PENNIWILL (PVT) LTD
versus
THE TRUSTEES FOR THE TIME BEING OF GABRIEL AND ANGELS TRUST
and
NOBERT MAVUNGA
and
CYNTHIA SITHOLE
and
TANAKA SITHOLE
and
CECIL KACHAMBWA
and
JOICE POUND
and
EDITHA INVESTMENTS (PVT) LTD
and
THE SHERIFF OF HIGH COURT OF ZIMBABWE NO.

HIGH COURT OF ZIMBABWE
KWENDA J
HARARE, 21 July, 30 July & 16 September 2021

Chamber Application - urgent

Adv *W Ncube,* for applicant
Adv *R Mbabwe* with *Ms A Chatsama*, for 1st & 2nd respondents
Mr *J Mambara,* for 3rd & 6th respondents

KWENDA J: This is a chamber application for a provisional order, wherein the applicant seeks a temporary interdict restraining the 1st to 6th respondents from infringing upon its property rights. Reference to the respondents in this judgment will exclude the 7th and 8th respondent because the 8th respondent is an officer of this court mandated to execute its judgments who has no interest in the outcome of the matter and there is no order sought against the 8th respondent.

The applicant is a juristic person and owner of a certain immovable property known as Subdivision A of subdivision H of N'Thaba of Glen Lorne Township situated in the district of Salisbury and held by it under Deed of Transfer number 1998/75. On the 6th August 1998 the City of Harare, pursuant to powers given to it in s40 (5) of the *Regional, Town and Country Planning Act* [*Chapter 29:12*] (hereinafter the Regional, Town and Country Planning Act), granted an application for a permit (no. SD 534/98) submitted by a company known as Lorraine Castedo (Pvt) for the consolidation of the applicant's aforementioned immovable property with an adjacent piece of land known as Lot 1 of subdivision G of subdivisions D of N'taba of Glen Lorne belonging to another person and thereafter subdivide the consolidated property into stands to be known as stands 2619 to 2640 Glen Lorne Township. A reasonable inference accepted during argument is that Lorraine Castedo (Pvt) Ltd, was incorporated to hold title over the consolidated property since the development is a joint venture by two owners of separate pieces of land.

The permit was issued subject to various conditions which included construction of tarred roads, construction of culverts and storm water drains as well as provision of reticulated water and sewer systems and that transfer of ownership of the stands is not registrable by the Registrar in the absence of a certificate of compliance issued by the City of Harare confirming due performance of all the conditions of the development permit, registration of servitudes and approval of survey diagrams by the Surveyor General within 12 months of the date of the issuance of the permit, subject to possible extension of that period. The other conditions were fulfilment of the mandatory requirements of the *Land Survey Act* [*Chapter 20:12*] (herein after the Land Survey Act). In terms of s 40 of the Land Survey Act, the Registrar of Deeds is prohibited from accepting, in the absence of certain dispensation, any general plan or diagram of any piece of land in connection with any registration of such land, unless such general plan or diagram has been approved by the Surveyor General. In terms of s 42 (2) Lorraine Castedo (Pvt) Ltd was required, pursuant to the issuance of the consolidation and subdivision permit to instruct a land surveyor to prepare the consolidated title diagram for approval by the Surveyor General. The Surveyor General is prohibited from approving such survey records or diagrams relating to a consolidation of any land unless, among other requirements, the diagram complies with the consolidation permit concerned.

The applicant avers that the respondents have unlawfully interfered with its rights of ownership by occupying and barricading portions of its property, building perimeter walls, installing a gate which they have locked, digging the driveway and excavating land and rendering its private property impassable due to trenches, boulders and heaps of sand strewn all over. The 1st, 2nd, 3rd, 4th and 6th respondents are in unlawfully control of the applicant's land to be known as 2621, 2622, 2638, 2637 and 2640 per subdivision permit no SD 534/98, supra and are colluding to effectively deny it, its visitors, tenants and assignees of access to the land in question as well as stands 2619 and 2620. They are treating the applicant's land as theirs despite applicant's protestations. The main access to the applicant's property has, prior to the respondents' unlawful conduct, been through stand 2638 which remains unbuilt. However, the 3rd and 4th respondents have put a perimeter wall around stand 2638 as well as a gate which they keep locked at all times. Only the 1st to 6th respondents are allowed access through the gate. Although the respondents claim to have bought the pieces of land which they now occupy and consider as their property from the 7th respondent, the applicant avers that the 7th respondent did not and still does not have the right to sell, alienate or otherwise dispose of the applicant's privately owned land. The applicant was not a party to the agreements of sale relied upon by the 1st to 6th respondents and it does not recognise same. In the circumstances the 1st to 6th respondents have no right to barricade portions of its property, erect gates, build homes and to continue interfering with its rights of access to its property exercised through tenants, assignees and employees. The applicant avers that the 1st to 6th respondents have all collaborated to deny it access as aforementioned because they all have duplicate keys to the gate unlawfully installed at its property which they have not shared with it. Meanwhile gate is locked at all times. The 5th respondent has actively participated or associated itself with the occupation.

This case has come before me 23 years after the consolidation and subdivision permit was granted the project has not commenced. The proposed consolidation of two properties separately owned was the condition precedent to the subdivision. Sadly, the consolidation has not taken place to date. Without the consolidation the stands contemplated by the subdivision cannot be created which means that, at law, there cannot be any stands to talk about. There has been no attempt to comply with the mandatory provisions of the Land Survey Act. The company known as Lorraine

Castedo (Pvt) Ltd has disappeared from the scene. It is not a party to these proceedings. None among the parties alluded to its current circumstances. In all probabilities the company has become defunct. See s 52 of the Companies and Other Business Entities Act [*Chapter 24:31*]. Other players now claim the rights given to the company by the permit. The permit was extended on the 24 February 2004 to 6 August 2005 at the instance of certain *Messrs W and C Blumears* who were granted the extension. There is no evidence before me that that the permit was extended beyond the 6th August 2005. In all probabilities the permit has been revoked by operation of the law. In terms of s 40 (9) of the Regional, Town and Country Planning Act where the requirements of a permit have not been implemented within the stipulated time, the permit is deemed revoked unless its life is extended. The proposed consolidation not having taken place, Subdivision A of subdivision H of N'Thaba of Glen Lorne Township situated in the district of Salisbury therefore remains the property of the applicant still held by it under Deed of Transfer number 1998/75.

It is against this back ground that the applicant filed case no. HC 3492/21 wherein it seeks an order resolving the underlying dispute. This chamber application has been filed to deal with alleged infringements on the applicant's rights which flow from its ownership of the disputed properties while the parties await effective resolution of their dispute by due process of the law under case no. HC3492/21. According to the applicant the violations are escalating instead of ceasing. Herein the applicant prays for both prohibitory and mandatory interim interdicts as amended in argument. It prays for an order directing the 1st to 6th respondents to cease all unlawful activities at its property, directing the respondents to restore to it full access to its property which they now control by removing boulders, mounts of soil, backfilling the trenches in the driveway and giving it a duplicate key to the gate at stand 2638 Glen Lorne Township. On the return day it will seek a final order directing the respondents to restore the driveway to its original state and restraining the respondents from interfering with all its rights that flow from its ownership of its aforestated property.

The application is opposed by the 1st to 6th respondents. The 7th and 8th respondents did not file any papers. The inaction by the 7th and 8th respondents is understandable because no relief in currently being sought against both of them and the 8th respondent has no real and substantial interest in the outcome. Reference to respondents will therefore exclude 8th respondent.

At the hearing the respondents raised some preliminary objections. They argued that this matter is not urgent and there is no need for me to treat it as urgent because the applicant failed to approach the dispute with the urgency that it alleges. The events giving rise to this case occurred on the 24 July 2021 yet the applicant only filed this application after three weeks, on the 15 July 2021. The other objection is based on the submission that the applicant has not been candid because it is not quite barricaded from its land. There are alternative routes which have been used as access roads for a long time. One such route passes through stand no 2620, another through enterprise road and yet another. The road which passes through stand 2638 which the applicant insists on using does not exist on the layout plan of the proposed consolidation and subdivision plan. It was closed due to the creation of stand no 2638 by the applicant and 7th respondent. A certain Mr *Julius Chikomwe*, a legal practitioner who has previously represented the applicant, is living in the main house at the property and uses the alternative route through stand no 2620. They all submitted that the dispute is *res judicata* in that this application mirrors case no HC3587/21 which determined the present dispute against the applicant. The only remedy available to the applicant lies in an appeal to the Supreme court against the High Court decision in case no HC3587/21. In any event the applicant has an application pending before this court under case no HC3492/21 seeking a declarator which, if granted, will essentially give it the same reliefs sought herein. Case no HC3492/21 therefore offers an alternative remedy rendering this application unnecessary. The 3rd to 6th respondents argued that they were improperly joined in this matter since their joinder is based on speculation that they are colluding with the 1st and 2nd respondents. Lastly, 3rd to 6th respondents submitted that the applicant has not utilised a remedy available to it which is that the City of Harare is empowered in terms of s 32 of the Regional, Town and Country Planning Act *[Chapter 29:02]* to order the cessation of unlawful property developments or removal unapproved structures among other powers vested in it. There was therefore no need to come to court.

I had no difficulty in ruling on the issue of urgency. Both sides agree that the applicant is the owner of the piece of land where the dispute has arisen. The circumstances giving rise to the dispute are common cause. The respondents are barring the applicant, its employees and tenants access to its property through the usual entrance at stand number 2638. They are building houses on the applicant's property buoyed by the approval of their building plans by the City of Harare.

The gate at proposed stand number 2638 is locked and the applicant has despite demand, not been given a duplicate key. All the respondents have duplicate keys and unrestricted passage through that gate. The respondents are trenching on applicant's land without its permission. The pictures showing the locked gate, trenches, earth moving equipment, mounds of soil and boulders have not been not contested. The respondents have no intention to cease their activities at the applicant's property because they believe that they have the right to do what they are doing despite being aware of the applicant's objection to what they are doing. I must therefore deal with the merits promptly because the harm complained of is ongoing and the respondents are not relenting. It is true that this court has previously dealt with disputes arising from the planned but failed property development. This is because the various disputes that have come, including this one, are just manifestations of an underlying disagreements arising from the failed consolidation and subdivision project. The promoter of the project, being Lorraine Castedo (Pvt) Ltd has failed or neglected to implement it. Its whereabouts are not known. The applicant's position is that as of now it retains all rights accruing from its ownership of Lot 1 of Subdivision G of subdivision D of N'taba Glen Lorne and it has no legal relationship with the respondents. The respondents on the other hand believe that the applicant relinquished its ownership rights to the 7th respondent which in turn sold stands at the property to them and remains owner 'in name' only. In the circumstances they have the right to occupy and enjoy the property to the exclusion of the applicant. In other words, they genuinely believe that they have the right to treat the stands as their own. The positions taken by the applicant on one hand and the respondents on the other cannot be reconciled. They both and each want to exercise ownership rights to the exclusion of the other. Each time the fight turns physical they have come to court.

I am not persuaded that the dispute is *res judicata.* Case no HC 3587/2 did not resolve the problem of the constant fights because it was struck off. The outcome cannot therefore be a basis for pleading *res judicata.* Another case, being HC 9332/17, ended up in deed of settlement in terms of which an attempt was made to resuscitate the failed project. The settlement essentially dealt with a property belonging to the 7th respondent and not that of the applicant. The parties erroneously registered the contract as an order of this court. A court should not be invited to be a party to a settlement out of court as such settlement is not always necessarily restricted to the issues

before the court. In addition, a court order, even if it is by consent, must resolve the dispute brought before the court definitively yet a deed of settlement is in essence a contract which can be breached. As it turned out the terms of the deed of settlement have not been fulfilled. Another matter is case no HC 4173/19. In that case the parties asked the court for an opportunity to find a solution out of court while undertaking to return to court in the event that they failed to reach agreement. They have not returned to court since the year 2019 the case remains pending but in reality, abandoned.

I am not persuaded that the applicant has an alternative remedy under the Regional, Town and Country Planning Act. The remedies offered in section 32 of Act are available to the City of Harare at its discretion. The applicant has not cited the City of Harare in this case. If anything, the owner of a property is normally the 1st respondent in an enforcement order issued in terms of s 32 of the Regional, Town and Country Planning Act as opposed to being the person seeking it. If the respondents felt that the joinder of the City of Harare was necessary for the effective resolution of this matter they could have applied for its joinder.

As regards the alleged misjoinder of the3rd to 6th respondents, I found it difficult to separate the objection that the applicant has no cause of action against the 3rd to 6th respondents from the merits. I will consider that issue together with the merits.

The above discussion disposes of the preliminary objections. What is clear is that the parties will be in and out of court if this court turns a blind eye to the ongoing fights at the applicant's property.

In opposing this application, the 1st and 2nd respondents are steadfast that the applicant relinquished control of stands 2621 and 2622 in favour of the 7th respondent which in turn sold the stands to them and they now own the stands. They were, therefore, entitled to build houses upon the stands, which they have already done. They have the right to control the stands and exclude the applicant because it remains owner on paper only. A certain Julius Chikomwe, a legal practitioner practising under the law firm Thompson and Stevenson Legal Practitioners, facilitated their acquisition of the stands after assuring them that the applicant had relinquished ownership in favour of the 7th respondent. As proof of ownership, they rely on an agreement of sale dated 7 August 2017 which they say was prepared by Julius Chikomwe, entered into

between the 7th respondent and the 1st respondent. The agreement contains the following salient features: -

(1) The 7th respondent is the owner of a certain property known as Lot 1 Subdivision G of subdivision D of N'taba of Glen Lorne.
(2) Stands 2621 and 2622 are not part of Lot 1 Subdivision G of subdivision D of N'taba of Glen Lorne.
(3) The 7th respondent sold the two stands to the 1st respondent for USD 55 000.00, the effective date of the sale being the 7th August 2017.
(4) 7th respondent will be able to transfer ownership of the stands to the 1st respondent without further ado upon payment of the purchase price.
(5) The agreements contained the 7th respondent's warranty against eviction; and
(6) The written agreement contained the whole agreement.

On the face of it the agreement is not enforceable because it contains undertakings that are not achievable. My observations which are not intended to preempt the outcome of pending litigation but are made on a prima facie basis and on the strength of undisputed facts are stated below. Stand Nos 2621 and 2622 are not part of Lot 1 Subdivision G of subdivision D of N'taba of Glen Lorne as alleged in the agreement but on applicant's land. The 7th respondent does not have real rights over the property on which the stands are situated. The land on which the stands will be created belongs to the applicant. The 7th respondent is therefore in no position to transfer ownership of the stands. For the same reason it cannot validly give a warranty against eviction from the stands. The applicant, being the owner of the land, is not a party, does not recognise the agreement and does not wish to be bound by it. The agreement does not disclose the fact that stands 2621 and 2622 were intended to be created in a project which was supposed to begin with consolidation of two properties.

The other document on which the 1st and 2nd respondent rely is also invalid. The document which was executed between the 2nd respondent and 7th respondents on the 2nd June 2019 and named "Deed of Accession" is an agreement in terms of which 2nd respondent purported to assume rights in stand Nos 2621 and 2622 of Lot 1 of Subdivision G of subdivision D of Glen Lorne by virtue of being 'deemed' to have been part of completed case No. HC 9336/17. I am not sure what

that means. I'm not aware of a legal framework in terms of which a person is deemed to have become a party to a completed case. A person may be joined as a party to ongoing proceedings and not terminated proceedings and even then, by order of Court. In any event stand Nos 2621 and 2622 were not part of one subject matter in case No HC9336/17. In view of the obvious shortcomings counsel for the 1st and 2nd respondent had to and did concede that the 'Deed of Accession 'is worthless.

In my view the agreement of sale and the so called 'Deed of Accession' are dubious and fraudulent documents used to con the 1st and 2nd respondent of funds. The fraudulent nature of the and invalidity of the agreement of sale and 'Deed of Accession' appear to be admitted by the 1st respondent because that is its cause of action in case No HC 7177/19 where it claims refund of the purchase price paid to 7th respondent, Macdonald Chapfika and Evans Chapfika plus damages for breach of contract. The assertion by 1st and 2nd respondents that the fraudulent documents which they rely upon were prepared by Julius Chikomwe although it has not been contested by the applicant does not bolster their defence because when he drew the documents on behalf of the 7th respondent. The applicant's counsel did not comment on them and did not have to because the documents do not mention his client.

In opposing this application on the merits the 3rd and 4th respondents claim ownership of stand 2638. They have constructed a perimeter wall around stand 2838 and installed a gate which they have now locked. They are denying the applicant access through that gate and assert that the applicant should use alternative routes which already exist. They intend to start developing the stand and build a dwelling at the stand following the approval of their building plan by the City of Harare. They have brought excavators which are already digging of the driveway and all over the applicant's land as part of servicing without the authority of the applicant. Their claim to have bought the stand from the 7th Respondent. Although the agreement has not been produced their assertion is that the 7th respondent had bought the stand from the applicant in terms of an earlier agreements of sale. They however concede that they have not dealt with the applicant with respect to the stand concerned.

I am not persuaded by that argument. It is trite that faced with any claim based on ownership the respondents were supposed to seek protection from the 7th respondent which

purported to sell applicant's property to them and gave them a warranty against eviction. Unfortunately for them, the 7th respondent has not filed either a verifying affidavit or an opposing affidavit. The assertions by the 3rd and 4th respondents therefore remain unsupported. Further, a person can only assume rights and obligations created by an earlier agreement to which he or she was not a party through a process known as a combined cession and delegation. In such a tripartite agreement the new purchaser substitutes the first purchaser and assumes rights and obligations previously accruing to the first purchaser. The original seller and bearer of rights sold, the first purchaser and the person who intends to succeed the first purchaser must necessarily be parties to the agreement. See discussion of this in R H Christie *The Law of Contract in South Africa* 3rd Edition at pages 523 and 524. The 3rd and 4th respondents also claim ownership of stand 2638 based on the Deed of Settlement entered into in case no HC9336/17. In terms Clause 2(ii) of that Deed of Settlement the 7th respondent and the late Macdonald Makamba Chapfika undertook to transfer stand 2638 to the 3rd and 4th respondents. Unfortunately for them, on the face of it, the undertaking is incapable of performance because Stand no 2638 is situated on the applicant's property as aforementioned. The undertaking made by 7th respondent and the late Macdonald Makamba Chapfika was another fraud.

The fifth and sixth respondents reside in the areas covered by the consolidation and subdivision permit. It appears the proposed stands which they claim and live at are not on the applicant's property but have actively associated themselves with the other respondents. They the duplicate key to the gate which is on applicant's land which they have refused to share with the applicant. They have justified and associated themselves with the ongoing excavations.

This court has had to deal with many disputes symptomatic of chaotic land developments in Harare carried out in flagrant violation of the spirit of the Regional, Town and Country Planning Act sometimes with the involvement of the City fathers and senior strategic employees of the City of Harare. Stands are demarcated on the ground and 'sold', occupied, some have houses built on them and occupied without certificates of occupation and when all that happens outside the mandatory provisions of the Act disputes are inevitable. In the fights that ensue the adversaries usually take matters into their hands. In this case the City of Harare authorities and planners have become complicity in the chaos by corruptly turning a blind eye to what appears on the face of it

to be unlawful activity at the applicant's property to the extent of approving building plans over disputed land. It is common knowledge that approval of a building plan involves ticking boxes on a check list. In the absence of a consolidation and subdivision on an identifiable property one wonders where the houses that are being approved are expected to be built.

Agreements of sale of immovable properties are best handled or supervised by qualified conveyancers any person who enters into an agreement of sale for land does so with the ultimate objective of acquiring real rights over the immovable property concerned. In terms of the Deeds Registries Act [*Chapter 20:05*] the ownership of land may be conveyed from one person to another only by means of a deed of transfer executed or attested by a registrar. See also *Chapeyama v Chapeyama* 200 (2) ZLR 103(S). We have an unfortunate situation were anybody and everybody think that they can draw valid agreements of sale of immovable property based on templates which do not necessarily suit all situations. As correctly pointed out by M L Mhishi's *A Guide to the Law and Practice of Conveyancing in Zimbabwe* at page 78 while planning issues fall under the purview of planners a conveyancer must as of necessity: -

> "understand generally the wider provisions of the law relating to planning for the purpose of advice generally"

In this case a diligent and honest conveyancer would have advised the respondents on the legal implications of their agreement with the 7th respondent, the conditions precedent for a valid transfer of real rights especially in a property development and cater for all that in the agreement of sale. The development permit ought to have at least been mentioned in any agreement of sale. A subsequent purchaser substituting the first purchaser would therefore become fully aware of based on the disclosures made in the first agreement of sale. The purchasers would have been advised that the permit expires.

Sadly, in this case the respondents where enticed to buy 'stands' without receiving proper advice. Instead they were misled by the unscrupulous lawyer named as Julius Chikomwe. The corrupt officials at the City of Harare urged them on by approving their building plans. Now they are claiming ownership which may not exist while those who created the confusion are folding their arms and watching gleefully from the terraces while the applicants and respondents at each other's throats.

I am satisfied that the applicant has shown on a balance of probability that the activities complained of are *prima facie* unlawful. An interim interdict giving the applicant access to its land is merited. Access can only be restored to the applicant by the removal of the lock at the gate or by giving it a copy of the key to the gate at stand 2638. Further it is necessary for the respondents to be ordered to backfill the trenches they have created and remove the rubble, soil and boulders blocking the driveway. In my view an order for contempt of court would be precipitate in that it cannot be granted before the contempt occurs. The circumstances of this case satisfy all the requirements for temporary interdict.

The applicant has proved a prima facie right to the property where the activities complained of are taking place. The injury that it has complained of is not disputed. I have demonstrated above that it has no other adequate remedy except an order of court restoring access to it. In view of the fact that the odds are weighted against the respondents who on the face of it have no decipherable legitimate claim against the applicant's property, the balance of convenience favour the grant of the interim reliefs sought by the applicant. The fact that the City of Harare has approved building plans will not influence me because it clearly smacks of corruption. The implementation of the approved consolidation and subdivision has not even begun because the land on which the two pieces of land which are yet to be combined into one.

In my view case no HC 3492/21 is not the only case which will resolve the underlying dispute with finality. Case Nos HC 7177/19 is also pertinent. Both cases are pending before this case. The parties will save time if they consolidate the two cases. However, case No. HC 7177/19 was commenced by summons while HC 3492/21 is an application. It is up to the parties to decide to manage the cases. They may consider converting case no HC 7177 into an action commenced by summons. Both cases however tackle the underlying dispute. The draft final order must reflect that position.

I will amend the draft final order accordingly and grant the provisional order as amended.

Tamuka Moyo, applicant's legal practitioners
Chatsama & Partners, 1st and 2nd respondents' legal practitioners
J Jambara & Partners, 3rd, 4th, 5 & 6th respondents' legal practitioners