TRANSTOBAC (PVT) LTD
versus
C. MAKIWA

TRANSTOBAC (PVT) LTD HC 14237/12
versus
T. TAPERA

TRANSTOBAC (PVT) LTD HC 10915/12
versus
SARAH JUMBE

TRANSTOBAC (PVT) LTD HC13012/12
versus
VHURAMAI RUMBIE

TRANSTOBAC (PVT) LTD HC 13005/12
versus
MUTONHORI CHATUKUTA

TRANSTOBAC (PVT) LTD HC13614/12
versus
R. KARIMATSENGA

TRANSTOBAC (PVT) LTD HC 13024/12
versus
ANNAH WATUNGWA

TRANSTOBAC (PVT) LTD HC 13015/12
versus
PASSMORE MACHINGURA

TRANSTOBAC (PVT) LTD HC 10922/12
versus
BRIGHTON CHAGONDA

TRANSTOBAC (PVT) LTD HC 13018/12
versus
SHANGWA CHADUKA

TRANSTOBAC (PVT) LTD HC13019/12
versus
EMMANUEL GUMBO

TRANSTOBAC (PVT) LTD HC 12534/12
versus
EKINA KARIMATSENGA

TRANSTOBAC (PVT) LTD HC 12999/12
versus
ROBSON PEPUKAI

TRANSTOBAC (PVT) LTD HC 12543/12
versus
SPIWE CHANGUCHINO

TRANSTOBAC (PVT) LTD HC 13022/12
versus
SOLOMON VELAVELILA

TRANSTOBAC (PVT) LTD HC 13011/12
versus
W. CHIWAWA

TRANSTOBAC (PVT) LTD HC 12537/12
versus
LOVEMORE MUZUWA

TRANSTOBAC (PVT) LTD HC 12540/12
versus
WILLARD CHIKAKA

TRANSTOBAC (PVT) LTD HC 13001/12
versus
JOHANESS UMFANA

TRANSTOBAC (PVT) LTD HC 10916/12
versus
STUART MUTIZWA

TRANSTOBAC (PVT) LTD HC 11347/12
versus
FORD KACHIKOPA

TRANSTOBAC (PVT) LTD HC 12586/12
versus
TAKUNDWA GWANGWADZA

TRANSTOBAC (PVT) LTD HC 13007/12
versus
TAWENGWA MAMVURA

TRANSTOBAC (PVT) LTD HC 13016/12
versus
MILTON KAPITA

TRANSTOBAC (PVT) LTD HC 12997/12
versus
DANIEL NYAMUWE

TRANSTOBAC (PVT) LTD HC 13021/12
versus
ERIAH CHIRENDA

TRANSTOBAC (PVT) LTD HC 13009/12
versus
WILSON SIGAUKE

TRANSTOBAC (PVT) LTD HC 13004/12
versus
BLESSING ZIENDA

TRANSTOBAC (PVT) LTD HC 12583/12
versus
ATHANAS MUTARIRANO

TRANSTOBAC (PVT) LTD HC 12531/12
versus
GOLDEN CHEMUDONDO

TRANSTOBAC (PVT) LTD HC 12581/12
versus
EDIAS MASOCHA

TRANSTOBAC (PVT) LTD HC 11342/12
versus
JAMES MANYIKA

TRANSTOBAC (PVT) LTD HC 13014/12
versus
MUKOTSIWA

TRANSTOBAC (PVT) LTD HC 10921/12
versus
CHIPO MHARADZE

TRANSTOBAC (PVT) LTD HC 11340/12
versus
DADIRAYI MUCHENA

TRANSTOBAC (PVT) LTD HC 11351/12
versus
AMADIAS MANYERE

TRANSTOBAC (PVT) LTD HC 11341/12
versus
B. MUSINIWA

TRANSTOBAC (PVT) LTD HC 12996/12
versus
NHAMO KAITANO

TRANSTOBAC (PVT) LTD HC 10917/12
versus
KENNETH CHAGONDA

TRANSTOBAC (PVT) LTD HC 12533/12
versus
KREDIAS CHIKAVA

TRANSTOBAC (PVT) LTD HC 12584/12
versus
SAMUEL SIMANGO

TRANSTOBAC (PVT) LTD HC 12530/12
versus
TENNYSON MURAMBIWA

TRANSTOBAC (PVT) LTD HC 13002/12
versus
ROBSON MUSHAPAIDZE

TRANSTOBAC (PVT) LTD HC 13010/12
versus
O. MASAKA

TRANSTOBAC (PVT) LTD HC 13023/12
versus
ELSON MAPENDUKA

TRANSTOBAC (PVT) LTD HC 12582/12
versus
STEPHEN MUDZAMIRI

TRANSTOBAC (PVT) LTD HC 10918/12
versus
AUSTIN MADZIVIRE

TRANSTOBAC (PVT) LTD HC 12538/12
versus
JOHNFANI DAVID MOSES

TRANSTOBAC (PVT) LTD HC 12585/12
versus
SARAH MUKUTE

TRANSTOBAC (PVT) LTD HC 11336/12
versus
GIDEON SABURI

TRANSTOBAC (PVT) LTD HC 13003/12
versus
FREDERICK NEVER

TRANSTOBAC (PVT) LTD HC 13013/12
versus
RABSAC CHEMHERE

TRANSTOBAC (PVT) LTD HC 13008/12
versus
CALISTO MURAMBATSVINA

TRANSTOBAC (PVT) LTD HC 12998/12
versus
PETER CHINUNGU

TRANSTOBAC (PVT) LTD HC 10923/12
versus
CHANETSA MAJURU

TRANSTOBAC (PVT) LTD HC 11343/12
versus
OBERT MUKUTI

TRANSTOBAC (PVT) LTD HC 11352/12
versus
NIXON ZINGE

TRANSTOBAC (PVT) LTD HC 11353/12
versus
NHAMO SVETO

TRANSTOBAC (PVT) LTD HC 11348/12
versus
PETER MUNZEIWA

TRANSTOBAC (PVT) LTD HC 12542/12
versus
ERICK TIMBURWA

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE 19 & 20 March, 13 & 16 May, 24 & 25 July,
21, 25 & 27 August and 29 September 2014 and 20 May 2015.

Civil Trial

F. Nyamayaro, for the plaintiff
Ms S. Takawira, for the defendants

ZHOU J: This judgment is in respect of sixty-one matters in which different summonses were issued by the same plaintiff against the sixty-one defendants cited in those summonses. While the proceedings were instituted on behalf of the plaintiff by the same firm of attorneys the defendants were at some point represented by different firms. The matters were consolidated for the purpose of the trial, as the issues between the parties are essentially the same. At the time of the trial all the defendants were represented by the same legal

practitioner. The facts which underlie the dispute between the parties may be outlined as follows:

The plaintiff is the registered owner of an immovable property which is described in the Certificate of Registered Title as a "Certain Piece of Land Situate in the District of Salisbury Called The Remainder of Stand 14906 Salisbury Township, Measuring 34 8592 Hectares". The immovable property houses an industrial complex as well as a residential compound (hereinafter referred to as the "Transtobac compound") which was constructed for use by the plaintiff's employees many years ago. The defendants are in occupation of the residential houses. The occupants of the houses fall into four categories. The first category is that of employees of the plaintiff. The second category is that of former employees of the plaintiff. The third group is of dependants or relatives of former employees of the plaintiff. The fourth and last class is that of persons who are neither employees nor former employees nor dependants or relatives of such employees. Those are persons who were allocated the houses for lease.

In the sixty-one summonses issued the plaintiff seeks an order for the eviction of the defendants from the residential dwellings, together with arrear rentals in different amounts, interests on those amounts and costs of suit. All the defendants resist the ejectment and the other claims on the ground that they entered into agreements in terms of which they purchased the residential dwellings from the plaintiff. The defendants aver that in terms of the alleged agreements they were to pay the purchase prices for the houses over a period of twenty-five years calculated from 1980. They therefore had until 2005 to pay the full purchase price after which they became the owners of the houses. One of the defendants, C. Makiwa, made a counterclaim for the house which he occupies to be transferred to him. The basis of the counterclaim is that the defendants entered into a lease-to-buy agreement with the plaintiff in terms of which they were entitled to take transfer of the properties after a period of twenty-five years as referred to above. His claim is that the period of twenty-five years ended in 2005 after which he became entitled to take transfer of the rights, title and interest in House No. 76 Hillside Road Extension, Msasa, Harare. That is the housing unit which he purchased from the plaintiff in terms of the rent-to-buy agreement.

Five issues were referred to trial in terms of a joint pre-trial conference minute signed by the parties' legal practitioners. These are set out as follows:

1. What was the contract between the parties, was it a lease agreement or an agreement of sale?

2. What were the terms of either of the agreements?
3. Has any party breached the terms of such agreements?
4. If yes, what are the consequences of such breach?
5. Whether defendants should pay costs of suit.

In the summonses and declarations the plaintiff alleged that the defendants occupied the houses in terms of lease agreements concluded with it. The defendants were obliged to pay monthly rent. The amounts of the rent differed depending on the size of the house occupied. The plaintiff led evidence from three witnesses, LIoyd Mukewa, Furanai Chikwariro and Spencer Musungate. LIoyd Mukewa is employed by the plaintiff as a manager. His evidence was that the plaintiff is the owner of the immovable property in terms of the Certificate of Registered Title referred to above. The property is located in an industrial area in Masasa, Harare. There is an industrial complex which is being leased by the plaintiff to a tenant. The houses which the defendants occupy were originally built for use by the plaintiff's employees. Altogether there are four hundred tenants who occupy the houses. The defendants occupy the houses as tenants of the plaintiff. The witness produced some written lease agreements which were signed in 2006. All the five copies produced were for a period of five months from 5 April 2006 to 5 September 2006, with a provision that the leases would continue beyond that last date and would be subject to termination on notice of two calendar months being given by either of the parties. The witness produced receipts showing payments made by the defendants and the other tenants to the plaintiff. The receipts record the payments as representing "rent". The witness disputed that the houses were sold to the defendants. In cross-examination he stated that the plaintiff submitted an application to the local authority for a subdivision permit in order to separate the industrial complex from the residential area of the property. That permit has not been granted. The application was made in 2003. He stated that all the defendants stopped paying rent for the houses which they occupy in June 2011. That is what prompted the plaintiff to institute the proceedings for their ejectment and payment of outstanding rentals.

Furanai Chikwariro testified that he was employed by the plaintiff from 1974 to 1976. In 1976 he left his employment but returned to work after independence in May 1980. He retired in 1997 but left members of his family occupying the house in the compound which had been allocated to him. He stated that the members of his family were evicted from the house by the plaintiff when he stopped paying rent. The witness stated that during the period of his employment, before and after independence, the employees would pay rent. The

money was deducted from his salary. After his retirement his children would make the payments at the offices of the plaintiff. He denied that the houses were sold to the employees. At the time that he gave evidence he stated that he was seventy-five years old.

The last witness for the plaintiff, Spencer Musungate has resided at the compound since the time of his birth. His father was an employee of the plaintiff. Most of the evidence of this witness related to what he was told by his parents. No reliance will be placed upon that evidence as he has no personal knowledge of that information. He was thirty-nine years old at the time that he gave his evidence. His father was retrenched from employment in 1994 and was subsequently evicted from the house which he occupied. Following the retrenchment of employees in 1994 most of the houses became vacant. The witness stated that the plaintiff then offered the houses for lease to persons who were not employed by it. He testified that when his father was retrenched the plaintiff offered him employment in the same year, 1994. He was allocated a house which he described as "No. 11B Single Quarters" which he occupied together with four other persons. In 1995 he was allocated another house which he did not share with other employees of the plaintiff. The rent for that house was deducted from his salary. He left his employment in 1997. He then vacated the house which had been allocated to him, but managed to secure another house in the same compound for which he pays rent to the plaintiff. He stated that during 1996-1997 the residents wanted to purchase the houses in the compound but were advised that they were not available for sale as the compound was located in an industrial area. The plaintiff closed its case after the evidence of Spencer Musungate.

I dismissed an application for absolution from the instance which was made on behalf of the defendants after the plaintiff had closed its case and gave reasons for my decision. The matter accordingly proceeded to the defence case.

The defendants led evidence from Peter Chinungu, Sarah Jumbe, and Alex Maposa who are also defendants. Peter Chinungu, born in 1963, started to reside at the Transtobac compound in 1973. His father was an employee of the plaintiff. The witness himself was employed by the plaintiff in 1992 after the death of his father. He testified that after he was employed he was advised that he was joining the "rent-to-buy scheme" which his father had joined in 1980. The scheme, according to the witness, was available only to those employees who wanted to acquire the houses. His evidence as regards what happened before he was employed was also of no value as he related to what he had been told by his father. He stated that he saw a document which had been signed by the workers' representatives and the

plaintiff's representatives pertaining to the scheme. The witness stated that in 2006 the defendants demanded that the houses be transferred to them as they had paid the full purchase price for them. The plaintiff's representatives advised the defendants to continue to pay their rent while arrangements were being made for subdivision permits to be issued, as the plaintiff needed the money to maintain the roads. He and the other defendants continued to pay rent until July2011 when they stopped the payments. In cross-examination the witness stated that each time the employees' salaries were increased the monthly rent would be reviewed upwards. During cross-examination he stated that he and some of the defendants had signed lease agreements with the plaintiff but that he had been forced to sign the agreement when the plaintiff's representatives locked his house. The lease agreement which he signed had expired. In re-examination he denied ever signing a lease agreement. According to the witness the employees who did not participate in the rent-to-buy scheme continued to pay rent as tenants. In answer to a question from the court he stated that the employees who had elected not to participate in the rent-to-buy scheme were exempted from paying rent to the plaintiff.

Sarah Jumbe gave evidence that she started residing at the Transtobac compound in 1973. At that time the plaintiff company was called Imperial Tobacco Group. According to her the company changed its name to the present name in 1980. She continued to reside at the compound after she got married in 1974. Her evidence was that she was told by her late husband who was also an employee of the plaintiff that money was being deducted from his salary for the purchase of the houses. Her evidence as regards the purchase of the houses at the compound was based on what she was told by her husband. She never saw a document relating to the agreement to purchase the houses. She last paid rent for the three-roomed house which she occupies on 31 July 2011.

Alex Maposa stated that he has been resident at the Transtobac compound since 1974. At that time he was working for a company called Imperial Tobacco Group (ITG). According to him the company changed its name to Transto Rhodesia, and later to Transtobac in 1980. He was the Vice Chairman of the Workers' Committee when the workers engaged the representatives of the plaintiff in order to be allowed to purchase the houses that they occupied. Those who agreed to participate in the rent-to-buy scheme registered their names with the plaintiff. The scheme would run for a period of 25 years. He stated that the terms of the agreement were contained in a document which was signed by one Moses Kapaza representing the workers and Mike Falon on behalf of the plaintiff. The

plaintiff's representatives took possession of the document for safekeeping, according to the witness. In cross-examination he stated that one reason the document was kept by the employer was that the workers' representatives were not in agreement as to who would keep the document. He stated that he stopped paying rent in 2011 after realising that the rent was increasing as the plaintiff was now charging rent per room and not per house. He stated that at one time the workers engaged the services of a firm of legal practitioners who wrote some letters to the plaintiff on their behalf. The witness stated that the plaintiff once advertised the houses at the compound for sale in newspapers. The witness disputed a signature on a lease agreement bearing his name which was produced by the plaintiff. He stated that he never signed a lease agreement in respect of the house which he occupied. He took occupation of that house in or about 1992 or 1993. It is a different house from the one that he was occupying from 1980. In cross-examination the witness stated that he left the plaintiff to go and work for another company known as Casalee in June 1990 because the conditions of service were better at that company.

It seems to me that this matter could be easily disposed of on the basis of the absence of a subdivision permit from the local authority authorising the subdivision of the properties which the defendants claim to be the subject of a lease-to-buy agreement. Section 39 of the Regional, Town and Country Planning Act [*Chapter 29:12*] provides as follows:

> "**39. No subdivision or consolidation without permit**
>
> (1) Subject to subsection (2), no person shall –
> (a) . . .
> (b) Enter into any agreement –
> (i) For the change of ownership of any portion of a property; or
> (ii) . . .
> (iii) . . .
>
> Or
>
> (c) . . .
>
> except in accordance with a permit granted in terms of section *forty*."

There was no subdivision permit in existence in respect of the property on which the Transtobac compound is located at the time of the trial. Such a permit has never been issued. The defendants' witnesses gave evidence that at some point many years after 1980 they were assured that a permit to subdivide would be applied for. As noted above the property is not only located in an industrial area but also houses an industrial complex as well as a residential compound. The houses have no separate title from each other and the industrial complex.

They are just residential units located on one piece of land. The effect of that would be that any purported agreement of sale of the houses would be void *ab initio* for being in contravention of the provisions of the Regional, Town and Country Planning Act cited above. That position of the law is settled. See *X-Trend-A-Home (Pvt) Ltd* v *Hoselaw Investments (Pvt) Ltd* 2000 (2) ZLR 348(S); *Tsamwa* v *Hondo &Ors* 2008 (1) ZLR 401(H) at 405G-409D; *Mikesome Investments (Pvt) Ltd* v *Silcocks Investments (Pvt) Ltd* 2003 (1) ZLR 56(H) at 61 E-H;*Madzivanzira & Ors* v *Dexprint Investments (Pvt) Ltd & Anor* 2002 (2) ZLR 316 (H) at 319 F-G. The above conclusion leaves the defendants with no defence which is valid at law even on their own version of events before it is even tested. On that account alone the defendants have no legal basis to remain in occupation of the plaintiff's houses without paying rent. The Plaintiff is entitled to eject them from the houses.

In order to bring finality to the matters raised in the pleadings, I propose to consider the issues referred to trial based on those pleadings.

The nature of the agreement between the plaintiff and defendants vis-à-vis the houses in question is a contentious issue. The houses belong to the plaintiff by reason of being located on its land. The plaintiff produced proof of its title to the property in the form of the Certificate of Registration of Title. Some copies of written lease agreements were produced to show that the defendants were tenants on the property whose written lease agreements had expired. A copy of a payslip produced in evidence showed that the defendants paid rent to the plaintiff. The monthly rent was deducted from the defendants' salaries. Alex Maposa's payslip for the month of January 1997 shows a deduction of $62.50 for 'rent'. The copies of the receipts which were issued to the defendants and the other employees also recorded the amount received as for 'rent'. The suggestion by the defendants that the deductions were to be appropriated towards the purchase of the houses is not supported by the documentary evidence produced. The amount would have been reflected as for "rent-to-buy" if there was such an agreement. Also, the defendants did not produce a single document or some other proof to support their claim regarding a rent-to-buy scheme. Their witnesses referred to an agreement signed between workers' representatives and representatives of the plaintiff. Copies of that agreement were not produced. The suggestion that all the copies of that agreement were kept by the plaintiff is inherently unconvincing and certainly does not accord with the probabilities. A workers' committee constituted by persons of the calibre of Alex Maposa would not enter into such a serious transaction in the manner suggested by the defendants' witnesses. It is equally improbable that one agreement would be concluded in

respect of all the employees who offered to participate in the alleged rent-to-buy scheme. The plaintiff is a company and would, in all probability have entered into separate agreements with the individual purchasers. Each agreement would need to obviously identify the property being sold, the purchase price as well as the monthly repayments. No evidence was given as regards the purchase price for the houses other than an unsupported assertion that the purchase prices differed depending on the size of the unit being purchased. Alex Maposa testified that the house that he occupied in 1980 is not the one that he occupied as at the date of the trial. According to his evidence, he moved into that house in 1992 or 1993. Yet he claimed that he had purchased that same house in terms of an agreement which, according to him and the other witnesses for the defendants, had been entered into in 1980. It does not make sense that a person would enter into a rent-to-buy agreement in respect of one house only to vacate it some twelve or thirteen years later and take occupation of another property based on the same agreement of sale. Also, Alex Maposa's reason for stopping the payment of rent in 2011 is different from that given by Sarah Jumbe and Peter Chinungu. While these two witnesses suggested that they stopped paying the rent because they realised that the plaintiff was not implementing the rent-to-buy agreement or carrying out the promised subdivision, Maposa's reason was that the rentals were now too high as they were now being charged per room rather than per housing unit.

There are other documents produced by the defendants which weaken the defendants' claim that there was a rent-to-buy agreement between them and the plaintiff. A letter dated 19 August 2003 by the defendants' erstwhile legal practitioners, Honey & Blanckenberg, was addressed to Mr Cotton representing the plaintiff. In that letter the defendants complained about proposed rental increases. They made no claim to being purchasers in terms of the alleged rent-to-buy agreements. Instead, they took the position that they would not be prepared to pay the increased rent. In a subsequent letter dated 25 August 2003 the defendants through their legal practitioners threatened to stop paying rent. Nowhere in that letter is a claim made that the defendants were in the process of acquiring the properties in terms of a scheme put in place in 1980. On 24 March 2004 the defendants' legal practitioners wrote a letter to the plaintiff in response to some advertisements which had been published in a newspaper for the sale of the houses in question. In that letter the defendants never asserted their rights based on the alleged rent-to-buy agreements. Instead, the letter raises other issues such as the absence of authority from the local authority and the fact that the proposed prices were beyond the reach of most of the defendants and were, therefore "extortionate and

completely unreasonable". The positions articulated in the above letters are inconsistent with any claim to have acquired the properties in terms of a rent-to-buy agreement.

From the totality of the evidence placed before the court the defendants are tenants of the plaintiff. They breached their obligations by failing to pay rent. They have been in occupation of the plaintiff's premises for more than three and a half years without paying rent. Whatever the true reasons were for their decision to stop paying rent, it is clear to this court that they were misled by some of the residents of the compound. The plaintiff is entitled to have them ejected from the premises.

As noted above, one of the defendants, C. Makiwa, made a counterclaim for a declaration that he owns the housing unit which he occupied and for an order directing the plaintiff to transfer rights, title and interests in that unit. For the reasons given above, the counterclaim is without merit and must fail.

The plaintiff claimed arrear rentals in respect of each of the defendants in different sums of money. No evidence was, however, led as regards how those amounts are calculated. Only five written lease agreements were produced. They contain different monthly rentals. The lease agreements produced relate to the period between 5 April 2006 and 5 September 2006. The rentals are in Zimbabwe dollars. The receipts which relate to the period after the inception of the multicurrency system show different amounts in United States dollars. No attempt was made in evidence by the plaintiff's witnesses to relate the amounts shown in the receipts to the amounts which are being claimed in respect of arrear rentals. The receipts relate to different months. Some are for 2010 while others are for 2011. Thus while it is common cause that the defendants have not been paying rent since 2011 the quantum of the outstanding rentals should be proved by evidence if any claim for them is to be sustained. That was not done.

In the premises, in respect of the claim for arrear rentals the defendants are absolved from the instance.

As regards costs, there is no reason for a departure from the principle that costs follow the result. In the premises, the costs of suit should be borne by the defendants jointly and severally the one paying the others to be absolved.

In the result, IT IS ORDERED AS FOLLOWS:

1. The defendants and all persons occupying through them shall vacate the housing units which they occupy which are on a Certain Piece of Land Situate in the District of

Salisbury Called the Remainder of Stand 14906 Salisbury Township Measuring 34, 8592 hectares within seven days of this order.

2. In the event that the defendants and any persons occupying through them fail to comply with para 1 hereof the Sheriff be and is hereby authorised to take all steps necessary to remove them from the property and to give vacant possession thereof to the plaintiff.
3. The defendants be and are hereby absolved from the instance in respect of the plaintiff's claims for arrear rentals.
4. The counterclaim by C. Makiwa be and is hereby dismissed.
5. The defendants shall pay the costs of suit jointly and severally the one paying the others to be absolved.

Farai Nyamayaro Law Chambers, plaintiff's legal practitioners
Mugugu & Takawira, defendants' legal practitioners