

**MABEKA NATHANIEL NDLOVU**

**Versus**

**PHAKAMILE NDLOVU**

**And**

**BULAWAYO CITY COUNCIL**

IN THE HIGH COURT OF ZIMBABWE

NDOU J

BULAWAYO 14 & 15 JUNE 2012 & 7 FEBRUARY 2013

*N. Ndlovu* for plaintiff

*S. Mlaudzi* for 1<sup>st</sup> defendant

Judgment

**NDOU J:** The plaintiff's claims against the defendants are for:-

- "1. An order declaring the sale of house number 3750 Magwegwe North, Bulawayo to 1<sup>st</sup> defendant by Nkululeko Ndlovu unlawful, null and void.
2. An order that the plaintiff is the rightful and legal owner of stand number 3750 Magwegwe North, Bulawayo.
3. An order directing the 1<sup>st</sup> defendant to transfer stand number 3750 Magwegwe North, Bulawayo into the plaintiff's name at the 2<sup>nd</sup> defendant's offices within 5 days of this order failure to which the Deputy Sheriff be directed to sign transfer papers on the stead of the 1<sup>st</sup> defendant
4. An order directing the 1<sup>st</sup> defendant and those claiming through him to vacate house number 3750 Magwegwe North, Bulawayo within 5 days of this order failure to which the Deputy Sheriff be directed to evict the 1<sup>st</sup> defendant and all those claiming through him.
5. Alternatively, the 1<sup>st</sup> defendant be ordered to pay the plaintiff a sum of R150 000 being the current market value of the house on grounds of unjust enrichment within 10 days of this order.

6. The 1<sup>st</sup> defendant to bear costs of suit at an attorney-client scale.”

The salient facts of the matter are the following. The plaintiff purchased the property in question from the 2<sup>nd</sup> defendant in 1978. Plaintiff lived in the house from 1978 to 1999 when he retired and went to live at his rural home in Zhombe. He left his son Nkululeko Ndlovu (“Nkululeko”) living in the property. It is the plaintiff’s case that Nkululeko sold the house to 1<sup>st</sup> defendant without his knowledge and consent. It is alleged that he used a fake general power of attorney to achieve this fraudulent sale of the property. As a result of this fraudulent sale the plaintiff caused the arrest of his son, Nkululeko. Nkululeko was charged with theft by false pretences. Nkululeko died in prison before the criminal trial took place. The 1<sup>st</sup> defendant has refused to vacate the house or transfer it back to the plaintiff or pay current market value of the house. This resulted in this action against the 1<sup>st</sup> defendant.

The 1<sup>st</sup> defendant has raised a special plea that the plaintiff’s claim has prescribed. The parties have made submissions on the question of prescription and want me to determine this issue first. This judgment is only confined to this issue of prescription. It is beyond dispute that the plaintiff became aware of the sale to 1<sup>st</sup> defendant by his late son as far back as 2002. In February 2005 he made valliant attempts to reverse the sale using extra-judicial methods. He only approached this court on 11 November 2009 when he instituted this action. The legal proceedings were instituted well after three years. The issue is whether the claim has prescribed in terms of the Prescription Act [Chapter 8:11] (the “Act). It is clear from the pleadings that the plaintiff’s claim is for a declaratory order premised on the fact that the general power of attorney used in selling his house was forged and therefore a nullity. In section 2 of the Act a debt is defined as follows:

“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.”

The point worth noting in this definition of “debt’ is that the suit or claim must be “by reason of obligation” on the part of the debtor arising from the stated bases. In my view, a declaratory order is a remedy to secure the public interest of certainty or correct legal position. Such a remedy cannot prescribe – *Oertel NNO v Director of Local Government* 1981 (4) SA 491 (T) at 492. In this case the court held –

“Public rights are excluded from the operation of the Prescription Act ... and “debt” in the Act must be necessarily restricted to such claims as arisen in the field of private law. Whilst every debt encompasses an obligation not every obligation constitutes a debt for the purposes of the Prescription Act.”

Further the claim is based on the fact that sale is null and void *ab initio*. As stated by Lord Dennington in *MacFoy v United Africa Co. Ltd* (1961) ALL ER 1169 (PC) at 1172 –

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without much ado, though it is convenient to have the court declare it to be so ... you cannot put something on nothing and expect it to stay there. It will collapse ...” – *Ngani v Mbanje & Anor* 1987 (2) ZLR 111 (SC) at 115E – F. This claim is based on the alleged nullity of sale transaction and does not arise from a “debt” as defined in the Act.

Accordingly, the 1<sup>st</sup> defendant’s special plea of prescription is dismissed with costs.

*Cheda & Partners*, plaintiff’s legal practitioners

*Samp Mlaudzi & Partners*, 1<sup>st</sup> defendant’s legal practitioners