FBC BANK LIMITED
versus
MUNYARADZI YUJINI MAJONI
and
PAULINA KWADZANAYI MAJONI
and
CLAITOS CHIDHAKWA
and
GIRLIE KANYE
and
SUCCESS AUTO (PRIVATE) LIMITED
and
HONEYPOT INVESTMENTS (PRIVATE) LIMITED
and
DOUGLAS MAKONESE
and
MERCY MAKONESE
and
KUDZAI CHIRIMA
and
REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE: 25 June 2021 & 24 May 2021

Opposed Application

T. Magwaliba, for the applicant
D. Ochieng, for the 1st – 4th respondents
T. Kuchenga, for the 5th- 8th respondents

MUSITHU J: The applicant applied for leave to appeal to the Supreme Court against a judgment by NDEWERE J handed down on 10 June 2020 under HC3727/18. The relief sought is framed as follows:

> "IT IS HEREBY ORDERED THAT:-
> 1. Leave be and is hereby granted to the Applicant to appeal to the Supreme Court against the whole of the decision of the High Court of Zimbabwe at Harare per NDEWERE J which judgment was handed down on 10th June 2020.
> 2. The Applicant shall file its notice of appeal within ten days of the date of this order.
> 3. Costs shall be in the cause."

The application was opposed by the first to fourth respondents.

BACKGROUND

It is pertinent to highlight the factual background to HC3727/18 in order to place the present application into perspective. The first to fourth respondents herein instituted motion proceedings in terms of Order 49 Rule 449(1)(a) of the High Court rules (the rules) under HC3727/18. The application sought the setting aside of a court order granted by TAKUVA J on 7 October 2013 under HC7402/13 on the basis that it was erroneously made. In HC 3727/18, the first to fourth respondents herein were the applicants, while the applicant herein was the first respondent. The fifth to ninth respondents herein were the second to the sixth respondents respectively. The tenth respondent herein was the seventh respondent therein.

In the matter before TAKUVA J, the applicant herein was the applicant therein. The fifth respondent herein was the first respondent. The sixth respondent herein was the second respondent. The seventh respondent herein was the third respondent, while the eighth respondent herein was the fourth respondent. The order by TAKUVA J reads:

> "IT IS ORDERED THAT:
> Judgment be and is hereby entered against the 1st, 2nd, 3rd and 4th respondent, jointly and severally, the one paying the others to be absolve, in case number HC361/13, as follows;
> 1. For payment of the sum of US$454 874-62 together with interest thereon at the rate of 35% per annum from the 1st August 2012 to date of payment.
> 2. For a declaration that Stand 80 Borrowdale Brook Township of Subdivision H of Borrowdale Brook of Borrowdale Estate measuring 5,0445 hectares in extent and held by 2nd respondent under Deed of Transfer No. 6099/99 dated 30th June 1999 shall be executable; and
> 3. For payment of costs of suit both in respect of this matter and also in respect of case number HC361/13 on the legal practitioner and client scale."

The first and second respondents herein, who are the first and second applicants in HC3727/18, purchased a property known as Stand 776 Borrowdale Brook Road, (the property) from Bract Investments (Bract), represented by David Muchinguri. The agreement of sale was signed by the purchasers on 21 August 2003, and on behalf of the seller, Bract on 22 August 2003. The purchase price was Z$55,000,000.00 (fifty five million dollars). Bract had purchased the property from one Paul Ali Chindamba. In pursuit of the registration of the property into their names, the first and second respondents discovered that the title of the property was in the name of Honeypot Investments (Private) Limited (the third respondent therein and the sixth respondent in this matter). The first and second respondents signed a cession agreement with the sixth respondent herein on 21 August 2003. The sixth respondent was represented by one Kudzai Chirima (the ninth respondent herein).

The property was a subdivision of Stand 80 Borrowdale Brook Township of Subdivision H of Borrowdale Brook of Borrowdale Estate (the whole property). Since their property was a subdivision, the first and second respondents sought documentation confirming that the whole property had been lawfully subdivided. They obtained the subdivision permit, the subdivision diagrams and the deductions by the Surveyor General. Those documents revealed that the subdivision of the whole property created stands 774-779 Borrowdale Brook Township for residential purposes. The entire process had been approved by the relevant authorities. The first and second respondents claim that at the time of signing the cession, the sixth respondent herein, undertook through the ninth respondent, to attend to the transfer of the property into their names.

Sometime in 2005, the first and second respondents cleared the outstanding rates at the instance of the sixth respondent to pave way for the transfer of the property. They claimed to have been advised that all the processes had been completed. As they awaited transfer of title into their names, the first and second respondents started buying building materials and making the necessary preparations towards building a residential property. Building plans were also approved by relevant authorities.

Sometime in 2011, one Douglas Makonese (fourth respondent in HC3727/18 and the seventh respondent herein came and barricaded the whole property with steel angle iron fence, thus blocking the first and second respondents' access into their property. The seventh respondent herein claimed that he had been given the title deed to the whole property by the ninth respondent herein, and for that reason, the alleged subdivisions were of no consequence. The parent deed did not show that the whole property had been subdivided. First and second respondents reported the matter to the Zimbabwe Republic Police Fraud section. At the police station, they were accompanied by the seventh respondent herein, Mercy Makonese (the eight respondent herein and wife to the seventh respondent), the ninth respondent herein and one Florence Mutodi of Floburg Property.

The ninth respondent claimed that he had decided to sell stand number 777 of Stand 80 Borrowdale Brook Township of Subdivision H of Borrowdale Brook of Borrowdale Estate. Stand No 777 is what the sixth respondent herein had remained with after selling the other subdivisions. The ninth respondent engaged Floburg Property to advertise and sell that stand on behalf of the sixth respondent. Floburg Property advertised Stand No. 777 for sale, and the seventh and eighth respondents expressed interest and purchased that stand from the sixth

respondent. The ninth respondent sold his entire shareholding in the sixth respondent, and resultantly the seventh and eighth respondents assumed control of the sixth respondent and all its properties.

The ninth respondent allegedly handed the title deed of the whole property to the seventh respondent in order for him to transfer the other subdivisions to the respective buyers so that he would on his part remain with Stand No. 777, which represented the sixth respondent's interest after the subdivision of the whole property. Following the engagement at the Police Station, the seventh and eighth respondents acknowledged that they could not claim title to the whole property. The issue was resolved and the seventh and eighth respondents removed the barricades that had been placed on the first and second respondent's property. The first and second respondents claim they did not encounter any challenges thereafter and proceeded to build a structure on the property.

In 2016, the first and second respondents were shocked when a gentleman claiming to be from FBC Bank Limited (the first respondent therein and the applicant herein), informed them that they were occupying the bank's property. They did not believe him though. On 10 February 2017, they received a letter from the applicant herein instructing them to stop the illegal developments on the property. The first and second respondents challenged the bank's claims through a letter from their legal practitioners. They carried out their own investigation to ascertain the bank's claims, and established that: the whole property had since been registered in the name of the bank; the bank took transfer pursuant to an order of this court under HC 7402/13 against, Success Auto (Private) Limited (second respondent therein and fifth respondent herein), Honeypot Investments (third respondent therein and sixth respondent herein), Douglas and Mercy Makonese (seventh and eighth respondents herein).

Apparently the sixth respondent had, through the seventh and eighth respondents mortgaged the whole property on the basis that it held title of the whole property. It defaulted on its obligations to the applicant herein resulting in the execution of the whole property in order to recover the debt. It was pursuant to the sale in execution that the applicant herein took transfer of title of the whole property.

The first and second respondents argued that the sixth, seventh and eighth respondents had no power to mortgage, alienate or transfer the whole property disregarding the other interested parties who had purchased subdivisions which were part of the whole property. The

sixth respondent's interest to the property was only in respect of Stand No 777, which was the only its remaining extent after the sale of the subdivided portions.

Aggrieved by the events, the first and second respondents, together with third and fourth respondents herein) filed a court application under HC3564/17 seeking the cancellation of the title deed in the name of the applicant herein arguing that it had been procured through fraud. That application was opposed with the applicant herein asserting that it had obtained title through a court order that remained extant. The court, per MAKONI J (as she then was) dismissed the application on the basis that the transfer of the property to the applicant was pursuant to a court order. The court opined that the parties ought to have sought the setting aside of that order in terms of r 449. The first and second respondents conceded that indeed the transfer of the property to the applicant herein was pursuant to an order of this court which had the effect of declaring the whole property specially executable.

The first and second respondents contended that paragraph 2 of the order by TAKUVA J under HC7402/13 was impugnable to the extent that it declared the whole property specially executable, disregarding the fact that it had been subdivided. They further averred that the error came about as a result of a misrepresentation by the applicant herein that the whole property was available to it when it was aware that its interest was only in respect of Stand No. 777.

THE JUDGMENT BY NDEWERE J

The operative part of the judgment handed down by NDEWERE J reads as follows:

> "Consequently, it is ordered that:
> 1. Paragraph 2 of the order granted under case number HC 7402/13 be and is hereby rescinded.
> 2. The 7th respondent be and is hereby ordered to restore the 3rd respondent's title to stand 80 Borrowdale Brook Township of Subdivision H Borrowdale Brook of Borrowdale Estate as it was prior to the order of HC 7402/13, of 7 October, 2013.
> 3. The 1st respondent shall pay the appellant's costs of suit on an attorney and client scale."

Based on the evidence placed before her, NDEWERE J found that all the respondents before her were aware of the claims by the applicants to their respective subdivisions. The first respondent (FBC Bank Limited), knew before mortgaging the property, that there were people with not only claims to part of the whole property, but also in occupation of their land. This position had been confirmed by the fourth respondent therein (Douglas Makonese). Despite being aware of these claims, the court noted that the first respondent therein deliberately omitted to alert the claimants of the course of action it was taking despite several earlier communication between the parties on the same issue.

The court also found that the first respondent conveniently withheld that information before the court in HC7402/13. The court found merit in the applicants' argument before it that the order by TAKUVA J was granted erroneously. It concluded that had the court been aware of these claims, then the least it could have done was to join the claimants as respondents to the proceedings to accord them an opportunity to be heard before their rights were extinguished.

The judge also observed that the first respondent was arguing the merits of the case before her, yet what the applicants wanted was an opportunity to be have the order by TAKUVA J set aside so that the merits could be considered. The court further noted that HC7402/13 was determined behind the applicants back. There had no idea of what was happening.

In her final analysis, the learned judge observed that paragraph 2 of the order by TAKUVA J is what was erroneously granted. The court further stated:

> "That is the part which I shall rescind because the issue of stand 80 Borrowdale Brook Township being declared executable is the issue which requires that the applicants be given audience first by a court of law before a decision is made in view of their rights over the portions of land purchased and occupied by them…..
> The effect of rescinding para 2 is that the status quo will be restored and the third respondent remains the owner of the whole of stand 80 Borrowdale Brook because it is the order in HC 7402/13 which resulted in the changes in the registered title."[1]

The Applicant's Case Herein

The effect of the judgment by NDEWERE J was that it ordered a reversal of the transfer of title in the property from the applicant to the sixth respondent as the original owner. The applicant wished to appeal the judgment to the Supreme Court. However, it reckoned that since the judgment did not bring the rights of the parties to a final and definitive conclusion, there was need to first seek leave of this court before approaching the Supreme Court on appeal.

Rule 262 requires that an application for leave to appeal be made immediately upon handing down of judgment. According to the applicant, such application was not immediately made because the judgment was only handed down in motion court by another judge who was not NDEWERE J. Apart from requiring an explanation as to why an oral application was not made in terms of r262, r 263 requires an applicant to state the proposed grounds of appeal, and the bases upon which it is contended that leave to appeal should be granted. The applicant motivated five grounds of appeal which will be considered in detail as part of the analysis.

[1] Page paragraph 4 of the judgment on page 220 of the record.

First, Second, Third and Fourth Respondent's Case

The first respondent deposed to the main opposing affidavit on his behalf and on behalf of the second, third and fourth respondents (hereinafter referred to as the respondents). They contended that it was malicious for the applicant to take as security, foreclose on a property and take transfer of a property it knew was the subject of interest by third parties. They insisted that all they wanted was a chance to be heard as per the NDEWERE J judgment. Justice demanded that a party must be heard before a decision affecting their rights was made.

The respondents averred that the applicant did not dispute that the respondents were not involved in HC7402/13, yet the court order made pursuant to the hearing of that case affected their rights. It was that part of the order that was of concern to them. There was no need to appeal the NDEWERE J judgment as it merely paved way for them to be heard. The application was clearly an abuse of court process and ought to be dismissed with the contempt it deserved.

The respondents averred that it was common cause that when the whole property was mortgaged, the applicant was made aware that the only property available to it was one subdivision. The other subdivisions had been registered in the names of new owners and the applicant had to cancel them when it took title of the whole property. The applicant had an obligation to inform the respondents of the action it was taking as it was aware of their interests. The respondents had no qualms whatsoever if the order by TAKUVA J was being enforced to the exclusion of their own subdivisions. Their problem was that the order was being used to evict them on the basis that the applicant had taken title. The property declared specially executable should not have been so declared because it was unavailable to the applicant in the first place.

The respondents further averred that they had rights to protect. It was necessary that these rights be brought to the attention of the court. The respondents would not have been aware of any execution process underway unless they were involved in the earlier proceedings. They could not have been bothered by advertisements of public auctions without being directly involved in the earlier proceedings.

The respondents claimed that the sixth respondent had not refused to transfer the subdivisions into their names since it acknowledged the existence of their rights. Sixth respondent had promised to resolve the issue amicably. Presently, they could not sue the sixth respondent since it lost title to the applicant. The sixth respondent could only be sued if title

reverted to it. This was the effect of the NDEWERE J judgment which the applicant shockingly wanted to challenge on appeal. In any case, TAKUVA J would not have allowed the execution of the whole property had he been made aware of third party rights in the same property.

The respondents also submitted that r 449 was not concerned with their arguments on the merits. It was concerned about a judgment made in the absence of a party affected by that judgment. The applicant did not dispute that the respondents were affected by TAKUVA J order, and that their rights were extinguished by that order. It was because of that order that the sixth respondent could no longer pass transfer of the subdivisions to them.

The respondents also contended that there was no bar against vindication of rights constitutionally guaranteed. That they had initially pursued a wrong remedy was no bar for them to pursue the correct remedy ultimately. They had always been in contact with the sixth respondent in a bid to secure the transfer of their properties. Their agreements with sixth respondent were not cancelled, neither did that party refuse to pass transfer to them. Their rights were only lost thanks to the fraud by the applicant. The position had since been remedied by the NDEWERE J judgment.

In conclusion the respondents insisted that there was no legal or factual basis upon which leave to appeal was sought. The applicant could not claim that its property rights were being impinged upon, when it had divested the respondents of their rights in a fraudulent manner.

The Answering Affidavit

The applicant persisted in its averments that the judgment by NDEWERE J was wrong and its correctness ought to be tested on appeal. The applicant also contended that the respondents did not deserve to be heard or joined as co-defendants in HC7402/13. The respondents had not established any legal right against the applicant or the property in dispute. The respondents only had a financial interest against the sixth respondent. That interest was borne out of their sale agreements with the sixth respondent. That financial interest did not entitle them to be heard in HC7402/13 since they did not have a direct and substantial interest in those proceedings which would ground a legal right for joinder. The court did not identify the legal right that existed in 2013, which would have entitled the respondents to be joined as co-defendants in HC7402/13. The applicant further averred that the respondents ought to have sued to compel transfer of their respective subdivisions at the material time. All they could

claim at this stage was compensation for damages suffered as a result of the fraudulent conduct of the fifth to ninth respondents.

The applicant further claimed that at no point did the fifth to ninth respondents inform it that any of the portions of the whole property had been sold to third parties. It had also come across further evidence to support its case. That evidence was not available at the time it deposed to the opposing affidavit in HC 3727/18. It would seek leave to have the said evidence admitted at the appeal stage. The first of such evidence was a letter of 28 May 2013 from Scanlen & Holderness representing the fifth to ninth respondents in HC 7402/13. The letter was written before the order by TAKUVA J. The letter was addressed to Danziger & Partners who represented the applicant in the same proceedings. The letter reads in part as follows:

> **"RE: FBC BANK LIMITED VS. SUCCESS AUTO (PVT) LIMITED AND 3 OTHERS HC361/13**
>
> Reference is made to the above matter and to our clients' previous correspondence in respect of the same subject matter.
>
> We are instructed to make, on a without prejudice basis, an offer for settlement of the above matter
>
> We propose the following;
> 1. that the property held under the deed of Hypothecation 6503/10, that is, stand 80 Borrowdale Brook township of subdivision H of Borrowdale Brook of Borrowdale Estate; be released either in part or whole to allow our clients to get a competitive purchase price for it to enable them to either clear the total loan amount or service the loan and carry out his capital projects……."

The applicant claimed that the letter could not be availed earlier because Danziger & Partners who dealt with the action proceedings had long closed their file. The letter confirmed that the applicant had been offered the whole property in settlement of the outstanding debt. There was no mention of the subdivisions. The second piece of evidence was a valuation report prepared by a registered Estate Agent, one C. Ngoro. He conducted a valuation of the property in November 2010 before the registration of the mortgage bond over the property in 2011. That valuation report stated that as at 19 November 2010, Stand 80 Borrowdale Brook was vacant and uninhabited.

The applicant averred that it was wrongly accused of acting fraudulently, when it was clear on the papers before the court that when the mortgage bond was registered in its favour, no subdivisions had been registered against the immovable property. The first to fourth respondents had not even commenced construction. The applicant contended that based on the

receipts appearing in the record, the respondents only commenced construction in March 2014, after the registration of the mortgage bond, institution of the summons action and the granting of the order by TAKUVA J. The applicant also averred that the respondents had failed to demonstrate that at the time the applicant applied for default judgment under HC7402/13, it was aware that the respondents held sale agreements for unregistered subdivisions on the whole property.

In any case, the commencement of construction did not mean that such construction was authorised or that the land was lawfully sold to the respondents. There was still no valid subdivision of the whole property. The land was still undeveloped. There were no roads. There were no sewer and water lines. No certificate of compliance had been issued by the relevant authority. The respondents had received nothing from the Surveyor General's office to confirm that the subdivision permit was being considered. There was no confirmation by any law firm that the transfer of title in the subdivisions was underway. They were no efforts to check whether the parent title deed was encumbered. The applicant claimed that the fifth to ninth respondents acted fraudulently in not disclosing to the respondents at their meeting with the police that the whole property had been mortgaged. They also never advised the applicant that they had previously sold unregistered portions of the whole property to the respondents. They maintained at all times that the whole property was wholly owned by the sixth respondent. The allegations of fraud attributed to the applicant were therefore ill-conceived.

The applicant denied violating the respondents' right to a fair hearing, but instead blamed them for their laid-back approach in asserting their rights. The applicant claimed that when it registered the mortgage bond, no subdivisions had been registered over the whole property. The respondents had not registered any caveat against the title deeds of the whole property to assert their interest. They had done nothing to secure transfer of their subdivisions for close to twenty years. The respondents had simply started building without making any verifications on the land, thus placing themselves in a precarious position. The respondents had only approached the police in 2011 and nothing more. The finding by the court that the respondents had acted swiftly in seeking their remedies was therefore unreasonable.

The applicant further asserted that the right to a fair hearing was not unqualified. A party could not just claim, without justification that they ought to have been heard in proceedings that did not concern them. Proceedings in HC7402/13 were concerned with the payment of an outstanding loan and foreclosure on a mortgage bond. For them to have been

heard in those proceedings, the respondents ought to have established a legal right in the whole property. They were also expected to place before the court valid agreements of sale in order to demonstrate the existence of a sustainable right.

According to the applicant, the sixth respondent's alleged desire to pass transfer of the subdivisions could not remedy the fact that the first and second respondents' agreement of sale referred to a seller who was not party to the proceedings at all. Further, a condition precedent in the cession agreement was also not complied with. The sixth respondent's alleged desire to pass transfer of the subdivisions could also not remedy the fact that the third respondent's agreement of sale was void *ab initio* as it violated s 39 of the Regional Town and Country Planning Act[2]. An agreement that violated the law was unlawful and invalid. The fourth respondent's agreement could also not be rescued by the sixth respondent's alleged desire to pass transfer of the subdivision because the agreement self-terminated by virtue of its own provisions and could not thus be resurrected by the mere say so of the fourth respondent.

The applicant further averred that the court's failure to identify a legal right which entitled the respondents to be heard in HC7402/13, and the failure by the respondents to place valid and enforceable agreements before the same court, meant that no case was made for rescission of TAKUVA J's order based on r 449(1)(a).

The applicant denied that the writ of execution was issued on the basis of paragraph 2 of the order by TAKUVA J. That paragraph merely protected the applicant as a preferential creditor. For as long as paragraph 1 of the order remained extant, the applicant was still entitled to proceed against the immovable property of the sixth respondent because of an extant order against it. A rescission of paragraph 2 of the court order, without the cancellation of the writ of execution, could not justify cancellation of the title deed registered in the applicant's name. This was so because even without paragraph 2 of the court order, once a judgment debt existed against sixth respondent, the applicant was still entitled to proceed against the immovable property registered in sixth respondent's name.

The Issue

Only one issue arises for consideration, and it is whether the proposed grounds of appeal carry prospects of success on appeal.

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[2] [*Chapter 29:12*]

The submissions and the analysis

The right of access to the courts is one of the fundamental rights précised under the right to a fair trial.[3] The application was made in terms of s 43(2)(d) of the High Court Act[4], as read with r 262 and r 263 of the old High Court Rules. In its heads of argument the applicant cited the celebrated criminal case of *S v McGown*[5], where the court held as follows:

> "The decision whether or not to grant leave to appeal depends on the prospects of success. How good must those prospects be? Byron JA in S v Tengende 1981 ZLR 445 (S) @ 447 stated that it would be a very serious step to deny a man the opportunity to appeal from conviction at first instance. He said that the matter should therefore be approached on the basis, not of how good the prospects must be before leave is granted, but how poor they must before it is refused. The Applicant should, therefore, be required to make out a reasonably arguable case in the sense of there being substance in the argument."

The views were expressed in the context of a criminal matter, but they apply with compelling force to civil cases. Thus in *Chikurunhe & Ors v Zimbabwe Financial Holdings*[6], the court held:

> "The party seeking leave must show *inter alia* that he has prospects of success on appeal. In other words, leave is not granted simply because a party has sought such leave."

In consideration of the question of prospects of success on appeal, the court must also take into account the need to bring finality to litigation.[7] In the present matter, prospects of success must be determined relative to the applicant's draft grounds of appeal which were placed before the court. The court is mindful that at this stage it is not sitting as the appeal court or the reviewing court. It must establish on a balance of probabilities whether the intended appeal carries with it prospects of success. I will now proceed to consider the issue of prospects of success relative to the grounds of appeal as set out in the draft notice of appeal.

First ground of appeal-That the court aquo erred in concluding that judgment under HC 7402/13 was erroneously granted on account of the non-joinder of the 1st-4th respondents in those proceedings whereas there was never any legal obligation on the appellant either to join the 1st-4th respondents to those action proceedings or to inform TAKUVA J of the personal rights held by those individuals against the registered owner of the hypothecated immovable property in question

In its heads of argument, the applicant submitted that the debt, which resulted in the court in HC7402/13 declaring the whole property specially executable, was secured by a mortgage bond. That mortgage bond accorded the applicant real rights, less ownership in the

[3] Section 69(3) of the Constitution
[4] [*Chapter 7:06*]
[5] 1995 (2) ZLR 81 at p83
[6] SC 10/08
[7] See also *Chimunda v Zimuto & Ano* SC 76/14

whole property. The respondents herein were not concerned by the loan or the mortgage bond. The applicant was interested in recovering the loan advanced to the debtors. The respondents had no legal rights to enforce.

In their heads of argument, the respondents argued that there were no prospects of success because the ground of appeal attacked a conclusion that was never made by the court. They further argued that the ground of appeal acknowledged the existence of personal rights against the registered owners. According to the respondents, the court only found paragraph 2 of the order under HC7402/13 to have been erroneously granted in the absence of the first to fourth respondents.

A reading of the judgment by NDEWERE J shows that the court found paragraph 2 of the order under HC7402/13 to be impugnable. It is the part of the order the court was prepared to rescind *"because the issue of stand 80 Borrowdale Brook Township being declared executable is the issue which requires that the applicants be given audience first by a court of law before a decision is made in view of their rights over the portions of land purchased and occupied by them"*.

A reading of the ground of appeal shows that it is the question of respondents' rights to their subdivisions that is central to the determination of this ground of appeal. The applicant contends that they had no legal rights that justified the finding by the court. Their personal rights did not justify their joinder to the proceedings. In my view that ground of appeal raises a legal issue which warrants further ventilation by the court on appeal. The appeal must determine whether the existence of personal rights as opposed to legal rights entitled the respondents to be joined in the proceedings under HC7402/13.

Second ground of appeal-The Court a quo erred in concluding that the 1st-4th Respondents should have been given an opportunity to make representations to the court in respect of the summons action and the application for default judgment which was granted under HC7402/13 regarding the portion of the order declaring the hypothecated immovable property specially executable whereas the 1st-4th Respondents were never legally entitled to be heard in those action proceedings.

This second ground of appeal is substantially similar to the first ground of appeal. The issue that needs to be resolved is whether the right upon which the respondents were entitled to be joined as well as make representations in HC 7402/13 was established. That issue is arguable on appeal. If the court were to find that the respondents had not established any rights which entitled them to be heard under HC7402/13, then that will affect the complexion of the respondents' case.

Third ground of appeal-The Court a quo erred in failing to consider that it was pointless to rescind paragraph 2 of the court order under HC7402/13 because none of the agreements furnished by the 1st-4th Respondents were enforceable and would therefore would not have sufficed in preventing the hypothecated immovable property from being declared specially executable even if the 1st-4th Respondents had been joined as co-defendants in the action proceedings under HC7402/13.

Mr *Magwaliba* submitted that the illegality of the agreements struck at the heart of the respondents claims. It affected their *locus standi*. A party could not litigate to enforce an illegal agreement. Once the issue had been raised, then the court was expected to resolve it. It was left unresolved. In its heads of argument, the applicant submitted that the record of proceedings confirmed the illegality of the agreement between the fourth and sixth respondents for instance.[8] An agreement which ran contrary to a statutory prohibition was void. Reference was made to s 39 of the Regional Town and Country Planning Act which proscribes agreements of sale for undivided land[9].

As regards the first and second respondents, it was submitted that their agreement with the sixth respondent violated s11 of the Deeds Registries Act[10] in that it sought to pass the right to receive transfer directly to them and bypass the relative causes of transfers intermediate between the two. The sixth respondent had sold the property to Paul Ali Chindamba, who in turn sold it to Bract. Bract then sold the property to first and second respondents. The applicant contends that the court recorded the sequences of the transaction, as well as the misrepresentation of the cession to the first and second respondents as a donation. The applicant further contends that the court could not grant relief to the first and second respondents on the basis of an illegal cession agreement. The two were not relying on their agreement with Bract, and neither did they produce it.

The applicant also argued that the third respondent was in the same position as the fourth respondent because his own agreement was concluded before the issuance of a sub

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[8] Clause 4 of the agreement between the 4th and 6th respondents on page 92 of the record provided that:
"The property transfer to the purchaser to be effected after the sub-division permit has been approved by the Surveyor General's Office and conditions fulfilled"

[9] [*Chapter 29:12*]

[10] [*Chapter 20:05*]. Section 11 (1)(a) states:
"**11 Deeds to follow sequence of their relative causes**
(1) Save as otherwise provided in this Act or as directed by the court—
(*a*) transfers of land and cessions of real rights therein shall follow the sequence of the successive transactions in pursuance of which they are made, and if made in pursuance of testamentary disposition or intestate succession they shall follow the sequence in which the right to ownership or other real right in the land accrued to the persons successively becoming vested with such right;

divisional permit. The court noted this position in the judgment[11]. On the basis of these proved illegalities, the appeal therefore enjoyed good prospects of success.

In response Mr *Ochieng* argued that the issue of illegality was not raised before TAKUVA J. What was in issue before TAKUVA J was the question of the applicant's rights as against the sixth respondent herein. The legality of the agreements was an issue for TAKUVA J to determine once the respondents were afforded an opportunity to be heard. He further submitted that there was no dispute between the respondents and the sixth respondents in connection with their rights. NDEWERE J had found that even the holder of personal rights had an interest as regards the execution by a third party of a property in which they had an interest. The respondents had the requisite *locus standi* to be heard regarding the extent of their rights.

Mr *Ochieng* further argued that the question of legality of the agreements was not an issue before NDEWERE J to deal with. What mattered was that the respondents had established the existence of a *prima facie* right and the applicant was aware of those rights. The court's finding could not be faulted.

From a reading of the NDEWERE J judgment, the legality of the subdivision agreements was pleaded by the applicant herein in the matter before her[12]. The court dealt with the issue as follows:

> "It is common cause that the applicants had interests in the stands sold to them. Although the first respondent is challenging the validity of the sale agreements on the technicalities raised; there is no factual dispute that indeed the applicants went through the motions to buy the stands they claim and paid for them…….The first respondent itself, although disputing validity of the sales on legal arguments it is raising, does not dispute that the applicants and third respondents embarked on what they considered to be sale agreements……."

The court went on to remark that the first respondent (applicant herein) was missing the point in raising those issues, as it was arguing the merits, yet all the applicants (respondents herein) wanted was a platform where the merits would be argued before a decision was made.

It is trite that a point of law can be raised at any stage of the proceedings, provided it is not one which is required by a definitive law to be specially pleaded, and its consideration involves no unfairness to the party against whom it is directed.[13] The position of the law is also

[11] Paragraph 2 of the judgment on p 218 of the record.
[12] Page 215 of the record being page 7 of the NDEWERE J judgment
[13] *Muchakata v Netherburn Mine* 1996(1) ZLR 153 (S) at 157A: *Muskwe v Nyajina & Others*-SC-17-12

clear on agreements that are forbidden by the law.[14] That being the position of the law, the question of whether or not the court ought to have made a determination on that point at that stage of the proceedings is one of fundamental importance. It is the gravamen of the ground of appeal. The court is persuaded to accept that the ground of appeal is indeed endowed with merit.

Fourth ground of appeal-The Court a quo misdirected itself in finding that the 1st-4th Respondents had acted diligently in the protection of their rights as purchasers of unregistered subdivisions of the hypothecated immovable property and had approached the court swiftly seeking a remedy.

The fourth ground of appeal seeks to challenge the finding that the respondents acted diligently in asserting their rights. The applicant contends that the court accepted that the mortgage bond in favour of the applicant was registered in 2011. The registration of real rights in the Deeds Registry was significant. It informed the world of the existence of such rights. The respondents did not enquire about their rights or those of the applicant over the property. Having become aware that the applicant had obtained transfer of the whole property, the respondents only took action in 2018, resulting in the judgment by NDEWERE J. Their initial attempts under HC3564/17 were unsuccessful.

In response, the respondents argued that the court was correct in finding that the fact that they had wrongly approached the court under HC3564/17 was not fatal. What mattered was that they took action. In any case, a r449 application was without limitation in terms of time.

On the issue of delay, the court made the following conclusion:

> "On the alleged delay, the court noted that the applicants sprung into action in 2017 when they realized what had happened. The fact that they approached the court wrongly in HC 3564/17 cannot be used against them. The important thing is they approached the court swiftly seeking a remedy. They did not just sit and do nothing"

The critical issue is whether the respondents acted diligently under the circumstances regard being had to the position of the applicant and the manner in which it asserted its rights from the time the mortgage bond was registered in its favour in 2011. Did the respondents act in a reasonable manner in asserting their rights to the property from the time they signed the alleged agreements of sale for the sub divisions with the respective sellers? I also note that in

[14] X-*Trend-A-Home (Pvt) Ltd v Hoselaw Investments (Pvt) Ltd* 2000(2) ZLR 348(SC) at 348F: *York Estates Ltd v Wareham* 1950 (1) SA 125 at p 128

Success Auto (Pvt) Ltd & 3 Ors v FBC Bank Limited & Ano[15], the fifth to eight respondents herein unsuccessfully sought the setting aside of the decision of the Sheriff for Zimbabwe, confirming the sale in execution of the fifth to eighth respondents immovable property being stand 80 Borrowdale Township of Borrowdale Brook Harare (the whole property herein).

In that case, proceedings were instituted in 2015, and surely by that time it ought to have occurred to the respondents that there was a dispute pertaining to their rights in the property. The court found that the first and second respondents signed the sale and cession agreements in August 2003, while the third and fourth respondents signed their agreements of sale in July 1997. The conclusion by the court on the reasonableness of the delay by the respondents in asserting their rights when juxtaposed against the applicant's conduct, is clearly an arguable point on appeal. The court finds that the ground of appeal is not devoid of merit as submitted on behalf of the respondents.

Fifth ground of appeal-The Court a quo erred in granting an order directing the 10th Respondent to restore title of Stand 80 Borrowdale Brook into the name of the 6th Respondent whereas the execution sale of the immovable property was carried out not only on the basis of paragraph 2 of the court order under HC7402/13, but also, on the basis of the writ of execution issued by the Registrar of the High Court under that matter, which writ of execution remains extant, and still entitles the Applicant to proceed with execution against the immovable property.

The ground of appeal attacks the propriety of paragraph 2 of the order granted by NDEWERE J. The court found paragraph 2 of the order granted by TAKUVA J impugnable to the extent that it declared the whole property executable without regard to the rights of the respondents over the subdivided portions they acquired and occupied. The court reasoned that the *status quo* must be restored so that the third respondent therein retained ownership of the whole property. The applicant's counsel argued that the auction sale, the confirmation of the sale and the subsequent transfer of title to the applicant were all juristic acts which depended on each other. The deed of transfer could not be set aside without assailing the writ of execution.

For the respondent it was argued that the non-cancellation of the writ of execution in the judgment by NDEWERE J was of no consequence to the dispute before the court. The wording of the writ itself directed the Sheriff or his lawful deputy to execute consequent to a

[15] HC 5759 and HH 157/15

court order. The court was referred to the case of *Mahomed v Dhudia & Ano*[16], in which the court is said to have remarked that a writ of execution is issued out consequent to a court order. Mr *Ochieng* submitted that the effect of the rescinding paragraph 2 of the order by TAKUVA J and substituting it with an order directing the restoration of title to the third responded was in consonant with sections and 8 and 20 of the Deeds Registries Act.[17]

In his brief reply, Mr *Magwaliba* argued that the respondents could not seek the setting aside of a title by implication. The respondents had properly sought the cancellation of the deed of transfer in favour of the applicant under HC 3564/17. It showed their appreciation that separate proceedings were required to achieve that result. The application was dismissed by MAKONI (as she was then) on the basis that the transfer of the property to the applicant was pursuant to an extant court order. The court reasoned that the respondents ought to have sought the setting aside of that order in terms of r 449.

The parties' submissions must be considered in the context of the relief sought by the respondents before NDEWERE J.[18] Paragraph 1 of the draft order sought the setting aside of the order granted by TAKUVA J. Paragraph 2 reads as follows:

> "The title deed number 2757/15 registered in the name of FBC BANK LIMITED, the 2nd Respondent herein, in respect of Stand 80 Borrowdale Brook Township of Subdivision H Borrowdale Brook of Borrowdale Estate."

The statement is incomplete. The applicant herein was not even the second respondent. It was the first respondent. It is not clear what the applicants (respondents herein) wanted the

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[16] HH 140/18

[17] Section 8 reads as follows "8 Registered deeds not to be cancelled except upon order of court
(1) Save as is otherwise provided in this Act or in any other enactment, no registered deed of grant, deed of transfer, certificate of title or other deed conferring or conveying title to land, or any real right in land other than a mortgage bond, and no cession of any registered bond not made as security, shall be cancelled by a registrar except upon an order of court.
(2) Upon the cancellation of any deed pursuant to an order of court—
(*a*) the deed under which the land or any real right in land was held immediately prior to the registration of the deed which is cancelled shall be revived to the extent of such cancellation unless a court orders otherwise; and
(*b*) the registrar shall make the appropriate endorsements on the relevant deeds and entries in the registers."

Section 20 reads as follows:
"20 Particulars required in every deed
Every deed conferring title to land shall contain the following particulars in addition to the description and area of the land concerned—
(*a*) the date and number of the grant, transfer or other title to which—
(i) if such be the case, the diagram of the land is annexed or relates;
(ii) if such be the case, the diagram of the land would, but for the issue of a dispensation certificate, be annexed or related;
(*b*) if a dispensation certificate has been issued in respect of the land, a reference to the general plan concerned;
(*c*) the name of the person in whose favour the grant, transfer and other title deed referred to in para-graph (*a*) was made;
(*d*) the date and number of the grant, transfer or other title by which the land is held;
(*e*) the special conditions, if any, contained in the title deed from which the land is being transferred.

[18] Pages 94-95 of the record.

court to do with the title deed. Paragraphs 3 and 4 read pretty much the same. The applicants wanted the first respondent therein to be interdicted from disposing, alienating, encumbering, or making any developments on the whole property. Paragraph 5 required the first respondent to be restrained from evicting or disturbing the applicants' occupation of their respective subdivisions. Paragraph 6 sought confirmation of the subdivisions of the whole property in line with subdivision permit SD/936. Paragraph 7 dealt with the issue of costs.

None of the paragraphs of the draft order spoke to the relief that was ultimately granted by the court save for the issue of costs. From a reading of the judgment, it is not clear whether the applicants therein sought an amendment of the draft order. Two key issues arise herein. These are whether the court could then set aside paragraph 2 of the order by TAKUVA J and proceed to direct that the third respondent's title be reinstated. The third respondent (sixth respondent herein), did not oppose the application under HC3727/18. It did not ask that title be reinstated into its name.

This court is also mindful of the fact that in the same judgment the court had reasoned that the parties must avoid arguing the merits of the case, with these to be argued once the respondents had been afforded an opportunity to be head. The court had jettisoned the argument on the legality of the agreements on the basis that these would be determined together with the merits. Similarly counsel for the respondents herein argued that the issue of the legality of the agreements was an issue for determination by TAKUVA J. The determination of the merits would obviously have a bearing on the issue of title to the property. In my view, once the court had deferred the determination of the merits on the basis that the respondents needed to be heard first, then there was no need to interfere with the title of the whole property at that stage.

The second issue is whether it was proper for the court to amend the relief sought by the applicants therein. As already noted, from a reading of the judgment it does not appear as if the applicants applied for an amendment of the draft order. They sought the setting aside of the order under HC 7402/13. The court did not set aside the whole order. It rescinded paragraph 2 of the order under HC 7402/13, and proceeded to amend it to read something else. I agree with applicant's counsel that the effect of paragraph 2 of the order granted by NDEWERE J is that the sixth respondent herein, which lost title at an auction sale which was confirmed by the Sheriff and has not challenged such sale, will effectively get title that it never sought.

Mr *Ochieng's* submission that the order granted by the court must be read and understood in the context of sections 8 and 20 of the Deeds Registries Act does not in my view

take the respondents' cause any further. The circumstances envisaged under the two sections are markedly different. What was before the court was a r 449 application, which had the court been persuaded, would have resulted in the setting aside of the order by TAKUVA J, thus affording the respondents an opportunity to be joined in HC 7402/13. Whether or not the court could competently set aside by implication all the processes that resulted in the applicant taking title to the property, is clearly an arguable issue on appeal.

For the foregoing reasons, I find that the applicant's grounds of appeal are not devoid of merit. They raise arguable issues on appeal. The applicant is entitled to the relief that it seeks.

DISPOSITION

Resultantly it is ordered that:

1. Leave be and is hereby granted to the applicant to appeal to the Supreme Court against the whole of the judgment of the High Court of Zimbabwe by NDEWERE J in HC3727/18, which judgment was handed down on 10 June 2020.
2. The applicant shall file its notice of appeal within ten days of the date of this order.
3. Costs shall be in the cause.

Dube Manikai & Hwacha, legal practitioners for the applicant
Moyo & Jera, legal practitioners for the 1st to 4th respondents
Makururu and Partners, legal practitioners for the 5th to 9th respondents