NETONE CELLULAR (PRIVATE) LIMITED
versus
BACNET TRADING (PRIVATE) LIMITED
and
MINISTER OF LOCAL GOVERNMENT PUBLIC WORKS AND NATIONAL HOUSING
and
REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 28 March 2019 & 26 April 2019

Opposed application

E.T. Matinenga, for the applicant
T.S.T. Dzvetero, for the 1st respondent
S. Hashiti, for the 2nd respondent

MANGOTA J: Two pieces of land lie at the centre of the parties' dispute. They comprise:

(a) Stand 2 Cleveland Township of Lot A Chikurubi- and
(b) The remaining property of Lot A Chikurubi.

The two pieces were originally one piece of land. It was called Lot A Chikurubi. It is situated in the district of Harare formerly Salisbury. It is 136, 3231 hectares in extent.

Stand 2 Clevelend Towhship of Lot A Chikurubi was excised from Lot A Chikurubi in 1975. It is 4.9521 hectares in extent. The other piece of land which is known as the remaining property of Lot A Chikurubi ["the remaining property"] has an area of 131, 3710 hectares.

The applicant's statement is that it owns the remaining property. It insists that Stand 2 Cleveland Township of Lot A Chikurubi belongs to the first and second respondents. It moves the court to make a declaration which is to the effect that it is the owner of the remaining property which is 131, 3710 hectares in extent and to interdict all the respondents from dealing with that property in a manner which is inconsistent with its ownership of the same.

The position of the first and second respondents is to the contrary. They content that they own the remaining property of Lot A Chikurubi. They state that Stand 2 Cleveland Township of Lot A Chikurubi belongs to the applicant. They, therefore, oppose the application

for a declaratur and an interdict. They move that the application be dismissed with costs. The third respondent maintains neutral view of the matter. My assumption is that he intends to abide by my decision.

The first respondent withdrew the preliminary matter which it raised in its opposing papers. The withdrawal puts the same to rest.

The parties' dispute must be placed into context. It is essentially one of placing a proper construction on the Deed of Grant through which the land came into the hands of one of the parties, whoever it is. The history of the evolution of Lot A Chikurubi with an area of 136, 3231 hectares is, therefore, relevant. It reads as follows:

(i) On 10 September, 1953 Queen Elizabeth the second, through His Excellency the Governor of the Colony of Southern Rhodesia, granted to the Government of the Colony of Southern Rhodesia, its successors or assigns, Lot A Chikurubi, situated in the district of Salisbury, measuring 159, 1596 Morgen [i.e. 136, 3231 hectares] in extent. She did so through Deed of Grant number 13832.

(ii) The condition of the grant was that the said land shall be used for communication purposes only; failing which the Municipality shall have the right of first refusal to purchase the said land at a price stated in the Deed of Grant; failing which Government would have the right to sell the land to any purchaser at an agreed price and, where Government and the purchaser cannot agree on the purchase price, at the price which the arbitrator(s) appointed by them determine.

(iii) Where the sale of the land takes place, Government shall retain the right to all minerals, mineral oils, natural gases and precious stones which are on the land and shall reserve to itself the power to make grants of the right to prospect the minerals, mineral oils, natural gases and precious stones which are on the land.

The contents of the Deed of Grant number 13832 are as clear as night follows day. They contain a clearly defined *modus operandus*. The *modus* is that the land which is described in the Deed of Grant was for no other use than for a use which relates to communication.

The grantor remained alive to the fact that, the intended use for which the land was granted to the Government of the Colony of Southern Rhodesia might, for one reason or the other, not occur. It was for the mentioned reason, if for no other, that she instructed that, where the intended use does not occur, the land would be offered to the Municipality which must be allowed to exercise its right of first refusal. It is only after it had exercised that right and refused

to purchase the land at the price which is mentioned in the Deed of Grant that Government would be at liberty to sell the land to interested purchasers at an agreed price or at a price which the arbitrators appointed by them would have determined.

What Government was allowed to retain in terms of the Deed of Grant are all minerals, minerals oils, natural gases and precious stones which were/are on the land. It retained those notwithstanding that the land was/is owned by the entity which deals with communication or by the municipality or by any purchaser of the same. Also reserved to it in terms of the Deed of Grant was/is the power to grant to entities which had/have an interest in mining and prospecting for minerals the right to do so on the land.

The President of Rhodesia whose duty was to defend, obey and respect the country's Constitution and other laws of the time read the contents of the Deed of Grant and understood their meaning and import very well. He remained alive to the fact that, although Lot A Chikurubi which measured 136, 3231 hectares, was granted to the Government of the Colony of Southern Rhodesia, its successors or assigns, that land was not for his government to deal with it as it pleased. He acknowledged that Lot A Chikurubi was granted to the Government for a specific purpose. He, in other words, knew that the grantor had passed that land to the Government of the Colony of Southern Rhodesia for purposes of communication only. He, therefore, remained of the correct view that he could not temper with the conditions which were stipulated in the Deed of Granted. He knew that he could not do so without being brought to account for his conduct.

It is for the mentioned reason that he acted in terms of Executive Council Minute 364 of 1967, NO. 964 of 1967, and applied for the issue to him of a Certificate of Registered Title in terms of s 36 of the Deeds Registries Act [*Chapter 253*] in respect of Stand 2 Cleveland Township of Lot A Chikurubi. The application which he made on 2 October, 1975 allowed him to hive off 4.9521 hectares from lot A Chikurubi and have the same registered in his name.

The remaining portion of the land [i.e 131,3710 hectares] – remained reserved for the purpose to which the grantor granted Lot A Chikurubi to the Government of the Colony of Southern Rhodesia. It was for the mentioned reason that the third respondent made an endorsement to the stated effect on 3 December 1975 under consent number 4717/75. In making the endorsement as he did, he acknowledged that Lot A Chikurubi which at the time of the grant was 136, 3231 hectares was no longer the same. He acknowledged further that its area had been reduced by 4.9521 hectares which were allocated to the President on the latter's application for a Certificate of Registered Title.

It requires little, if any, debate to state that all communication matters in this country fell under the purview of the Post and Telecommunications Corporations Act which was repealed and substituted by the Postal and Telecommunications Act *[Chapter 12:05*] under which the applicant falls. It is for the mentioned reason that the land which was granted to the Colony of Southern Rhodesia for purposes of communication, less what the President of Rhodesia acquired through the Certificate of Registered Title, was allocated to the applicant by virtue of the endorsement which the third respondent made on the Deed of Grant on 15 June, 2008. He did so in terms of s 108 of the Postal and Telecommunications Act.

Section 108 upon which the endorsement of 13 June, 2008 is anchored makes reference to transfer of assets and liabilities of the Corporation to successor company. Subsection (4) of the same upon which the endorsement of 13 June 2008 rests is relevant. It reads:

> "(4) It shall not be necessary for the Registrar of Deeds to make any endorsement on title deeds or other documents or in his registers in respect of any immovable property, right or obligation which passes to the successor company under this section; but the registrar of Deeds when so requested in writing by the successor company concerned in relation to any particular such property, right or obligation, shall cause the name of the successor company to be substituted, free of charge, for that of the corporation on the appropriate title deed or other document or in the appropriate register."(emphasis added)

The endorsement of 13 June, 2008 is very revealing. It was made by the third respondent. The assumption is that he did so following a written request to do so by the applicant which was/is the successor company to the Corporation.

There is little, if any, debate that the endorsement of 13 June 2008 conferred title of the remaining property of Lot A Chikurubi which has an area of 131, 3710 hectares on to the applicant. De Beer and R F Rocke state in their *Newall's Law and Practice of Deeds Registries*, 3rd Edition, p 67 that:

> "various laws make provision for transfer of ownership by endorsement."

Jones states in his *Conveyancing in South Africa*, 4th Edition, p 92 that:

> "Many statutes provide that land registered in the name of one statutory body shall be vested in another body by means of an endorsement on the existing title…."The learned author continues at p 313 of his learned textbook and states that:

> "particular statutes provide that the Registrar of Deeds shall record a change of ownership by way of an endorsement on the existing title deeds."

The third respondent acted within the law when he made the endorsements of 3 December, 1975 and 13 June, 2008. The first endorsement was an acknowledgment by him of the conditions which was stipulated in the Deed of Grant. The second one must have been at the written request of the applicant.

It is the submission of the first respondent that Lot A Chikurubi which has an area of 136,3231 hectares belongs to the State which holds it through the second respondent. It argues that the State did not consent to the endorsements which were made on the Deed of grant. It submits further that any such endorsement is legally of no force or effect. It argues that the endorsement on the Deed of Grant does not transfer any real rights to the applicant. The endorsement, it asserts, is tantamount to fraudulent transfer.

The applicant places reliance on the endorsements which appear in the Deed of Grant as read with the Certificate of Registered Title through which the President of Rhodesia was able to excise Stand 2 Cleveland Township from Lot A Chikurubi. Its narration resonates well with logic, the correct law as well as sound reasoning.

The first respondent does explain why the President of Rhodesia whom it claims to be the owner of Lot A Chikuribi which has an area of 136,3231 hectares had to go to the trouble of applying for a Certificate of Registered Title for Land which allegedly belonged/belongs to him. It does not explain what he intended to achieve by applying to have 4.9521 hectares excised from Lot A Chikurubi if, as is being suggested, the entire land belonged to him.

I have already made a finding which is to the effect that his application for a Certificate of Registered Title was borne out of his realization of the fact that the grantor of the Deed of Grant intended that the land she so granted to the Government of the Colony of Southern Rhodesia was for no purpose other than for communication purposes only. The land was, no doubt, granted to him not as a blank cheque. It was granted for a specific purpose which was known to the President and his cabinet.

The Deed of Grant did not state that the President could deal with the land as he pleased. It stipulated the main, and the alternative, condition (s) of the use to which the land was to be put. Both conditions were spelt out in a clear and unambiguous language.

The third respondent read and understood the language which was contained in the Deed of Grant. He did not require the consent of the State or Government to make the endorsements which he made. He merely followed the instructions which were stipulated by

the grantor of the Deed of Grant. The endorsements which he made are, therefore, within the law.

The second respondent makes an attempt at defining the meaning and import of the phrase which appears in the endorsements. The phrase reads:

> "The within hand vents in the Posts and Telecommunications Corporation in terms of s 28 (1) of the Posts and Telecommunications Act No. 9 of 1970 subject to conditions I and II contained in the under-mentioned consent."

It submits that the word within means *inner or interior part of something*---. The word, it insists, means that whatever was given to PTC was the inner or interior part of something. It states that, *in casu*, the within land referred to the excised portion of the land which is the subject of the parties' dispute.

The second respondent, no doubt, misconstrued the phrase which relates to its argument. The phrase refers to the land which remained in the Deed of Grant after Stand 2 Cleveland Township of Lot A Chikurubi was excised from Lot A Chikurubi. That land is within, as opposed to the without, the Deed of Grant. It vests in the Corporation which owned it by virtue of the first condition of the Deed of Grant.

The Certificate of Registered Title does not show that Stand 2 Cleveland Township of Lot A Chikurubi was endorsed in the name of the Corporation. It was excised from Lot A Chikurubi following the application by the President to whom it was allocated. The land which remained in the Deed of Grant (*i.e. the within land*) was endorsed as the land which was/is for the Corporation's use in terms of the first condition of the Deed of Grant.

The second respondent was/is cautious in the manner that it couched its argument. It proceeded by way of a hypothesis from which it deduced the conclusion which, in its view, is favourable to it. The conclusion which it anchored on a false premise is fallacious. It does not hold.

The current is a two-in-one application. It is an application for a declaratur as well as an interdict. The declaratur aspect of the same is in terms of s 14 of the High Court Act [*Chapter 7:06*]. The section confers upon me the discretion to inquire into and determine any existing, future or contingent right. I can only make the inquiry and the determination of such a right at the instance of an interested person.

The applicant, no doubt, has a direct and substantial interest in the property which is the subject of the parties' dispute. It moved me to inquire into and determine the right which relates to the property it alleges belongs to it.

On a proper construction of what the parties placed before me, therefore, I am satisfied that the applicant is the owner of the remaining property of Lot A Chikurubi which has an area of 131, 3710 hectares. The findings which I made in the foregoing paragraphs of this judgment support the stated position. The application for a declaratur is, accordingly, in order and it remains unassailable.

There is no doubt that, from as far back as 2008, the first and second respondents commenced to deal with the applicant's property in a manner which was/is inconsistent with its ownership of the same. The second respondent allocated the property to the first respondent for housing purposes. The activities of the two respondents on the property of the applicant cannot be allowed to continue. They must cease. They infringe upon the clear right of the applicant.

The applicant satisfies the requirements of a final interdict which the court laid down in *Johnson* v *Agricultural Finance Corporation* 1994 (10 ZLR 95 (HC) at 98 wherein it stated that:

> "The requirements of a final interdict are a clear right, an injury actually committed or reasonably apprehended and the absence of a similar protection by any other remedy."

The first and second respondents knew that their submissions stood on nothing. They made every effort to denigrate the work of the third respondent. They anchored their argument on the endorsement which he made on 6 July 1973 and cancelled on 30 April 1974. They insisted on the point that the third respondent also makes mistakes.

The third respondent is the custodian of the records which are in his office. He is better placed than any other officer/person to make authoritative statements on the records which he keeps. Nothing turns on the point that he made an erroneous endorsement on the Deed of Grant on 6 July 1973.

The fact that the third respondent was able to pick the error and correct it shows the meticulous manner in which he allows his records to always show a correct picture of any documents which pertain to real rights which are filed in his office. It was out of his good record-keeping that he was able to detect and correct the error. It was also out of the same that he was able to state, in clear and unambiguous terms, that the applicant owns the remaining property of Lot A Chikurubi.

The applicant proved its case on a balance of probabilities. The application is, therefore, granted as prayed.

Mhishi Legal Practice, applicant's legal practitioners
Antonio & Dzvetero, 1st respondent's legal practitioners
Civil Division of the Attorney General's Office, 2nd respondent's legal practitioners