REPORTABLE (92)

CLAWZY TRADING (PRIVATE) LIMITED
v
(1) JONASI CHITSA (2) SABINA NYARAI CHITSA (3) MATOPOS PROPERTIES (PRIVATE) LIMITED (4) REGISTRAR OF DEEDS N.O (5) THE DEPUTY SHERIFF N.O

SUPREME COURT OF ZIMBABWE
GUVAVA JA, MAKONI JA & CHATUKUTA JA
HARARE: 17 JUNE 2024 & 18 OCTOBER 2024

T.L. Mapuranga, for the appellant

R.M. Fitches, for the first and second respondents

No appearance for the third, fourth and fifth respondents

MAKONI JA:

[1] This is an appeal against the whole judgment of the High Court of Zimbabwe ("the court *a quo"*) sitting at Harare dated 10 November 2021. In the court *a quo*, the first and second respondents issued summons against the appellant for cancellation of its title deed over a certain piece of land situate in the district of Salisbury called Stand 2465 Glen Lorne Township (hereinafter called 'the property"). The appellant counter claimed for their eviction from the property and holding over damages. Judgment was entered for the first and second respondents as against the appellant. It is that judgment that is the subject of this appeal.

BACKGROUND FACTS

[2] The appellant is a company registered in accordance with the laws of Zimbabwe. The first and second respondents are husband and wife and were the holders of title to the

property before its transfer to the third respondent and subsequently to the appellant. The third respondent is a company registered in the United Kingdom, and an entity controlled by one Frank Buyanga. The fourth respondent is the Registrar of Deeds, Harare. The fifth respondent is the Deputy Sheriff, Harare.

[3] The facts of this matter are common cause. This is one of the many cases that have gone through our courts which can be safely termed "The Buyanga Cases". On or about August 2009, the first and second respondents entered into a loan agreement with the third respondent for US$ 25,000.00.

[4] Part of the terms of the agreement were that the sum of US$25 000.00 plus an administration fee of US$2 500.00 were to be repaid, by the first and second respondent, at an interest rate of 9% per month in three instalments as follows:

(a) A sum of US$2 475.00 being interest on or before the 30 of September 2009;

(b) A sum of US$2 475.00 being interest on or before the 31 of October 2009;

(c) A sum of US$2 475.00 being interest and the capital debt in the sum of US$ 25 000.00 on or before 30 of November 2009.

[5] As security for the loan, the first and second respondents put up their immovable property. In view of the fact that the third respondent was not a registered money lender, it was agreed that the first and second respondent would sign an agreement of sale, powers of attorney and declarations by sellers in favour of the third respondent. They also handed over the title deed to the property on the understanding that the transfer would never be effected.

[6] Pursuant to the loan agreement, the first and second respondents repaid a total sum of US$6 900.00 to the third respondent. They defaulted in the remaining payments. They

sought and were granted an extension to repay the loan on or before the 24th of March 2010. They then tendered a sum of US$35 000.00, in full and final settlement of the loan, plus interest on **24 March 2010**. The tender was rejected by the third respondent on the basis that the outstanding amount had ballooned to US 68 000.00.

The property was subsequently transferred into the name of the third respondent on **30 March 2010** and the same property was transferred into the name of the appellant on **29 April 2010.**

PROCEEDINGS BEFORE THE COURT *A QUO*

[7] The first and second respondents issued summons in the court *a quo* seeking an order declaring the transfer of the immovable property from their names to the third respondent and the subsequent transfer of the same property from the third respondent to the appellant, null and void. They also sought consequential relief which included, *inter alia* the reinstatement of their title deed.

[8] The first and second respondents contended that they never intended to sell the property to the third respondent especially considering that the purchase price of US$25 000, reflected in the agreement, was way below the value of the property of US$170 000 which was ascertained through an evaluation of the property.

[9] The third respondent denied that there was ever a loan agreement and that the first and second respondents were asked to surrender their title deeds as security. It was the third respondent's position that the first and second respondents approached the third respondent intending to sell their property at an agreed price of US $25 000.00. It must be noted that the third respondent, after filing its plea, did not participate further in the proceedings *a quo*.

[10] The appellant filed a claim in reconvention in the court *a quo*. It claimed that the immovable property was transferred to it by the third respondent who was the holder of rights, title and interest in the property in question. The appellant alleged that the first and second respondents were occupants of the immovable property and were given 3 months' notice to vacate the premises but they refused to do so. It sought an order for their eviction and holding over damages.

[11] In the proceedings *a quo*, evidence was led through one Ellen Mawire from the Deeds Registry and one Tawanda Peter Chitura from ZIMRA amongst other witnesses. Ellen Mawire led evidence in respect of irregularities on the power of attorney that was used to transfer the property from the first and second respondents to the third respondent. There was an alteration that was not signed for.

[12] Tawanda Peter Chitura testified that the capital gains tax certificate that was used to transfer the property into the third respondent's name was fraudulent but that the one used for the transfer between the third respondent and the appellant was genuine. He pointed out the many features of the certificate that proved that it was fake. He also gave evidence to the effect that the US $1 250 supposedly paid as capital gains tax was never paid because the parties were not in the ZIMRA system. It was his evidence that no number had been created in the system for purposes of effecting payment. The number indicated at the top of the certificate showed that it belonged to a different taxpayer. The signatures on the certificate were fake and the ZIMRA stamp on the certificate was also fake.

FINDINGS BY THE COURT *A QUO*

[13] The court *a quo*, in dealing with the matter, relied on the judgments of *Mzilikazi & Anor* v *Marume & Ors* SC 39/16 and *Mhende & Anor* v *Cookham Inn (Pvt) Ltd & Anor* HH-45-21. It held that the matter before it bore all the hallmarks of the *Mzilikazi* and *Mhende* judgments.

[14] It held that the first and second respondents never intended to sell their property to the third respondent and that the loan agreement was fraudulently disguised as an agreement of sale. It also held that the transfer from the first and second respondents' names to the third respondent was fraught with irregularities, chief among them was a fraudulent capital gains certificate.

[15] Even though the court was convinced that the appellant took all steps to ascertain whether the third respondent had title, it found that an agreement founded on an illegality cannot at law give rights and obligations enforceable by parties *inter se*. The court further held that the doctrine of estoppel could therefore not protect the appellant. And for those reasons, the claim in reconvention by the appellant against the first and second respondent for eviction and holding over damages could not be sustained.

[16] Accordingly, the court made an order in favour of the first and second respondents' claim and dismissed the appellant's claim in reconvention. Dissatisfied by the decision of the court *a quo*, the appellant noted this appeal on the following grounds:

GROUNDS OF APPEAL

"The court *a quo* erred at law by –

1 Failing to find that the judgment in *Mzilikazi & Anor* v *Marume & Ors SC* 39/16 was distinguishable on the facts of this matter as the first and second

respondents had failed to take positive and timeous action to vindicate their property upon being aware that the property had been transferred into the name of the third respondent.

2 Failing to find that *in casu* all the requirements for estoppel had been met such that the first and second respondents could not vindicate the property from the appellant due to the unique circumstances of the matter.

3 Failing to find that the defence of estoppel prevented the first and second respondents from vindicating the property from the appellant as they had made a negligent representation which was relied upon by, and which had caused prejudice to the appellant by signing documents indicating that they had sold and transferred the property to the third respondent.

4 Failing to find that the defence of estoppel prevented the first and second respondents from vindicating the property from the appellant as they had made a negligent representation which was relied upon by, and which had caused prejudice to the appellant by failing to timeously take legal action to recover the documents that they signed purporting to sell and transfer the property to the third respondent.

5 Failing to find that the defence of estoppel prevented the first and second respondents from vindicating the property from the appellant as they had made a negligent representation which was relied upon by, and which had caused prejudice to the appellant by failing to timeously take legal action to reverse the transfer of the property to the third respondent upon discovering of the transfer of the property to it, prior to the subsequent transfer to the appellant.

6 Finding that the defence of estoppel could not succeed based on previous precedent of this Court and the High Court when the facts of this matter were unique in that

the first and second respondents had cause to act and forewarning requiring them to act prior to the transfer of the property to the appellant.

7 Failing to uphold the counterclaim and dismiss the claim in convention considering the admissions by the first respondent in evidence that the amount for holding over damages claimed reflected the fair market rental for the property.

8 Finding that the central issue was the validity of the agreement of sale between the First and Second Respondents on the one hand and the third respondent on the other when this had ceased to be an issue at the beginning of the case for the defence and the focus became solely on estoppel."

APPELLANT'S SUBMISSIONS BEFORE THIS COURT

[17] The appellant, through a letter dated 13 May 2024, requested for the constitution of the court by a panel of five Judges to determine this matter. The reason for this request is that the appellant believed that it may be necessary to argue that the case of *Mzilikazi & Anor* v *Marume & Ors* SC 39/16 was wrongly decided in so far as it introduces a requirement of direct contact in a case of estoppel. It was the appellant's contention that this new requirement is contrary to established authorities in this jurisdiction including the cases of *Stanbic Finance Zimbabwe Ltd* v *Chivhungwa* 1999 (1) ZLR 262 (HC) and *Mashave* v *Standard Bank of South Africa Limited* 1998(1) ZLR 436 (SC).

The court in the *Mzilikazi* case *supra* had at p6 made the following remarks;

> "Insofar as the argument for estoppel is concerned, **it is abundantly clear that there were no direct dealings** between the first respondent and the appellants and that the former made no representation to the latter. The only party that could have relied on the doctrine of estoppel is the second respondent. **Without any direct link between the first respondent and the appellants they cannot raise any estoppel as against her.**"

It is this finding that the appellant intended to take issue with.

[18] At the hearing, Mr *T. L Mapuranga*, counsel for the appellant, submitted, as a preliminary point that the appellant was abandoning the request for the matter to be heard before a five-member bench.

[19] On the merits, Mr *Mapuranga* submitted, at the outset, that the appellant accepted that the sale agreement between the first and second respondents with the third respondent was a simulated agreement and therefore was not valid.

[20] Mr *Mapuranga* further submitted that notwithstanding that concession, the first and second respondents must be estopped from vindicating the property as they had, by the underlisted conduct, made a negligent misrepresentation which resulted in the appellant purchasing the property. They signed transfer papers in the simulated agreement of sale. They made attempts to redeem the signed documents but did not agree with the third respondent on the amount outstanding. At that stage they had a duty to approach the courts, on an urgent basis, to recover those transfer papers. The property was transferred to the third respondent on 30 March 2020**.** The first and second respondent got to know about the transfer on 4 April 2020.Transfer to the appellant was effected on 29 April 2020. On 30 April 2020 the appellant gave notice to the first and second respondents to vacate the property. The first and second respondents only instituted a suit against the third respondent and the appellant on 16 November 2020.

[21] Mr *Mapuranga* submitted that the transfer from the third respondent to the appellant was not necessarily a nullity or an invalid transfer but it was a transfer which did not give title because the third respondent had no valid title. He however submitted that the appellant was not claiming title but estoppel barring the first and second respondents from vindicating the property from it.

[22] Counsel further submitted that the matter before the court was distinguishable from the *Mzilikazi* case which the court *a quo* relied on. It was his submission that the *Mzilikazi* case was wrongly decided as direct contact is not a requirement for the defence of estoppel. I must observe that this point was not persisted with in view of the appellant's position of abandoning its request for a five member bench.

FIRST AND SECOND RESPONDENTS' SUBMISSIONS

[23] Mr *Fitches,* for the first and second respondents, submitted that the court *a quo* determined estoppel on relevant authority. It was his submission that the first and second respondents never intended to sell the property and the third respondent could not in turn transfer what it did not have.

[24] Counsel was in agreement with Mr *Mapuranga*'s submission that the defence of estoppel does not require direct contact. It was however his submission that estoppel could not be relied on as the initial transfer from the first and second respondent was tainted at law. Counsel accordingly prayed for the dismissal of the appeal with costs.

ISSUES FOR DETERMINATION

1. Although the appellant raised eight grounds of appeal, only two issues arise for determination by this Court. The issues are:
    1. Whether or not the first and second respondents were estopped from vindicating the property.
    2. Whether or not the court *a quo* erred in dismissing the appellant's counter claim.

APPLICATION OF THE LAW TO THE FACTS

Whether or not the first and second respondents were estopped from vindicating the property.

[25] The first issue is whether or not the first and second respondents were estopped from vindicating the property from the appellant on the basis of negligent misrepresentation.

[26] It was conceded, on behalf of the appellant, that the agreement between the first and second respondents and the third respondent was simulated. There was an agreement of a loan between the first and second respondents and the third respondent. The first and second respondent did not sell their property. The first transfer from the first and second respondents to the third respondent was done illegally. The question that arises is whether the requisites to establish an estoppel emerge from circumstances of this matter.

[27] The requirements for estoppel to be successful were explained in the case relied on by the appellant, of *Stanbic Finance Zimbabwe Ltd* v *Chivhungwa* 1999 (1) ZLR 262 (HC) at 266 D-G as follows:

> "In 1956, STEYN JA (as he then was) in *Grosvenor Motors* (*Potchefstroom*) *Ltd* v *Douglas* 1956 (3) SA 420 (A) emphasised the importance our law attaches to the protection of property when at p 427C -D he said:
>
> > 'It is only necessary to add that according to Metthaeus Paroemia 7.7i.f. enactments derogating from the owner`s vindicatory rights are to be very strictly (strictissime) construed, a view with which Voet *Commentaries* 6.1.12. agrees.
> >
> > This serves to emphasise the importance which, notwithstanding recognised exceptions, our law attaches to the owner's right to vindicate his property and suggests that, where estoppel is pleaded, he is not debarred from asserting that right *unless there is clear proof of estoppel*.' (The emphasis is mine)
>
> Estoppel depends upon an allegation that a representation was made by the owner (Mashave's case *supra* at p 438D). In Oakland Nominees supra at p 452A-G HOLMES JA said:
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> > '(i) There must be a representation by the owner, by conduct or otherwise, that the person who disposed of his property was the owner of it or was entitled to dispose of it. A helpful decision in this regard is *Electrolux (Pty) Ltd* v *Khota & Anor* 1961 (4) SA 244 (W) with its reference at p 247 to the entrusting of possession of property with *indicia* of *dominium* or *jus disponendi*.
> >
> > (ii) The representation must have been made negligently in the circumstances.

> (iii) The representation must have been relied upon by the person raising the estoppel.
>
> (iv) Such person's reliance upon the representation must be the cause of his acting to his detriment.'"

[28] It might be necessary, at this stage, to define what is meant by negligent misrepresentation which is also known as estoppel by negligence. *In Standard Finance Zimbabwe Limited supra* at p 268D-E, quoting from P J Rabie: *The Law of Estoppel in South Africa* p 91, it was defined as follows;

> "The expression 'estoppel by negligence' is not infrequently encountered in cases of estoppel … It seems that... the expression is commonly used in those cases where an estoppel is against a person, not on the ground of representation which he himself made to the person raising the estoppel, but on the ground of representation which he, through negligent conduct on his part, enabled another person, acting fraudulently, to make to the person claiming the estoppel. Ewart, as shown above, refers to a representation made in this fashion as 'assisted misrepresentation'.
>
> In such a case, he says, the person against whom the estoppel is raised is estopped, not because of any misrepresentation made by himself, but because he 'furnished an opportunity for fraud 'and' made the representation of another person credible."

[29] It is the appellant's contention that the first and second respondents 'furnished an opportunity for fraud and made the misrepresentation of another person credible'. On the representation by conduct of the first and second respondents, the appellant, in its heads of argument, relied on the case of *Oriental Products (Pty) Ltd* v *Pegma 178 Investments Trading CC & Ors* 2011 (2) SA 508 (SCA) where it was stated;

> "[9] The court *a quo* found that the third respondent was not properly authorized to pass transfer of the property to the second respondent, therefore the transfer was void as it lacked the prerequisite to effect registration of transfer, being that the transferor (in this case the appellant), must intend to transfer and the transferee (in this case the second respondent) must intend to take transfer (***Trust Bank van Afrika v Western Bank en & Andere* 1978 (4) SA 281 (A)** at 302 A-referring with approval to ***Commissioner of Customs and Excise v Randles Brothers & Hudson Ltd* 1941 AD 369** at 397-398. See also **Wille's *Principles of South African Law* 9 ed (2007)** at 520-521.)
>
> ……………..
>
> [15] The next question is whether the appellant is estopped from challenging the first respondent's title by bringing these proceedings **at the time and in the circumstances in which it did. . …………..**

[18] The first respondent's contention is that the failure to take immediate steps to bring proceedings against the second respondent amounts to a representation that the second respondent was the lawful and registered owner with a right to sell the property. The first respondent further argues that the said failure also carries with it the requisite negligence on the part of the appellant to found estoppel. The first respondent contends that, had the appellant acted timeously, the property would not have been transferred to the second respondent and the first respondent would, not have embarked on high scale development of the property, which it did. In order to demonstrate that the appellant acted negligently, Ms Cook testified that in January 2007 she did not know that the first respondent had purchased the property and she had not decided who was going to be her attorney to deal with the matter. On the contrary, by 18 December 2006 she knew that the property had been transferred and registered in the name of the second respondent. Webber Wentzel Bowens had already informed her of the first transaction. Relying on the appellants' inaction the second respondent sold the property to the first respondent who consequently started developing it. Had the appellant acted swiftly the chain of events would have been avoided .....

[21] The relevant period in this case is **between 18 December 2006, when attorneys Webber Wentzel Bowens wrote a letter to Mr Kuk advising him that the property had been registered in the name of the second respondent and 8 February 2007 when the property was indeed transferred to the first respondent.** The directors of the appellant remained inactive for almost two months after learning that its property had been registered in the name of the second respondent. **The inaction for almost two months is sufficient to constitute negligence considering the surrounding circumstances as described above. One must bear in mind that we are dealing with immovable property which was the core business of the appellant.** It should have rung a bell and raised a red flag immediately to Mr Kuk and Ms Cook after they heard of the new developments in mid-December 2006. **They only launched the application for vindication on 7 May 2008, almost seventeen months after knowing that the property had been fraudulently sold and transferred**.

[22] I am satisfied in concluding that the appellant's inaction was negligent representation which led the first respondent to rely on it to its detriment. STEYN JA in ***Grosvenor Motors (Potchefstroom) Ltd v Douglas* 1956 (3) SA 420 (A) at 427** defines estoppel as a principle in terms of which an owner 'forfeits his right to vindicate where the person who acquires his property does so because, by the culpa of the owner he has been misled into the belief that the person from whom he acquired it, is entitled to dispose of it.' (See **Voet *Commentarius ad*** 6256/63456

***Pandectas, 6 1 13* & 23; P J *Rabie The Law of Estoppel in South Africa* at (1992) 86 599; D L Carey Miller *The Acquisition and Protection of Ownership* (1986) at 263 and *Johaadien* v *Stanley Porter (Paarl) (Pty) Ltd* 1970 (1) SA 394** at (A) 406)……

> [23] In the context of this case, the appellant is entitled to retransfer of the property but for the fact that it cannot assert its right of ownership because of estoppel. Hence the appellant loses its ownership of the property." (The emphasis is mine)

[30] The appellant argued that the aforementioned case was critical in light of the first and second respondents' failure to timeously stop the transfer of property to the appellant. However, the circumstances in the *Oriental* case *supra,* are distinguishable from the case before this Court. In the *Oriental* case, the property was fraudulently transferred from the appellant to the second respondent. The second respondent subsequently sold and transferred the property to the first respondent who commenced developments on the property. Both respondents were not aware that the person who purported to represent the appellant had forged the documents. The appellant knew of the first transfer of the property to second respondent within two months of its happening and did nothing about it. It was only after two years that the appellant decided to act. It was on that basis that the court held that the appellant was estopped from vindicating the property from the first respondent. The appellant's inaction amounted to negligent misrepresentation which led the first respondent to rely on it to its detriment. The court also found against the appellant on the further basis that dealing in immovable property was its core business.

[31] *In casu* the critical period is the time when the first and second respondents became aware of the transfer of the property from them to the third respondent which is 30 March 2020 and the time the appellant took transfer on 29 April 2020. The transfer from the first and second respondents to the third respondent and subsequently to the appellant took place in a space of one month. The first and second respondents could not have reasonably been expected to have acted in such a short period of time to prevent the transfer to the appellant. The microwave speed with which the search for a property to buy, the viewing,

of it, signing the agreement of sale, payment of the purchase price, the conveyancing processes including ZIMRA interviews and finally the transfer to the appellant happened raises red flags. This is compounded by the fact that the appellant's representative viewed the property from outside only which viewing was facilitated by a gardener and not by the first or second respondents. The gardener was familiar with the agent, who accompanied the appellant's representative, as he had previously done an evaluation of the property. No request was made by the appellant's representative to view the inside of the property by arrangement with the first and second respondents. It must, however, be noted that the court *a quo* made a finding that there was no collusion between the appellant and the third respondent and there is no appeal against that finding. The point however is that the first and second respondents were not afforded enough time to take action to prevent the transfer to the appellant. This is the critical period in the whole matrix of this matter and not the time when they finally instituted the vindication suit. The horse had already bolted. The other significant distinguishing feature is that in *Oriental's* case *supra,* the appellant (in that case) was in the business of dealing in immovable property unlike the first and second respondents who were mere owners of the property.

[32] The appellant also relied on the Zimbabwean case of *Peters* v *Janda NO* 1980 ZLR 553 (G) in pushing forward the argument on estoppel. The application of the principle of estoppel was explained in the *Janda* case at pp 556 – 557 as follows:

> "Mr de Bourbon also argued that Plaintiff's conduct, if not amounting to waiver, amounts to estoppel. It is quite true that neglect to enforce a right timeously may either have the same effect as a waiver of it or may come very near the line of estoppel. As pointed out by the Privy Council in Lindsay Petroleum Co. v Hurd (1874) LR 5 PC 221 at 240 where a man has by his conduct and neglect, " though perhaps not waiving the remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted", then lapse of time becomes of great importance. When a person entitled to a right

> knows that it is being infringed and by his acquiescence leads the person infringing it to think that he has abandoned it, then he would under certain circumstances be debarred from asserting it. (New York Mutual v Ingle, 1910 TPD 540 at 551 per INNES CJ). **In this case Plaintiff could not have had any reason to believe that any right he possessed was being infringed by the purchaser and therefore could not by his own conduct have led the purchaser to believe that he was abandoning any such right. I consider therefore that there is no substance in this defence either.**" [Emphasis added]

[33] It is clear from the above authority that estoppel can only be successfully relied on if the owner of the property knew that his property rights were being infringed by the purchaser and led the purchaser to believe that he was abandoning such rights.

[34] In the present case, the first and second respondents did not expect the third respondent to take transfer of the property. The third respondent used fraudulent means to obtain such transfer. The first and second respondents only became aware of the transfer after the property had already been transferred. If the legal conveyancing processes had been followed the first and second respondent would have become aware of the intended transfer at that stage. The appellant has not laid a basis for its belief that the first and second respondents were abandoning their rights over the property.

[35] In *Beckett & Co* v *Gundelfinger* 4 OR 77, which was also relied on by the appellant, the defendant refused to vacate a property that had been sold, on the basis that he had a lease agreement which had not yet expired. It was the court's finding that he was estopped from asserting his rights because he was present when the property was sold through a public auction and had remained quiet when it was asked whether there was a lease on the property. It was on that basis that estoppel was established.

[36] The *Becket* case also cannot apply to the matter at hand. The first and second respondents were not present when the property was sold to the appellant. They could not have been

expected to interdict the transfer of the property to the appellant, which they had no knowledge of.

From the above analysis it becomes clear that the first and second respondents cannot be found guilty of having 'furnished an opportunity for fraud 'and' made the representation of another person credible.

[37] In the *Mzilikazi* case *supra,* the factual conspectus is almost on all fours with the facts of the matter *in casu*. It is one of the *Buyanga* cases where there would be a simulated agreement of sale, a signed Declaration by Seller, a Power of Attorney to pass transfer and the surrender of title deeds. There was a default in repayments of the loan and the property of the first respondent was fraudulently transferred to an entity owned by Buyanga. The property was subsequently transferred to the appellants. The first respondent successfully instituted vindicatory proceedings.

[38] The court *a quo,* in that case, found that the first respondent had no intention to sell her property and that the transaction between her and the second respondent was a loan disguised as an agreement of sale. The sale was also found to be illegal as it violated the Moneylending and Rates of Interest Act [*Chapter 14:14*] since neither Buyanga nor the second respondent was the holder of a valid moneylender's license. The transfers were also held to be illegal because the second respondent and the appellants had not secured any tax clearance certificates in contravention of s 30A of the Capital Gains Tax [*Chapter 23:01*]. It was further held that it was not disputed that the power of attorney signed by the first respondent had been falsified as regards the conveyancer nominated by her to effect transfer to the second respondent.

[39] Accordingly, the initial transfer was held to be a nullity and consequently, the subsequent transfer, having been based on a nullity, had collapsed. The court *a quo* also held that it had been proved, on a balance of probabilities, that the appellants had colluded with the second respondent. Accordingly, the appellants' counterclaim fell away.

[40] The appellants, aggrieved by the decision of the court *a quo*, appealed to this Court. Their grounds were premised on the position that the first agreement of sale was not void but voidable. They also argued that the first respondent was estopped from challenging title acquired by the appellants as *bona fide* purchasers.

[41] This Court upheld the decision of the court *a quo* that the first respondent had no intention to sell the property to the second respondent "for the unacceptably paltry sum of US $30,000". The court also held that the transaction between the parties was in essence a loan agreement. The court further held that the appellants failed to demonstrate any misdirection by the court *a quo* in its factual findings as to the real intention underlying the transaction between the first and second respondents. On the issue of estoppel, the court held that there were no direct dealings between the first respondent and the appellants and that the former made no representation to the later. It found that without that direct link between the first respondent and the appellants they could not raise any estoppel as against her.

[42] Additionally, the court was of the position that the evidence before the court *a quo,* which was not challenged or rebutted, showed that several irregularities vitiated the original purported sale and transfer between the first and second respondents. Accordingly, this Court dismissed the appeal as it was devoid of merit.

[43] The appellant, *in casu,* sought to distinguish the findings of that case on estoppel on the following basis–

a. The case for the purchaser of the property was contested on multiple bases whereas the present case is contested solely on estoppel.

b. Estoppel was decided on the unique facts of that case.

c. The court found that no representation was made but, in this case, representations were indeed made.

d. The court found positive evidence of collusion between the estoppel asserter and the party which purchased the property.

e. *In casu* the first and second respondents had a unique opportunity to prevent title from being transferred from them because they found out that the property had been transferred from them to third respondent. They could have prevented further transfers by seeking an urgent interdict.

[44] Other than the factors of collusion and that there was a finding that there was a misrepresentation, all the other factors are neither here nor there. Regarding the issue of collusion, I have already commented that despite the finding of the court *a quo* that there was no collusion, the microwave speed with which the transfer from the third respondent to the appellant was done, did not give the first and second respondents an opportunity to prevent further transfers. One must bear in mind that dealing in immovable property was not their core business. Regarding misrepresentation, I have already found that the first and second respondents' conduct did not amount to negligent misrepresentation in the circumstances of this matter.

[45] It is clear that, in the context of this matter, the court *a quo* arrived at the correct decision that the defence of estoppel was not available to the appellant, but for the wrong reasons.

[46] Having concluded that estoppel was not successfully argued, the second issue for determination automatically falls away. A finding on a dispositive issue marks the end

of the enquiry of the Court. See *Gospel of God Church International 1932* v *Mungweru & Ors* SC 99/19.

DISPOSITION

[47] The appellant failed to establish that the first and second respondents' inaction was negligent representation which led it to rely on it to its detriment. It further failed to lay a basis for its belief that it was led by the first and second respondents to believe that they were abandoning their rights in the property. On the basis of the a foregoing, the appeal has no merit and must be dismissed.

[48] Regarding costs there is no reason why they should not follow the result.

Accordingly, it is ordered as follows;

"The appeal be and is hereby dismissed with costs."

GUVAVA JA : I agree

CHATUKUTA JA : I agree

Mushoriwa Pasi Corporate Attorneys, appellant's legal practitioners.

Ferrao Law Chambers, 1st & 2nd respondents' legal practitioners.