

CHIPO MARUKU  
versus  
KATT CONSTRUCTION (PVT) LTD  
and  
SIMON MUZENDA HOUSING COOPERATIVE  
and  
THE SHERIFF OF ZIMBABWE N.O

HIGH COURT OF ZIMBABWE  
**MAMBARA J**  
HARARE; 1 October 2024

### **Opposed application**

Mr *Mugiya*, for the applicant  
Mr *J.B. Matandire*, for the first respondent

MAMBARA J:

This is an application brought by the applicant, Chipu Maruku, seeking the rescission of a default judgment granted in favour of the first respondents Katt Construction (Pvt). The judgment pertains to a stand in Stoneridge, Harare, where the applicant claims an interest derived from her ex-husband, Caven Gunha, through the alleged cession of his rights to the property following their separation.

The default judgment, which ordered the eviction of Gunha and any other persons claiming rights through him, was granted when Gunha failed to oppose the respondent's application. The applicant now seeks to have the default judgment set aside, arguing that it was granted in error because she had a direct interest in the property which was not considered.

The first respondent opposes the application, asserting that the applicant was not a party to the original contract between the first respondent and Gunha, and therefore lacks the necessary legal standing to seek rescission of the judgment. It further contends that the applicant has not provided evidence of a formal cession of rights from Gunha to her, rendering her claim legally defective.

During the hearing, the applicant's counsel raised a point in limine, arguing that the respondents' opposing affidavit should be declared invalid due to the electronically inserted date, thereby rendering the matter unopposed.

This court must determine the following key issues:

1. Whether the electronically inserted date on the respondents' affidavit renders it invalid, and whether the matter should be treated as unopposed.
2. Whether the applicant's case has substantive merit, even if treated as unopposed.
3. Whether the applicant, not being a party to the original contract, can claim rights over the property based on the alleged cession from Gunha.
4. Whether the applicant's failure to apply for joinder in the original proceedings is fatal to her claim.
5. Whether the applicant has demonstrated that the default judgment was granted in error, as required under Rule 29 of the High Court Rules 2021.
6. Whether the principle of *quod non habet* (one cannot give what one does not have) applies to the applicant's claim of cession.

Affidavits are critical in legal proceedings, particularly in motion applications. An affidavit must be signed in the physical presence of a commissioner of oaths, with the date of execution being contemporaneously endorsed by the commissioner. This is intended to ensure that the affidavit is a genuine document made under oath, with the commissioner verifying the deponent's identity and the authenticity of the oath-taking.

The courts in Zimbabwe have consistently upheld these requirements. In *Ndoro v Conjugal Enterprises (Private) Ltd* HH814/22, the High Court ruled that an affidavit without a properly commissioned date is defective. Similarly, in *Twin Castle Resources (Pvt) Ltd v Paari Mining Syndicate* HH153/21, the court reiterated that affidavits must be properly signed and dated, with the physical presence of the deponent before a commissioner of oaths.

In the present case, the respondent's affidavit was electronically signed, and the date was electronically inserted. The applicant's counsel argued that this contravenes the procedural requirement that affidavits be signed and dated in the presence of a commissioner of oaths, and as such, the respondent's affidavit is invalid. The court must determine whether the electronically inserted date is sufficient to comply with the formal requirements for affidavits under Zimbabwean law.

The electronically inserted date raises concerns about whether the affidavit was properly commissioned. Given the strict procedural requirements outlined in the cases of *Ndoro* and *Twin Castle Resources*, this court finds that the electronically inserted date on the respondents' affidavit does indeed render it procedurally defective. The purpose of requiring

the deponent's physical presence before a commissioner of oaths is to ensure that the affidavit reflects a genuine act of oath-taking, and the electronically inserted date undermines this assurance.

To contextualize the issue of electronic signatures, it is essential to examine their historical and legal evolution globally. The legal frameworks in South Africa and Australia provide useful insights into how modern legal systems have adapted to technological advancements in signature verification, while maintaining the integrity of legal documents.

Signatures have been used for centuries as a method of authenticating documents and signifying intent. The earliest forms of signatures can be traced to ancient Mesopotamian civilization, where individuals used engraved seals on clay tablets to represent their identity and approval of transactions. As writing systems developed, personal signatures became more standardized, with ancient Greeks and Romans adopting written signatures as part of legal agreements.

By the Middle Ages, the signature had become an established method of validating legal documents, particularly in European legal systems. Royal decrees, contracts, and other legal documents were often authenticated by a signature or a wax seal. As societies evolved, the signature became a formal legal requirement, symbolizing consent and authenticity in legal agreements.

South Africa has made significant progress in incorporating electronic signatures into its legal system through the **Electronic Communications and Transactions Act (ECTA)**, which was enacted in 2002. The Act provides a clear legal framework for the use of electronic signatures in both commercial and legal contexts. Under the ECTA, electronic signatures are legally recognized as valid, provided they meet specific security and verification requirements. For legal documents such as affidavits, the use of an **advanced electronic signature (AES)** is required, ensuring that the identity of the signatory can be reliably verified and that the document has not been altered after signing.

As outlined in the article, "*A 'sign' of the times: a brief consideration of the validity of e-signature in an agreement and affidavits in South African law, 2024, vol 45, n1*" by Singh Cresh, South Africa has accepted the validity of an electronically signed affidavit, provided it met the necessary security requirements. The emphasis is that the use of electronic signatures should not compromise the integrity of legal documents, and that the key to ensuring their validity lies in the reliability of the signature and the method of verification.

Similarly, Australia has embraced the use of electronic signatures through the **Electronic Transactions Act (Victoria) Act 2000 (ETA)**, enacted in 1999. The ETA allows for electronic signatures in both commercial and legal transactions, provided they are reliable and appropriate for the circumstances. Australian courts, such as in *Getup Ltd v Electoral Commissioner* [2010] FCA 869, have accepted electronically signed documents, emphasizing that the method of signing must be secure and verifiable.

The article *Electronic Signing and Online Witnessing of Legal Documents*, Justice and Community Safety, Victoria State Government, highlights how Australia's legal framework accommodates electronic signatures, even allowing for remote witnessing in certain cases. This adaptation underscores the importance of balancing technological efficiency with legal safeguards to ensure document authenticity.

Despite the growing recognition of electronic signatures in jurisdictions like South Africa and Australia, Zimbabwean law has not yet caught up with these developments. The current legal framework, as demonstrated in the cases discussed earlier, remains rooted in traditional procedural requirements that mandate physical presence before a commissioner of oaths for the commissioning of affidavits. This reliance on physical signatures and contemporaneous oath-taking limits the flexibility of the legal system and makes it difficult to accommodate technological advancements.

The Justices of Peace and Commissioners of Oaths Act [Chapter 7:09] which governs the administration of oaths in Zimbabwe, does not currently provide for the use of electronic signatures in legal documents. Given the global shift toward electronic transactions and the growing reliance on digital platforms for legal and commercial transactions, there is a clear need for legislative reform in Zimbabwe to incorporate electronic signatures into the legal framework.

Such reforms could draw inspiration from the ECTA in South Africa and the ETA in Australia, both of which have successfully integrated electronic signatures into their legal systems. By amending the Justices of Peace and Commissioners of Oaths Act to recognize electronic signatures, Zimbabwe could modernize its legal system and improve access to justice, particularly in cases where physical presence before a commissioner of oaths is not feasible.

However, any legislative reform must include safeguards to ensure the reliability and security of electronic signatures. This could involve the use of advanced electronic signatures

for affidavits and other legal documents, as well as stringent verification processes to confirm the identity of the signatory and the integrity of the document.

In light of the foregoing, this court finds that the respondents' affidavit is procedurally defective due to the electronically inserted date. As a result, the matter is treated as **unopposed**. However, the applicant must still demonstrate that her application has substantive merit, which the court will now address.

The primary substantive issue in this case is whether the applicant, who was not a party to the original contract between Katt Construction (Pvt) Ltd and Caven Gunha, can assert any legal rights over the disputed property. The doctrine of privity of contract is a well-established principle in Zimbabwean law, as well as in other common law jurisdictions. It holds that only the parties to a contract can enforce its terms or be bound by its obligations.

In *Fletcher v Fletcher* [1844] 4 Hare 67, the court reaffirmed that third parties cannot claim rights under a contract unless they are expressly included as beneficiaries or have been assigned rights under the contract. This principle is critical to maintaining the integrity of contractual relationships, ensuring that only those who have expressly agreed to the terms of the contract can enforce its provisions.

In the present case, the contract concerning the disputed property was entered into between Katt Construction and Gunha. The applicant was not a party to this contract, and there is no evidence to suggest that she was included as a third-party beneficiary. Her claim to the property is based on her assertion that Gunha ceded his rights to her following their separation. However, the applicant has not provided any formal documentation to support this claim, and the respondent has challenged the validity of the purported cession.

The doctrine of privity of contract dictates that, as a non-party to the original agreement, the applicant has no legal standing to enforce any rights under the contract. Her reliance on the alleged cession of rights from Gunha does not alter this fundamental principle, particularly in the absence of any formal cession agreement.

Cession is a legal process through which a personal right is transferred from one party (the cedent) to another (the cessionary). For a cession to be valid, it must meet formal requirements, including the execution of a written agreement and notification to relevant parties.

In the absence of a formal cession agreement, the applicant's claim remains speculative. A reading of the papers shows that Gunha is still litigating over the same property. The fact that Gunha has continued to litigate over the property in other cases suggests that he did not

cede his rights to the applicant. The principle of *quod non habet*—one cannot give what one does not have—further undermines the applicant’s claim, as Gunha could not have transferred incomplete or disputed rights.

Another significant procedural deficiency in the applicant’s case is her failure to apply for joinder in the original proceedings. The court enquired from the applicant’s counsel how the applicant, if the order was granted, was going to file her opposing papers in view of the fact that she is not a party to the proceeding that resulted in the default judgment. The applicant’s counsel then suggested that he could, in these proceedings, apply for a joinder or apply for a joinder later on after this matter is concluded. Joinder is a legal process that allows a party with an interest in a matter to be formally included in the litigation. It is a fundamental principle that a party claiming a direct and substantial interest in the subject matter of a case must apply for joinder to ensure that their rights are protected. The applicant had not applied for such a joinder.

In *Madzivire & Ors v Zvarivadza & Ors* 2006 (1) ZLR 514 (S), the Supreme Court of Zimbabwe emphasized the importance of joinder, holding that a failure to apply for joinder can preclude a party from asserting their rights in subsequent proceedings. The court noted that joinder is a critical procedural step, particularly in cases where the party claims an interest in property or other substantial rights.

In the present case, the applicant had ample opportunity to apply for joinder when the original proceedings were initiated. However, she failed to take this procedural step, and as a result, she was not a party to the proceedings that led to the default judgment. The fact that Gunha, the original party to the contract, was properly served with the application and chose not to oppose it further undermines the applicant’s claim. The applicant cannot now seek to circumvent proper procedure by attempting to rescind a judgment on the basis of an unformalized interest in the property.

Rule 29 of the High Court Rules 2021 governs the procedure for rescission of judgment. Under this rule, a judgment may be rescinded or varied if it was erroneously granted in the absence of a party affected by the judgment. To succeed in an application for rescission, the applicant must demonstrate that the judgment was granted in error and that there is a valid basis for setting it aside.

The applicant in this case has failed to demonstrate any error in the granting of the default judgment. The judgment was granted because Gunha, the party to the original contract, did not oppose the application after being properly served. There is no indication that the default judgment was granted in error, either procedurally or substantively. The applicant’s

assertion that the judgment was erroneous is based on her claim that she had a right to the property by virtue of the alleged cession from Gunha. However, as discussed earlier, the purported cession was never formalized, and the applicant was not a party to the original proceedings.

In *Mashingaidze v Chipunza & Ors* HH 688/15, the court held that an applicant seeking rescission must demonstrate both an error in the judgment and a bona fide defence or claim. In the present case, the applicant has failed to establish either. There is no evidence of any error in the original judgment, and the applicant's claim to the property is unsupported by any formal documentation or legal basis. Therefore, the court finds no grounds for rescinding the default judgment.

In the result, the application is dismissed with costs.

**MAMBARA J:** .....

*Mugiya Law Chambers*, applicant's legal practitioners  
*John Mugogo Attorneys*, first respondent's legal practitioners