

AGNES CHINGWARO MUPUNGA  
versus  
PAULINE MANDIGO  
and  
SHED CHIRATA CHINGWARO  
and  
MASTER OF HIGH COURT  
and  
THE REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE  
MATANDA-MOYO J  
HARARE, 14 February 2019 & 27 March 2019

**Trial**

MATANDA-MOYO J: Plaintiff issued summons against the defendants for the following reliefs:

- (1) An order declaring the agreement of sale signed by the later Adam Kutsawa and the second defendant null and void;
- (2) Cancellation of Deed of Transfer No. 8552/07 and reinstatement of Deed of Transfer/Grant No. 3235/95;
- (3) Costs of suit on an attorney client scale against the second defendant and the estate of the late Adam Kutsawa, jointly and severally the one paying the other to be absolved.

Plaintiff alleged that on 1 of May 2005 second defendant purportedly entered into an agreement of sale whereby second defendant fraudulently sold stand 1382 Section 4 Kambuzuma Township Harare to the late Adam Kutsawa. The purported agreed price was ZW150 000 or ZW50 000. A deposit of ZW\$10 000 was allegedly paid upon the signing of the agreement, thereafter monthly instalments of ZWS10 000.00 from 1 June 2005 to 1 March 2006. The late Adam Kutsawa was second defendant's son-in-law.

Plaintiff alleged fraud due to the following factors:

- (a) No purchase price was paid to the second defendant;
- (b) The purported sale and transfer was meant to depose the plaintiff of her rights over immovable property;
- (c) No purchase price was agreed upon and
- (d) The price was unreasonably low to be genuine.

Second defendant firstly filed a special plea to the claim. Firstly he averred that there is no executor for the late Adam Kutsawa's estate. Second defendant alleged that the first defendant had since recused herself as *Executrix dative* of the Estate Late Adam Kutsawa DR 1288/07 on 24 June 2015. The estate is therefore not represented in the current claim.

Secondly second defendant pleaded prescription. It is second defendant's case that the claim was presented as ten years have since lapsed after conclusion of the sale. The agreement of sale was concluded in 2005 and the claim was only lodged on 23 June 2015.

On the merits second defendant denied that the sale was a fraud. There was a valid offer and acceptance which resulted in a contract of sale being concluded between the parties. In any case plaintiff is not privy to the said contract.

Second defendant pleaded that the property was sold for ZW\$150 000 in terms of the agreement. Thereafter Messrs Wintertons attended to transfer.

Second defendant denied that plaintiff had any interest in the said property as the said property was acquired by second defendant together with his first wife. In any case second defendant's name appeared on the Deed of Grant 3235/95 making him the lawful owner of the property in question. As owner nothing stopped second defendant from disposing of the property.

Second defendant pleaded that there was no basis for costs on a higher scale. Second defendant prayed that plaintiff's claim be dismissed with costs.

Plaintiff insisted first defendant was the executrix of the estate of the late Adam Kutsawa. She averred that the papers from the Master's office reflect so. In any case at the time of instituting the proceedings she was the executrix. She can't be allowed to recuse herself in order to non-suit plaintiff.

On prescription plaintiff alleged that she only became aware of the sale in September 2014. Consequently she denied that her claim had prescribed in terms of the law.

She insisted on her position that the price was too low and that the sale was invalid.

The matter came up for Pre-Trial conference and the following issues were referred for trial:

- (i) whether or not plaintiff's summons is properly before the court,
- (ii) whether or not plaintiff's claim is prescribed,
- (iii) whether or not the agreement of sale entered into by second defendant and the late Adam Kutsawa was valid and
- (iv) whether or not the resultant transfer was valid.

On the date of trial it became apparent that second defendant was indisposed to stand trial due to illness. The legal practitioners representing plaintiff and second defendant agreed that since the facts involving the special plea were common cause, the court proceeded to make a determination of the two whilst awaiting second defendant to be fit to stand trial. The court had no problems with the suggestion. Parties filed their submissions pertaining to both legal issues. I therefore proceeded to deal with the two legal issues namely:

- (i) whether or not the plaintiff's summons is properly before the court and
- (ii) whether or not plaintiff's claim is prescribed.

(i) Whether or not the plaintiff's summons is properly before the court?

It is respondent's position that the plaintiff cannot bring an action for cancellation of a contract to which she is not a party. The contract in question was between second defendant and the late Adam Kutsawa. The doctrine of privity of contract posits that if one is not a party to the contract then one cannot enjoy any legal rights and obligations from that contract.

On the other hand the plaintiff denied that she sued as a party to the contract. Plaintiff submitted that she has been married to second defendant for over 40 years and that six children were born out of the marriage. Plaintiff has been staying on the property since 1974 and considers same as matrimonial property. In that regard plaintiff averred that she is an interested party who has substantial or direct interest in the matter. Plaintiff's counsel referred me to the case of *Zimbabwe Teachers Association and Ors v Minister of Education and Culture* 1990 (2) ZLR 48 S. He also referred me to the case of *Makarudze and Another v Bungu & Others* HH 08/15 where the court said;

*“locus standi in judicio* refers to one's right, ability or capacity to bring legal proceedings in a court of law. One must justify such right by showing that one has a direct or substantial interest in

the subject matter and outcome of the litigation--- normally only person who has a direct personal interest in the remedy being sought has *locus standi* to seek that remedy to court. the personal interest that a person may have that will provide the basis for legal standing can be that the action will affect interest such as a personal liberty, money or ..... Or benefits or legitimate expectation of benefits.”

In terms of the doctrine of privity of contract it is correct that a contract cannot confer rights or impose obligations upon any person who is not a party to the contract. it is only the parties to a contract who should be able to sue to enforce their rights or claim damages arising therefrom. However this doctrine does not prevent third parties from bringing another form of action. See *Donoghue v Stevenson* (1932) UKHL 100 where a third party though prevented to sue on the basis of contract successfully brought a claim of negligence.

It is therefore correct that plaintiff cannot bring an action in terms of the contract, but can sue on any other branches of the law like delict.

Plaintiff submitted that she has a right to set aside the sale meant to deprive her of her rights in the property. I do not believe so. As long as the plaintiff was not a party to the contract she derives no right therefrom entitling her to sue in terms of that contract. She cannot even seek cancellation of the contract. I do agree that as wife to the second defendant the plaintiff can bring a suit against the defendant claiming a share of the proceeds.

In that regard plaintiff do have a substantial interest as against the second defendant and not in terms of the contract. She can sue in delict.

#### Whether claim is prescribed?

Second defendant submitted that the plaintiff’s claim has prescribed. The cause of action arose in March 2005 and plaintiff only brought a claim some ten years later. Second defendant submitted that in terms of the Prescription Act [*Chapter 8:11*] especially s 15 (d) thereof plaintiff’s claim lapsed after three years from 1 March 2005. The agreement of sale which plaintiff purported to challenge was signed on 1 March 2005. The challenge was only filed with this court on 23 June 2015. Second defendant prayed that plaintiff’s claim be dismissed on account of prescription. Plaintiff denied that her claim has prescribed. She submitted that she became aware of the fraudulent sale and transfer in 2014. She further submitted that in terms of s 16 of the Prescription Act the claim was filed on time.

The issue falling for determination is “when did the debt become due and payable.” The parties differ on this aspect. Second defendant believes the debt became due and payable upon the

signing of the agreement of sale. On the other hand the plaintiff believes the debt became due upon her being aware of the said fraud; which is in 2014.

According to the Prescription Act debts prescribe after 3 years. A debt in terms of the Act is only deemed to be due when a creditor has knowledge of both the identity of the debt as well as of all the facts from which the debt arises.

It is common cause plaintiff is not a party to the agreement signed between second defendant and the late Adam in March 2005. She thus did not have information that second defendant had entered into an agreement, disposing of the property. The only reliable evidence we have is from plaintiff herself who said she only became aware the house was sold sometime in 2014.

The justification for prescription is to void stale claims. A creditor is required to be vigilant in enforcing his or her rights. In the case of *Cape Town Municipality v Allie N.O* 1981 (2) SA (1) (C); *Murray and Roberts Construction (Cape (Pty) Ltd v Upington Municipality* 1984 (1) SA 571 (A) the courts found that if creditors fail to enforce their rights or claims timeously then they may not enforce them at all.

In *Road Accident Fund & Another v Mdeyide* [2010] ZACC 18; 2011 (2) SA 26 (CC) the court said;

“In the interests of social certainty and the quality of adjudication, it is important, though, that legal disputes be finalised timeously. The realities of time and human fallibility require that disputes be brought before a court as soon as reasonably possible. Claims thus lapse, or prescribe, after a certain period of time. If a claim is not instituted within a fixed time, a litigant maybe barred from having a dispute decided by a court. This has been recognised in our legal system – and others – for centuries.”

Our system do recognise the difference between when the debt comes into existence and when the debt becomes recoverable. A debt only becomes recoverable when a creditor becomes aware of all the facts necessary to lodge a claim. See *Minister of Finance and Others v Gore N.O* [2006] ZASCA 98; 2007 (1) SA 111 (SCA), *Truter and Another v Deysel* 2006 (4) SA 168 (SCA), *Zimasco (Pvt) Ltd v San He Mining (Pvt) Ltd* HH 9097/14. Prescription starts running once a creditor has knowledge of the last of the facts required to prove a claim. See also *Peebles v Dairiboard Zimbabwe (Pvt) Ltd* 1999 (1) ZLR 41 (H) and s 16 of the Prescription Act.

I am of the view that the second defendant has failed to substantiate and prove prescription. Without any evidence to counter plaintiff's version that she only became aware of the purported fraud in September 2014, the special plea of prescription cannot be sustained.

Based on the first ground of the special plea I am of the view that this matter is improperly before the court.

Accordingly the matter is struck off the roll with costs.

*Gama & Partners*, plaintiff's legal practitioners  
*Matsikidze & Mucheche*, 2<sup>nd</sup> defendant's legal practitioners