

LINDA SAHWENJE  
versus  
TINASHE CHITEMERE  
and  
DIRECTOR OF WORKS N.O  
(CITY OF HARARE)  
and  
CITY OF HARARE

HIGH COURT OF HARARE  
CHITAPI J  
HARARE, 10 June 2024

### **Opposed Application**

*T M Mutema*, for the applicant  
*P Matsenhura*, for the 1<sup>st</sup> respondent

CHITAPI J: The applicant is a female adult of Harare. The first defendant is a male adult of Harare. The third and fourth respondent are respectively, the Director of Works in his nominal capacity as employee of the third respondent. The third respondent is the local authority for Harare Municipal area. The names of the parties appear on the heading to this judgment and are repeated by reference. The second and third respondents did not oppose this application. They are and remain barred. I will comment later about the negative effect of the decision of the first and second respondents not to participate in the determination of this dispute between the applicant and the first respondent. The dispute in the matter as I shall set it out later requires that a paper trail of the devolution of a property that is at the centre of the litigation is set out.

The applicant claims to hold rights, title and interest in a property situate in Belvedere suburb, Harare called stand 40295 Belvedere measuring 2106 square metres. She claims to have purchased the property by reason of a cession of rights from one Chris Edwin who had purchased the property from the third respondent. The agreement of sale between Chris Edwin and the third

respondent was attached to the applicant's supplementary affidavit filed on 25 July 2022. That agreement was executed by the third respondent and Chris Edwin on 10 October 2016.

In terms of clause 8 of the agreement of sale of the property executed between Chris Edwin and the third respondent, the purchaser was required to construct a dwelling house in accordance with a plan and specifications approved by the third respondent, such construction to be commenced within three months and completed within eight months of the date of signing the agreement.

In terms of clause 10 of the same agreement between the third respondent and Chris Edwin, alienation of the title and rights in the property if sought to be done before registration and passing of transfer from the third respondent to Chris Edwin was regulated. Clause 10 provided as follows:

- “10. The purchaser(s) shall not prior to transfer to him /her;
- (i) Cede of (sic) assign this agreement or any right acquired by him hereunder; or
  - (ii) Part with possession of the property or any part thereof; or
  - (iii) Alienate, dominate or otherwise dispose of the same without the prior consent in .... of the seller.”

In relation to how the applicant acquired the property from Chris Edwin Matema, she attached a copy of a sale agreement of the property by cession between Chris Edwin Matema as seller and she as 'Purchaser'. Parties to a cession are at law referred to as cedent and cessionary, the cedent being the one who makes over his or her rights, title and interest in the property and the cessionary being the one who takes over the rights. This point is noted for posterity and the validity or otherwise of the agreement in question is not impugned on this basis. It suffices that the agreement in question related to the same property stand 40295 Belvedere with the extent of the land being recorded as 2112 square metres which was six square metres more than what appears on the agreement between the third respondent and Chris Edwin Matema. Again nothing turns on this variance in the determination of this application. The agreement was signed by Chris Edwin Matema on 10 October 2016 and by the applicant on 17 October 2016. By the dates of signature of the agreement, Chris Edwin Matema signed the sale agreement of the same property to the applicant on the same date that he signed the agreement between himself and the third respondent. I will not speculate on what this scenario suggests. I am content to point out the coincidence without comment. Again the application does not stand to be determined on the basis of the

coincidence in dates of sale of the property to Chris Edwin Matema by the third respondent and simultaneous sale thereto from Chris Edwin Matema to the applicant.

The applicant claimed to have subsequent to acquiring the property from Chris Edwin Matema, sold part of the same to the first respondent by way of an agreement of cession of rights in 1000 square metres of the property. The copy of the agreement of cession was attached to the applicant's founding affidavit. The agreement was dated 31 May 2019. The preface to the agreement recorded that the applicant was the holder of certain rights, title and interest in a certain piece of undeveloped land measuring 2106 square metres in extent called stand 40295 Belvedere. The agreement recorded that the applicant had agreed to cede and make over her rights, title and interest in "an undivided portion of the property measuring 1000 square metres"

The applicant as cedent by that agreement then further ceded and assigned to the first respondent as cessionary, her title, rights and interest in an undivided 1000 square metres of the stand and the first respondent accepted the cession. The parties acknowledged the status of the sold portion as undivided and recorded that fact in clause 5 of the agreement as follows:

"5. All costs of subdivision of the property shall be borne equally by the cedent and cessionary"

The first respondent subsequently applied for and was granted a permit to subdivide the whole property, Stand 40295 to create stand 41550 which became known as stand 41550 Ganges Road, Belvedere. The permit is dated 28 August 2020. It was signed on 3 September 2020 by the second respondent. From the papers filed by the parties and not disputed, the paper trail on the devolution of stand 40295 is as detailed. The applicant and the first respondent's are at loggerheads as the applicant seeks the cancellation of the sale agreement of cession of the property between her and the first respondent and ancillary relief. The first respondent strenuously resists the cancellation

The applicant in her draft order seeks an order which she couched as follows:

"IT IS ORDERED THAT:

- (i) The application be and is hereby granted.
- (ii) The agreement of cession entered into by and between Applicant and First Respondent at Harare on 31 May 2019 be and is hereby declared null and void.

- (iii) The subdivision permit which was issued by Third Respondent in favour of First Respondent on 17 March 2020 under subdivision Permit Number SD/CR/02/20 or any subsequent subdivision permits hereto in respect of stand 40295 Belvedere be and is hereby set aside.
- (iv) Any acts, deeds or title obtained by the 1<sup>st</sup> Respondent in respect of stand 41550 Harare Township subsequent to the agreement of cession entered into by and between Applicant and First Respondent at Harare on 31 May 2019 be and is hereby declared null and void
- (v) Respondent shall pay costs of suit jointly and severally the one paying and the other to be absolved on a legal practitioners and client scale if this court application is opposed.

The applicant' contended in the founding affidavit that she had cancelled the agreement of sale between her and the first respondent for the reason that the first respondent had, without the applicants' consultation or consent, applied for and obtained a subdivision permit already referred to in this judgment, over the property in dispute. The applicant also contended that the first respondent, the second respondent and officials of the first respondent had refused or neglected to furnish the applicant with a copy of the subdivision diagram when she queried its issue. The applicant contended that as she had not been involved in applying for the permit as owner of the property to be subdivided, the issue of the subdivision was a nullity as having been illegally issued.

The applicant additionally averred that she had entered into the agreement of cession of the property with the first respondent in violation of s 39 of the Regional Town and Country Planning Act, which forbids the sale of purported subdivisions of land before a permit for the subdivision has been approved by the local authority for the area where the property concerned will be situate. In seeking the cancellation of the agreement, the applicant averred that she had tendered the refund of the purchase price to the first respondent.

The first respondent in the opposing affidavit took three points *in limine*. The first point was that the application raised a material dispute of fact which was not capable of resolution on the papers. The dispute of fact was the allegation by the applicant that there was collusion and corruption involving the respondents in issuing a permit over the property without the applicant's involvement or behind her back and that this allegation required oral evidence to prove it. The first respondent however, respondent abandoned the point at the hearing.

The second point *in limine* taken was based on the *actor sequitur forum rei* rule that the applicant had petitioned the wrong court for relief. It was contended that the correct court to

approach for the relief sought was the Administrative Court. Again the first respondent wisely abandoned the point *in limine* following exchanges between counsel and the court.

The third point *in limine* from the opposing affidavit was that the applicant had no cause of action in seeking a declaration because, she no longer had an existing future or contingent right in the property in dispute as she had alienated it by sale. As such, it was contended that the applicant could not seek a nullification of the sale agreement between her and the first respondent. The point was not advanced at the hearing and not surprisingly so because the applicant was suing on a breach of the agreement thus rendering its continued validity a point of dispute requiring determination.

Mr *Matsenhura* for the first respondent then raised another point *in limine* not properly ventilated in the opposing affidavit. The point raised was that the applicant had not exhausted domestic remedies available to her under the Regional Town and Country Planning Act. Counsel in making the submission also in the process conceded that s 39 of the Regional Town and Country Planning Act forbade the sale of a subdivision of a piece of land in the absence of the proposed subdivision having been approved by the local authority for the area and a subdivision permit being issued. In the light of the concession, it became apparent that the dispute could be disposed of on the basis of whether there was a violation of s 39 aforesaid and if so the consequences thereof. The merits could then be revisited depending on the interrogation and determination of whether there was a violation of the s 39.

The court after giving an opportunity to counsel to address on the issue of the need for the parties to provide a paper trail or history of the devolution of ownership of the titles and rights in the property directed counsel to file supplementary affidavits detailing the paper trail. The applicant filed her supplementary affidavit in which she attached copies of the sale agreement between the third respondent and Chris Edwin Matema. The first respondent did not dispute the authenticity of the agreements aforesaid. It was however submitted on behalf of the first respondent that if the argument on the contravention of s 39 of the Regional Town and Country Planning Act was relied upon by the applicant then she was in the same position with the first respondent as she was sold the property without the consent of the third respondent as seller contrary to clause 10 of the agreement which has already been quoted in full inside this judgment.

The first respondent thus adopted the, if I lose, you also lose position or if I cannot have the property, you equally cannot have it either.

The first respondent averred that the applicant concluded a sale and cession of the property with Chris Edwin Matema without the consent of the seller contrary to clause 10(1) of the originating sale agreement between the first respondent and Chris Edwin Matema. The first respondent averred that there was no written proof of any consent to the sale and cession of the property provided as part of the paper trial. He further averred that the third respondent had threatened to evict the applicant from the property and that such threatened eviction could only have arisen because the third respondent was the owner. The first respondent averred that he paid the purchase price of \$29 145.60 directly to the third respondent because the third respondent still owned the land. The rationale for such reasoning is not apparent but appears faulty because the third respondent had in fact sold the stand to Chris Edwin Matema. It had not repossessed it, this being a fact accepted implicitly by the first respondent when he averred that he entered into the sale of the property with the applicant at the time that the third respondent had threatened the applicant with repossession, clearly implying that the stand had not been repossessed.

It behoves the court to determine whether or not the sale of the property between the applicant and the first respondent was not done in contravention of s 39 of the Regional Town and Country Planning Act. The first respondent has impugned the sale between the applicant and Chris Edwin Matema. I will deal with that aspect later.

Section 39(1) of the Regional Town and Country Planning Act, [*Chapter 29:12*] reads as follows:

“PART VI

SUBDIVISIONS AND CONSOLIDATIONS

39. No subdivision or consolidation without permit

- (i) Subject to subsection (2) no person shall
  - (a) Subdivide any property; or
  - (b) Enter into any agreement
- i) for the change of ownership of any portion of a property ; or
- ii) for the lease of any portion of a property for a period of ten years or more for the lifetime of the lease; or
- iii) –iv).....”

Subsection (2) of s 39 provides exceptions to the applicability of s 39(1). The first respondent has not relied on the exceptions listed in subsection (2). For that reason it becomes unnecessary to zero in on or interrogate the provisions of that subsection. The facts of this application which facts the parties do not dispute are that, the first respondent transacted the *merx*, a proposed subdivision of stand 42095 and the subdivision was to be 100 square metres in extent which meant that the remainder of the stand would then be 1106 square metres. The sale or cession agreement was concluded before a subdivision permit was obtained. The superior courts in this jurisdiction courts have interpreted the fate of such agreements in several decisions. The courts have noted that the provisions of s 39(1) are peremptory and that a breach of the provisions renders such agreements a nullity. Counsel in this application have quoted a number of such decisions. I borrow from the applicant's heads of argument in para 14 to reinforce by case law the position I summarized of the interpretation of s 39 of the relevant Act.

“14. In *X –Trend –A –Home (Pvt) Ltd v Hoselaw (Pvt) Ltd* 2000 (2) ZLR 348 (SC) MCNALLY JA at 348 stated as follows:

“.... S 39 forbids an agreement for the change of ownership of any portion of property except in accordance with a permit granted under s 40 allowing for a subdivision. The agreement under consideration was clearly an agreement for change of ownership of the unsubdivided portion of a stand. It was irrelevant whether the change of ownership was to take place on signing or on an agreed date or when a suspensive condition was fulfilled. The agreement itself was prohibited “ See also *Shem Chivhumbu Mlambo v Isaac Mutama Phiri Chikata* HH 134/15 and *Maranatha ..... (Pvt) Ltd v Rio Zim Ltd* HH 482/20. In the Maranatha case MAFUSIRE J stated in para 24 of the judgment

“... so if parties enter into an agreement to buy and sell a portion of land which is part of a whole but without a subdivision permit, that agreement will be patently legal. It is unenforceable. No rights or obligations derive from it. A court of law will not associate itself with or relate to such an agreement. It is tough luck if one of the parties suffer loss by reason of anything done, or not done in terms of that agreement eg if the seller has already parted with possession of the property before the purchase price has been paid and now wants the property back; or conversely, if the purchaser has already paid the purchase price before taking transfer and now wants his or her money back. It is such an agreement as well be affected by the *ex-terpe causa* and *in pari delicto* principles”

As I understand the dicta by MAFUSIRE J, what the learned judge states if summarized is that an agreement of sale of a portion of a property of land which is concluded before the portion sought to be excised from the whole, if entered into before the subdivision has been authorized through issue of a subdivision permit relating to it, is illegal for all purposes as it is a nullity which the court ceases to see as soon as the contravention has been established. The affected parties as between themselves would be left to obtain relief under different causes of action.

*In casu*, the first respondent has raised argument about the competency of the applicant to seek a setting aside of the sale when her own title is unlawful for want of the consent of the third respondent to the sale between the applicant and Chris Edwin Matema. That issue is not before the court. She did not purchase a subdivision in any event. The third respondent which would authoritatively have impugned the agreement for want of its consent did not defend the matter or speak otherwise. However, it does not appear necessary to split hairs over the argument. It is clear from the provision of s 39 aforesaid that the law prohibits a sale envisaged therein when it is entered into by any person because the provision states that “no person shall” The law does not distinguish whether the person entering into the transaction is the owner, agent or proxy of either the seller or the purchaser. It focuses on the person who has sold, the buyer and the status of the property. The use of such person’s title to sell does not really count. If the person has no title then there is no legal agreement that is concluded and conversely if an agreement for a subdivision is entered into without a subdivision permit being obtained first, then the transaction meets the same fate as being illegal.

*In casu*, little argument arises. The applicant and the first respondent are persons. They executed an illegal agreement which they both admit to be their agreement. The agreement was illegal upon the date of its making. Any consequences or other process which arose consequent upon the agreement being executed cannot be legally recognized by the court. That goes for the subdivision permit which the first respondent applied for and obtained on the backdrop that he had bought 1000 square metres of land and sought to have the authority or permit processed *post facto* the sale or cession. The court cannot on the principle maximum *ex terpi causa non orithur actio* which forbids courts from enforcing an illegal contract, sanitize the agreement between the applicant and first respondent see *Dube v Khumalo* 1986 (2) ZLR 103(SC) and *Chioza v Siziba* SC 4/2015.

The agreement between the applicant and the first respondent was a nullity. A nullity does not really require to be declared to be so because in the eyes of the court the agreement which is a nullity is not there. What is not there cannot be subject of a declaration. The courts however in practice, make the declaration for certainty and convenience. It is indeed stated by Lord Denning in the celebrated case of *Macfoy v United Africa Co Ltd* (1961) 3 All ER 1169(PC) at p11721 thus;

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need of the court to set it aside. It is automatically null and void without further ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded



on it is also bad and incurably bad. You cannot put something on it and expect it to stay there. It will collapse.”

I will for the avoidance of doubt issue the appropriate declaration.

The first respondent did not abandon his point that the applicant ought to have exhausted domestic remedies by petitioning the Administrative Court to challenge the grant of the subdivision permit as provided for in s 38 as read with s 4 of the Regional Town and Country Planning Act. The provisions of s 38 provide that “any person who is aggrieved by any decision made by a local authority in connection with an application for-

- (i) a permit or preliminary planning permission, or
- (ii) .....
- (iii) .....
- (b) .....
- (c) .....

may within one month from the date of notification of such decision or such longer period as the President of the Administration Court may in writing authorize, appeal to the Administrative Court in such manner as may be prescribed in rules and the Administrative Court may make such as it seems fit.”

The first respondents’ counsel argued on the authority of the case of *Djordjevic v Chairman, Practice Control Committee Medical and Dental Practitioners Council of Zimbabwe & Anor* 2009 (2) ZLR 221 (H) that the applicant was required to exhaust domestic remedies availed under the Regional Town and Country Planning Act, or at least explained her reasons for not doing so.

The applicant in response stated that the first respondent did not outline the basis on which the applicant ought to have applied for a declarator in the Administrative Court. The applicant also argued that the High Court enjoyed original jurisdiction to determine the application because its jurisdiction was not ousted by the Regional Town and Country Planning Act.

In my reading of the provisions of s 38 the approach to the Administrative Court by a person aggrieved by a local authority on listed issues is permissive and not mandatory. The provision does not make the Administrative Court, the only court of choice to deal with these

issues. The applicant does not have a handicap of a procedural or substantive law prohibiting her from approaching this court for relief especially of the nature sought by the applicant which includes the declaration of nullity of a sale and cession agreement between the applicant and the first respondent. Only the High Court can grant a declaratur.

The principle that a litigant should invoke domestic remedies first is not an absolute rule. It has its variables. In the case of *Girjac Services (Pvt) Ltd v Mudzingwa* 1999(i) ZLR 88 H, it is stated:-

“In *Tutani v Minister of Labour and Ors* 1987(2) ZLR 88(H) MTAMBANENGWE J at p 95 observed that where domestic remedies are capable of providing effective redress in respect of the complaint and secondly where the unlawfulness alleged has not been undermined by domestic remedies themselves a litigant should exhaust has domestic remedies before approaching the courts unless there are good reasons for not doing so .....

In this application the applicant sought declarations and these go beyond the powers which the Local Authority and the Administrative Court can exercise. They cannot issue declarators. More importantly however, the exercise of jurisdiction by the High Court where domestic remedies have not been exhausted is in the discretion of the court. The discretion must be exercised judicially to achieve justice and the court considers the principle of subsidiarity and all salient circumstances of the case and the court’s convenience as well in exercising the discretion. I was satisfied that this application was a case which merited the exercise of this court’s jurisdiction to hear the matter.

At the beginning of this judgment, I expressed disquiet over the fact that the second and third respondents ignored the application and did not file any papers. My view is that the second and third respondents were expected to assist the court because the genesis of the matter arose from the sale of by the third respondent of its land stand 46295 Belvedere, Harare. It is the third respondent that issued a subdivision permit whose validity the applicant challenges on grounds already discussed herein. The challenge would have best been answered by the second and third respondents.

Whilst there is no rule of law which requires that where a local authority conduct is impugned, it should participate in the proceedings and not elect to keep silent and ignore process in its wisdom, such approach depending on the facts of each case is unhelpful to the court faced with a dispute in which answers lie within the knowledge of the local authority. As a result of the attitude of non-committal adopted by the Local Authority, there have been cases where the court

has resolved to using its power to require that the local authority is summoned to appear before the court. It is therefore expected that in future local authorities and indeed every administrative authority which is cited in court proceedings and whose conduct is challenged for its propriety or otherwise should unless there is good reason not to at least assist the court by giving the court facts which are relevant to the resolution of the dispute before the court. Failing this the local authorities or other administrative bodies risk being joined to the proceedings or being required to appear before the court even where they are barred for non-filing of opposition papers.

Reverting to the application before the court I have already indicated that a declaration of the illegality of the agreement of sale and cession of the property between the applicant and the first respondent had been established. The agreement becomes the reason or *causa sine qua non* for the application for the permit subdivision permit which the first respondent relies upon. The subdivision has no foundation to stand on.

The last issue relates to costs of the application. Costs generally follow the event. They are in the discretion of the court. In the case of *Ferreira v Levin; Vryenhoek v Powell* 1996 (2) SA 621 (CC) at 624; ACKERMAN J stated of costs and the position is the same in Zimbabwe jurisprudence;

“(3) The Supreme Court (now known as the High Court) has over the years; developed a flexible approach to costs which proceeds from two basic principles, the first being that the award of costs, unless expressly otherwise enacted is in the discretion of the judicial presiding judicial officer and the second that the successful party should as a general rule have his costs. Even the second principle is subject to the first. The second principle is subject to a large number of exceptions where the successful party is deprived of his or her costs. Without attempting either comprehensiveness or complete analytical accuracy, depriving successful parties of their costs can depend on circumstances such as for example the conduct of the parties, the conduct of their legal representatives, whether a party achieves technical success only, the nature of the litigants and the litigation. I mention these examples to indicate that the principles of which have been developed in relation to an award of costs are by their nature sufficiently flexible and adaptable to meet new needs which may arise in regard to constitutional litigation. They offer a useful point of departure.....”

The *dicta* in the above case quote simply underlines that the courts’ discretion as to the award of costs is not fettered by the principle that costs generally follow the event. Even where the event is success for a party, that party may be denied his or her costs for a variety of considerations as mentioned by ACKERMAN J without limit of course, it being always that the circumstances of each case inform the nature and extent of the discretion to be exercised by the judicial officer. I make note that because the principle that costs follow the event is the norm

rather than the exception, exceptional or special considerations must exist to depart from the principle.

In *casu*, I have reflected on whether there is a victor or successful party *stricto sensu* in this application. The findings of the court show that the applicant and first respondent concluded an illegal agreement. There was no suggestion that one party was deceived by the other. The agreement of cession captured that there was to be processed s subdivision permit. Both parties share equal blame. They connived to and entered into an illegal agreement. The finding has been made that the agreement was a nullity. The court cannot sanitize a nullity. Inasmuch as a nullity begets a nullity, it would in this matter be anomalous to have the court recognize that nullity which in effect means there is nothing to see or recognize. The matter and its illegal transactions should not be sanitized for purposes of costs. In my view an appropriate order of costs is that there should be no order of costs that arises from consequences and disputes grounded on a nullity.

The application is disposed of as follows:-

**IT IS HEREBY ORDERED THAT:-**

1. The agreement between the applicant and the first respondent date 19 May 2019 of the cession of rights title and interest in the property or part of it called stand 40295 Belvedere, Harare is declared to be a nullity
2. The subdivision permits over the property Ref SD/CR/02/20 dated 28 August 2020 which created off stand 40295 Belvedere stand 41550 is declared to be a nullity.
3. The applicant's prayer for cancellation of the sale/cession agreement referred to in para 1 above is dismissed in consequences of the declaration of nullity.
4. There is no order of costs.

*Masango Seda Muteda*, applicant's legal practitioners  
*T G Mboko*, first respondent's legal practitioners

