**CHARISSA GAYNOR TOMMY**

**Versus**

**LINDY GUNN**

**And**

**MICHAEL J. GUNN**

**And**

**ASSISTANT MASTER OF THE HIGH COURT**

**And**

**REGISTRAR OF DEEDS**

**And**

**SHERIFF OF ZIMBABWE**

IN THE HIGH COURT OF ZIMBABWE

TAKUVA J

BULAWAYO 11 JUNE 2019 & 20 FEBRUARY 2020

**Opposed Application**

*D. Dube* for the plaintiff

*Tsumele* for the 1st and 2nd defendants

No appearance for the 3rd, 4th & 5th defendants

 **TAKUVA J:** Plaintiff issued summons on 12 November 2015 against 1st and 2nd defendants for :

“(a) An order declaring the verbal agreement of sale entered into between plaintiff and her late husband Richard Roberts on one hand and Lindy Gunn on the other in March 2004 regarding stand number 41 Hillside South Township 3 of Subdivision 5W of Matsheumhlope also known as 4 Clocolan Road, Burnside, Bulawayo binding on 1st and 2nd defendants for all intents and purposes.

(b) An order that 2nd defendant signs all papers that need to be signed in any public office, be it City of Bulawayo, Registrar of Deeds or ZIMRA to facilitate the transfer of the title of the property described in paragraph (a) above from his name to that of the plaintiff.

(c) An order that should 2nd defendant fail to act as ordered in paragraph (b) above and within 5 days of the order being served on him, the 5th defendant be and is hereby ordered to sign all such papers that may need to be signed by 2nd defendant, to give effect to the order as contained in paragraph (a) above.

(d) Costs of suit against 1st and 2nd defendants, *in solidium* at an attorney and client scale only if they oppose this claim.”

The 1st and 2nd defendants entered appearance to defend, requested for and were supplied with further particulars. Subsequently, 1st and 2nd defendants filed a special plea in bar and plea on the merits. With the plaintiff’s agreement, the special plea was set down for hearing.

The facts of this matter are simple. The plaintiff and her late husband Richard Roberts entered into a verbal agreement to purchase the house mentioned in the summons. The agreement was entered into sometime in March 2004. It was agreed that the purchase price was BNP 41 000-00, payment of storage charges of ZWD$67 599 146.04 and pay off of a mortgage bond in the sum of ZWD$3 575 000-00 together with its cancellation costs of

ZWD$4 500 000-00.

 Plaintiff performed her side of the contract and obtained vacant possession of the house as the new owner although real rights over the property had not been transferred. In terms of the verbal agreement, the parties did not agree on the time frame or period within which transfer into the names of plaintiff and her late husband will be effected. As a result, plaintiff who is also the surviving spouse of her late husband has now put 1st and 2nd defendants *in mora* claiming that this Court declares the verbal agreement binding and also claiming specific performance for transfer of the property into her name.

 First and second defendants’ special plea is anchored on the following grounds;

1. The plaintiff’s claim has prescribed.
2. Plaintiff has no *locus standi* to act for and on behalf of the late Richard Roberts and,
3. The alleged agreement of sale is illegal.

As regards prescription the argument is that since the agreement was entered into in March 2004 and summons issued in November 2015, the plaintiff’s claim has prescribed. Reliance was placed on section 15 of the Prescription Act Chapter 8:11 in particular paragraph (d) which reads;

“(d) except where any enactment provides otherwise, three years, in the case of any other debt.” (my emphasis)

Plaintiff was said to have no *locus standi* to act for and on behalf of the late Richard Roberts because her Letters of Administration did not authorize her to administer the estate of the late Richard Roberts. It was further argued that plaintiff was never at any point in time appointed as an Executrix Dative in the estate of her husband held under DRB 252/14. Plaintiff was issued with a Certificate of Authority in terms of section 32 of the Administration of Estates Act. That certificate granted plaintiff authority to deal only with the deceased’s motor vehicle. Therefore, plaintiff has no *locus standi* to institute these current proceedings on behalf of the late Richard Roberts as she is not an Executrix of the estate.

The illegality according to the defendant arises from the fact that the house was sold in foreign currency without authority to do so from the Reserve Bank of Zimbabwe in violation of section 4 of the Exchange Control Regulations, 1996 SI 106/1996. Defendants relied on *Dube* v *Khumalo* 1986 (2) ZLR 103 (SC) at 109 D-F and *Gambiza* v *Tavaziva* HH 109/2008.

Finally, it was alleged that the 1st defendant had no capacity to sell the immovable property because the property is registered in the 2nd defendant’s names. It was further contended that the order by the Botswana High Court only granted 1st defendant with personal rights in the immovable property as against the 2nd defendant. These rights, so the argument went cannot be enforced in Zimbabwe, in the absence of a Court registering the divorce order – see order 37 of the High Court Rules 1971 and Civil Matters ( Mutual Assistance) (Chapter 8:02).

The plaintiff strongly opposed the special plea urging the Court to dismiss it and refer the matter for trial to be determined on the merits. The issues for determination in this application are the following;

1. Whether or not the plaintiff’s claim has prescribed when there was no agreement on when transfer was supposed to be effected?

2. Whether or not plaintiff has *locus standi in judicio*?

3. Whether or not the sale of the immovable property was an illegal transaction?

I now deal with the issues *seriatum*.

**PRESCRIPTION**

 In terms of section 15 (d) of the Prescription Act *supra* prescription commences to run as soon as the debt becomes due meaning that from the date it becomes immediately claimable by the creditor and immediately payable by the debtor – see *Desai* v *Desai NNO & Others* 1996 (1) 8A 141 (SCA) at 146-147A.

 What should be noted *in casu* is that the 1st and 2nd defendants were never placed *in mora* by the plaintiff over the transfer of the property into her name until the 12th of November 2015 when she caused summons to be issued seeking *inter alia* specific performance. Equally noteworthy is the fact that in the verbal agreement denied by 1st and 2nd defendants, plaintiff claims that the parties did not agree on the period or time frame on which transfer should be passed to the purchasers. In that regard, I take the view that the obligation to pass transfer and payment of related costs by the 1st and 2nd defendants does not constitute a debt and therefore prescription does not commence to run until the creditor has demanded performance.

 The principle was outlined by GUBBAY CJ (as he then was) in *Ashanria* v *Patel & Others* 1991 (2) ZLR 276 (s) in the following words;

“The general rule is that where the time of performance has not been agreed upon by the parties, performance is due immediately on conclusion of their contract or soon thereafter as is reasonably possible in the circumstances.”

It follows that in the absence of a specific date for transfer in the agreement, the defendants were supposed to be placed *in mora* first and prescription will begin to run. It is not a simple question of looking at the calendar and start counting up to three years and then claim prescription. It seems to me that the word “debt” equates to a cause of action and not a right of action. Therefore, the right to claim performance in terms of an agreement ordinarily becomes due according to its terms or if nothing is said, within a reasonable period – see *Hanuscke Belleggings CC* v *Kungwini Local Municipality* (2012) ZASCA 112.

The point is that the obligation to transfer property where no date of transfer has been agreed does not amount to a debt that prescribes within a period of three years as contemplated by section 15 of the Prescription Act. Accordingly, prescription cannot extinguish the right of action of transfer of property into the name of the plaintiff by the 1st and 2nd defendants. I find therefore that the claim for specific performance for transfer of the property into plaintiff’s names has not prescribed.

**LOCUS STANDI**

 In its stark naked form, *locus standi* simply means a direct and substantial or peculiar interest in the subject matter. In other words, one must demonstrate how he or she is going to be affected by the decision of the court – see *Minister of Education, Arts and Culture* v *ZIMTA* 1992 (2) ZLR 48.

 In the present matter, it is common cause that plaintiff is the surviving spouse of the late Richard Roberts. It is accepted that as the sole surviving spouse, she is a beneficiary in her late husband’s estate. Plaintiff was issued with Letters of Administration by the Assistant Master of the High Court in the form of a Certificate of Authority to deal with the estate of her late husband under DRB 252/2014. I find that plaintiff has *locus standi* in that she has a direct and substantial interest as the sole surviving spouse of the late Richard Roberts to persue specific performance of transfer of the immovable property in dispute into her name.

**ILLEGALITY OF THE TRANSACTION**

 In view of the *maxim in pari delicto esti potior condition possedentis*, the submission that the contract is tainted with illegality becomes a triable issue. For 1st defendant to raise this argument means that she is admitting that the *pretium* was paid in foreign currency. It is common cause that at the time of the agreement, 1st defendant was resident in Botswana. It appears that for the *pretium* to be paid in Botswana Pula, the parties must have agreed that it be so paid. That being the case, the court must guard against doing an injustice detrimental to one party and at the same time unjustly enriching the other by upholding a special plea on the basis of illegality. This in my view is why STRAFFORD CJ made the following comments in *Tajbhay* v *Cassim* 1939 AD 537 at 544-545:

“Courts of law are free to reject or grant a prayer for restoration of something given under an illegal contract, being guided in each case by the principle which underlies and inspired the maxim. And in this last connection I think a court should not disregard the various degrees of turpitude in delictual contracts. And when the delict falls within the category of crimes, a civil court can reasonably suppose that the criminal law provided an adequate deterring punishment and therefore, ordinarily speaking, should not by its order increase the punishment of the one delinquent and lessen it of the other by enriching one to the detriment of the other. And it follows from what I have said above, in cases where public policy is not foreseably affected by a grant or refusal of the relief claimed, that a court of law might well decide in favour of doing justice between the individuals concerned and so prevent unjust enrichment.” (my emphasis)

 Similarly, the circumstances of this case require the court to exercise its discretion but only after listening to *viva voce* evidence from all the concerned parties. The 1st and 2nd defendants should not be permitted to thwart plaintiff’s claim for specific performance using illegality as a special plea.

 In the circumstances, the exceptions taken are without merit and are accordingly dismissed with costs. The matter is referred for trial.

*Mathonsi Ncube Law Chambers*, plaintiff’s legal practitioners

*Dube-Banda, Nzarayapenga & Partners*, 1st and 2nd defendants’ legal practitioners