been proved, and I do not think it is necessary to analyse the evidence further; nor is it desirable at this stage, for to do so would make it inevitable for me to express an opinion on the quality of the evidence given by the plaintiff in regard to the vital issue as to whether the deed was ever signed, and how the signed deed came to be lost.”

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In *Yusaf v Bailey and Others* 1964(4) SA 117, the question of *onus* regarding the special plea of prescription was considered as follows:

“... A special plea was filed to the effect that plaintiff’s claim was prescribed by virtue of s 3(2) of Act 18 of 1943, as the issue of Drum was published on 20 June, 1961, and the summons was served on 29 June 1962. The replication to this special plea is that the article was brought to the plaintiff’s knowledge for the first time on or after 7 July, 1961, and that he ascertained the identity of the defendants on the same date as the defamatory article was first brought to his knowledge.

....

The point therefore arises whether the *onus* lies on the defendants to establish the special plea, *viz*, that the facts are such as to entitle them to a dismissal of the action because the claim has become prescribed or whether the *onus* lies on the plaintiff to establish the allegations contained in the replication to the special plea.

....

The *onus* then being on the plaintiff to satisfy the court in terms of his replication to the special plea that his claim had not become prescribed before service of summons and as the only evidence in this regard is that of the plaintiff himself consideration, as to whether that *onus* had been discharged cannot be divorced from an assessment of his credibility as a witness. Consequently, no decision on the special plea could, as originally suggested, be given before hearing the evidence on the whole case.”

After being served with the special plea of prescription the respondent should have replicated. The purpose of a replication is to inform the court and the defendant of the plaintiff’s rebuttal to the special plea. The failure by the respondent to file a replication to the special plea means that there are no disputes for determination on the special plea. In the absence of such replication there would be no issue for determination by the court *a quo*.

When one speaks of the need to discharge an *onus*, it immediately becomes clear that there is an evidentiary burden that must be met. There is no suggestion that such burden as required to be met was met by documents filed of record. There were no affidavits placed before the court *a quo*.

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Neither of the parties led evidence. Thus there was no evidence as to when demand for transfer was made. There was no evidence as to when the cause of action actually arose and given the fact that this was dependent on whether or not the appellants were placed in *mora*, the court was left in suspense on these very crucial issues. The court seems to have been alive to the fact that there was a need for a factual basis to be placed before it to facilitate a determination on the crucial issue of when prescription could be said to have started running.

The remarks by the learned judge show that the court made a decision on the special pleas in the absence of evidence. By adopting such an approach the court erred. It was critical for the court to understand the nature of the defences of prescription. The court disposed of the special pleas in the same manner as provided for exceptions and applications to strike out in the rules of the High Court 1975. The distinction between these procedures was highlighted by MURRAY CJ in *Reuben v Meyers* 1957(4) SA 57(SR) at 58C-D, wherein the learned judge stated:

“According to the modern practice a defence of prescription is raised by special plea; in the Courts of Holland this was done by exception, a term which as pointed out by INNES C.J., in *Western Assurance Co. v D Caldwell’s Trustee*, 1918 AD 262 at p 270, is used not in the narrow sense applied to it in South Africa (and Southern Rhodesia), but as covering a number of what would here be called special pleas.”

A special plea is an objection on the basis of certain facts which do not appear in the plaintiff’s declaration or particulars of claim and has the effect of either destroying or postponing the action. The various forms of special pleas and the rationale underlying the procedure were set out by GILLESPIE J In *Doelcam (Pvt) Ltd v Pichanick & Others* 1999 (1) ZLR 390 (H), at 396B-F in which he said:

“The purpose of a special plea is to permit a defendant to achieve prompt resolution of a factual issue which founds a legal argument that disposes of the plaintiff’s claim. Special pleas are three in kind. The plea in bar, by which a party may interpose a purely formal objection to the jurisdiction of the court. The plea is available as a plea to the jurisdiction or as a plea for the recusal of a judge and in no other case. Other special pleas are available to disclose some ground either for quashing or for delaying proceedings. Both are usually termed pleas in abatement, although that expression is properly used to describe the declinatory, rather than merely dilatory plea. The plea in abatement, strictly so called, avers some good ground, not disclosed in the declaration, which otherwise is admitted, for denying the plaintiff relief. The dilatory plea advances some fact, not disclosed in the declaration, which is otherwise admitted, and which entitles the defendant to a stay of proceedings.

Since a special plea involves the averment of a new fact, it is susceptible of replication and of a hearing at which evidence on this new fact alone may be led.”

The above *dictum* shows that a special plea enables a litigant to obtain prompt resolution of a dispute because it either delays the proceedings or quashes them. Because of its ability to extinguish a claim there is need for a judge faced with such a plea to hear evidence from the parties. Herbstein & Van Winsen, : The Civil Practice of the Supreme Courts of South Africa 5 ed Vol 1 at pp599-600 in explaining the essential differences between an exception and a special plea, articulated the need to adduce evidence in the case of a special plea as follows:

“The essential difference between a special plea and an exception is that in the case of the latter the excipient is confined to the four corners of the pleading. The defence raised on exception must appear from the declaration itself; the excipient must accept as correct the allegations contained in it and he may not introduce any fresh matter. Special pleas, on the other hand, do not appear *ex facie* the pleading. If they did, then the exception procedure would have to be followed. Special pleas have to be established by the introduction of fresh facts from outside the circumference of the pleading, and those facts have to be established by evidence in the usual way. Thus, as a general rule, the exception procedure is appropriate when the defect appears *ex facie* the pleading, whereas a special plea is appropriate when it is necessary to place facts before the court to show that there is a defect. The defence of prescription appears an exception to this rule for it has been held that the defence should be raised by way of special plea even when it appears ex the plaintiff’s particulars of claim that the claim has prescribed, apparently because the plaintiff may wish to replicate a defence to the claim of prescription, for example an interruption.”

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In Beck’s Theory and Practice of Pleading in Civil Actions 6th ed., the learned author Isaacs at p 152 states:

“Pleas in bar and pleas in abatement differ from exceptions precisely in this, that they do always introduce fresh matter which must be proven by evidence.”

In fact, when one has regard to the rules of the High Court one discerns a difference in the manner in which special pleas and exceptions ought to be dealt with. R 140 is pertinent in this regard. The rule reads:

140. Complaint by letter before applying to strike out or filing exception

(1) Before—

(a) making a court application to strike out any portion of a pleading on any grounds; or

(b) filing any exception to a pleading;

the party complaining of any pleading may state by letter to the other party the nature of his complaint and call upon the other party to amend his pleading so as to remove the cause of complaint.

[Subrules amended by s.i. 43 of 1992]

(2) The costs of any such necessary letter and of any matters incidental to it, including any necessary conferences with another legal practitioner, shall be allowable on taxation.

[Subrule amended by s.i. 277 of 1981]

(3) In dealing with the costs of any motion to strike out or of any exception, the provisions of this rule shall be taken into consideration by the court.

Whilst prescription is by way of a plea, an exception is raised by way of a court application. In terms of our rules of court an application shall be accompanied by an affidavit from a deponent who can swear positively to the facts contained therein. **Judgment No. SC 5/18**
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Critically, there is no provision for the filing of a court application where a special plea is filed, and when regard is had to the nature of the plea of prescription that a determination on the facts as to when the cause of action arose, it must by implication become obvious that a factual dispute must be decided. This can only be determined by the parties leading *viva voce* evidence unless the dates are not in dispute.

This position of the law was put beyond question by BEADLE CJ in *Edwards v Woodnut NO 1968 (4) SA 184(R)*, in which he stated the following:

“the basic difference, however, between an exception and a plea in abatement is that in the case of a plea in abatement evidence must be led, whereas in the case of an exception the facts stated in the pleadings must be accepted.”

It can therefore be accepted as settled that evidence is necessary when disposing of a matter in which a special plea of prescription is raised. The rationale behind this is that where a party raises a special plea as a defence, new facts arise and because of the introduction of fresh facts which did not appear in the declaration, there is need for a court to hear the evidence of the parties where facts are disputed before making a ruling on the plea.

In *casu*, the court *a quo* disposed of the matter in the absence of such evidence. Clearly, a dispute of fact as to when the cause of action arose was evident from the special plea and this could only have been resolved through *viva voce* evidence.

The respondent did not raise an objection to the special pleas, he filed heads of argument. The purpose of heads of argument is to expound on the law applicable to the facts placed before the court, and one cannot plead through written submissions. It is also trite that one cannot adduce evidence through heads of argument, but one may do so either in affidavits or *viva voce* evidence. In *casu*, there were no affidavits filed which could have justified the manner of disposal of the dispute by the court *a quo*. In his book *Extinctive Prescription*, the learned author M M Loubser, says the following at p8:

“From one point of view, extinctive prescription simply concerns questions of fact, namely whether a particular period of time, prescribed by statute in respect of a particular obligation, has passed, and whether other conditions prescribed by statute on prescription have been met. If so, and if the debtor chooses to rely on it, prescription takes effect.”

The failure by the court *a quo* to call evidence was akin to a court which determines a matter through the application procedure in the face of material disputes of fact. The learned judge in the court failed to appreciate that prescription is a defence and therefore a

matter of substance. The court *a quo* and the parties before it, ignored the nature of the pleading that was central to the dispute. Essentially what had to be disposed of was a plea. Its nature did not change by virtue of having the adjective special placed before it. It remained a plea which is a defence and which the court could only determine after hearing evidence unless the facts surrounding the plea were common cause or admitted. The facts were in dispute. It was therefore a matter for a trial cause. It is referred to as a special plea mainly due to its ability to destroy the action or postpone the proceedings.

Curiously the court disposed of the matter on a basis other than that argued by the parties. It was up to the respondent to prove that prescription did not start to run until demand for transfer would have been made. This issue is a question of fact. None of the pleadings filed on behalf of the respondent raises this issue.

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In the event, the court *a quo* did not properly exercise its jurisdiction. In my view due to the manner of pleading or lack thereof, there were no issues for determination before the court *a quo*. The failure by the respondent to file a replication to each of the pleas of prescription disabled the court *a quo* from determining the real issues between the parties. There was no basis on the record justifying the dismissal by the court *a quo* of the pleas of prescription. In so doing the court *a quo* misdirected itself.

In view of the failure to adhere to the correct procedure the judgments by the court *a quo* must be set aside. In my view the court should have in terms of the rules given directions to the parties on how the matter should have proceeded. There was nothing which

precluded the court from directing the respondent to file a replication and from thence to hear the matter on the issues raised in the plea and the replication. In the circumstances it seems to me just that this is the procedure that the court should adopt in order for the special pleas to be properly dealt with, and an order for the remittal of the matter to the court *a quo* would best achieve this.

In the premises the following orders will issue:

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1. The appeal be and is hereby allowed with costs.
2. The judgment of the court *a quo* is set aside.
3. The matter is remitted to the court *a quo* for a proper determination of the plea of prescription on evidence.

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1. The appeal be and is hereby allowed with costs.
2. The judgment of the court *a quo* is set aside.
3. The matter is remitted to the court *a quo* for a proper determination of the plea of prescription on evidence.

HLATSHWAYO JA: I agree

BHUNU JA: I agree

Wintertons, legal practitioners for the appellants

Ngarava, Moyo & Chikono, legal practitioners for the first respondent.