EMELIA NYASHA MUPETI
versus
KAMUNHU INVESTMENTS (PVT) LTD
and
CONSTANCE KAMUNHU
(in her capacity as Executor Dative of the Estate late David Kamunhu)
and
RAWSON PROPERTIES ESTATE AGENTS
and
MASTER OF HIGH COURT

HIGH COUT OF ZIMBABWE
FOROMA J
HARARE, 15 May 2017 & 31 May 2017

OPPOSED MATTER

Ms *M Mangwiro*, for the applicant
T. S. Manjengwa, for the respondent

FOROMA J: This is an application by applicant to amend its declaration. The applicant instituted a claim against the respondents claiming refund of the purchase price the applicant paid to the first respondent through the third respondent in respect of the purchase price of a property purchased from the first respondent called Stand 1576 Ardbennie Township of Subdivision A of 5, 6 and 7 Block MM Ardbennie township. The second respondent was the Agent of the first respondent in the sale agreement and the applicant paid the full purchase price through the third respondent in terms of the agreement of sale.

The agreement of sale between the applicant and the first respondent was recorded in writing and is annexed to the applicant's papers on p 20-25. Clause 4 of the agreement is explicit in that it provides;

(1) that the purchase price is $55 000-00

(2) the purchaser should pay the purchase price to Rawson Properties Trust Account No 020145668 at NMB Bank Angwa City upon signing of agreement by both parties.

(3) The purchase price would be released to the seller upon transfer of the property.

Clause 15 of the agreement of sale provides that no variation in this agreement shall be valid unless reduced to writing and signed by or on behalf of the parties. The applicant duly paid the purchase price in terms of the agreement of sale as confirmed by Rawson Properties receipt No 076 dated 23 November 2012.

The applicant despite complying fully with the agreement of sale could not obtain transfer as the first respondent after signing the agreement of sale had the property mortgaged to CBZ before transfer which the applicant only discovered after the transfer to it was declined by the Registrar of Deeds on account of the property being encumbered. After failing to get a solution to the problem (mortgaging the property) the applicant instituted this action against the respondents seeking specific performance alternatively cancellation of the agreement of sale. The declaration was clumsily drafted resulting in the third respondent raising an exception which exception was not set down in terms of the rules. The third respondent did not serve its exception on the applicant. As a result of failure by the third respondent to serve the exception on applicant it could not be set down for hearing.

When the applicant discovered that its declaration was excepiable it sought to amend the declaration in order to remove the cause of complaint. It is the application to amend which is the subject of this opposed application. Unfortunately, the applicant has relied on the wrong rule for the amendment sought. The third respondent argues that the amendment seeks to introduce a prescribed claim. However the basis of the proposed plea of prescription seems to me to be ill conceived. The first respondent in its heads of argument argues that the applicant was aware that the purchase price was transferred to the seller in 2012 when she took occupation of the property and her claim must have been known then. Under para 15 of its heads of argument the third respondent argues that if the applicant was aggrieved by the action taken by the third respondent in respect of the agreement of sale signed in November 2012 then the applicant ought to have served summons for such claim before November 2015.

Precisely when did prescription raised by 3rd respondent commence to run? According to the third respondent prescription commenced to run in November 2012 on signature of the

agreement of sale as the applicant's cause of action against the third respondent is the wrongful release of the purchase price to the seller without the purchaser's consent before transfer in breach of clause 4 of the agreement of sale.

The applicant does not accept that its claim is prescribed. Prescription only commences to run when the debt is due. In terms of s 16 of the Prescription Act [*Chapter 8:11*] 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. At best the debt in *casu* would have become due only after the failure of transfer as it is then that the applicant would have approached the third respondent to cancel the agreement if transfer could not be effected.

It is not in dispute that the third respondent caused or facilitated a breach of the agreement of sale by permitting the First respondent to access the purchase price before transfer which the applicant claims is the cause of its loss.

The parties are agreed that the purchase price was paid into the third respondent's trust account on behalf of the first respondent. Accordingly para 7 of the plaintiff's declaration is a common mistake in so far as it suggests that the purchase price was paid into the second respondent's trust account. It is that mistake that the applicant seeks to correct through the amendment sought in this application.

The law is clear. A party can amend its pleadings at any time before judgment see Order 20 r 132 of the High Court of Zimbabwe Rules 1971. The applicant's erroneous reference to Order 20 r 134 (1) as authority for the amendment sought cannot therefore be fatal. The mischief behind the provision for amendment is to ensure that the parties present themselves before the court on the correct facts to enable the court to adjudicate on the substantive dispute with a view to correctly determining the dispute between them. No prejudice actual or potential has been shown to be suffered by the third respondent by the amendment applicant seeks.

In the circumstances the applicant has made a proper case for the amendment sought. I accordingly order that the amendment be granted in terms of the draft order on pp 28 – 29. Paragraph 4 of the draft order is amended to read (4) the costs of this application to be costs in the cause.

Gambe and Partners, applicant's legal practitioners
Wintertons, 3rd respondent's legal practitioners