

SHORAI MAVIS NZARA
and
ARROLA TAKUDZWA TENDAYI IDEHEN
and
AMOSOGE RUDO IDEHEN
and
OSARETIN TANAKA FEMI IDEHEN
versus
CECILIAH KASHUMBA N.O.
and
THE REGISTRAR OF DEEDS
and
MASTER OF THE HIGH COURT
and
TAFIRENYIKA KAMBARAMI

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 22 January 2016; 10 & 24 February 2016

Opposed application

Adv. T. Mpofu, for the applicants
Adv. L. Uriri, with him *Adv. W. Chinamhora*, for the first respondent
G. Mhlanga, for the fourth respondent
No appearance for the second and third respondents

MAFUSIRE J: The facts of this matter were largely common cause. But the dispute was most convoluted. It had several facets.

[a] **Introduction**

The hearing of the matter was happening almost ten years after the proceedings had been instituted. The dispute had begun even earlier - almost sixteen years to the date of this judgment. Along the way there had been some profound developments. Among other things, one of the litigants – one of the main protagonists – had passed on. The property at the centre of the dispute had changed complexion. It had been split in two. Not only that, but it had changed hands several times over. To the original litigants had been added two more. Several

supplementary or answering affidavits had been filed. Some aspects of the dispute had been brought to this court, to the Supreme Court, and to arbitration on no less than seven separate occasions. The matter itself had started off as an opposed application. On the hearing, two years before this judgment, the presiding judge had felt there were disputes of facts that could not be resolved on the papers. The parties had failed to convince him otherwise. The matter had been referred to trial. Before me, there appeared little else by way of facts that would require *viva voce* evidence. The parties readily agreed. By consent I referred the matter back to motion court. However, I would hear it myself. When eventually I did, I reserved judgment.

In this judgment I have had to pack sixteen years of legal wrangling that had too many twists and turns. It was a morass.

[b] **The parties**

The first applicant was the mother of the second, third and fourth applicants [hereafter referred to as “*applicants 2 to 4*”]. Her status in the proceedings was the subject of one of two objections *in limine*. Her *locus standi* was challenged. I reserved judgment. I shall revert to this shortly.

All the applicants sued via one Veronica Nzara [“*Veronica*”]. She was the deponent to the main affidavits. She was the mother of the first applicant and the grandmother of applicants 2 to 4. She had been resident here. At the commencement of the proceedings all the applicants had been resident abroad. There had been a dispute over the authenticity and validity of the powers of attorneys granted by the applicants in favour of Veronica. But this dispute had petered out eventually. Among other things, the applicants had simply submitted fresh powers of attorneys. To be doubly certain, they had flown back into the country in time for the hearing. But the dispute relating to the first applicant’s *locus standi* had lingered on right up to the time of the hearing.

The first respondent [“*Cecilia*” or “*the executrix*”] was the wife of the Late Dzingayi Kashumba [“*the Late Dzingayi*” or “*the deceased*”]. She had been appointed the executrix dative to his estate. The Late Dzingayi was the original purchaser of the original immovable property at the centre of the dispute [“*the original property*”].

The second and third respondents were nominal parties on account of their statutory rights and obligations. The second respondent, the Registrar of Deeds, was a party right from inception. The property was registered in the Deeds Office, an office under his control and

supervision. The third respondent, the Master of this court, had been joined to the proceedings upon the demise of the Late Dzingayi. The Master has an oversight role over estate matters.

The fourth respondent came into the proceedings much later. After the Late Dzingayi's demise, Ceciliah had sold him one of the subdivisions to the original property. By the time of the hearing he had already taken title. It was one of the two deeds the applicants wanted nullified.

[c] **Relief sought**

The applicants seek the cancellation of Deed of Transfer No. 3030/2006, in the name of estate Late Dzingayi, and Deed of Transfer No. 773/2011, in the name of the fourth respondent. At the hearing, the applicants amended their prayer, with no objection, to include a claim for the ejectment from the respective subdivisions occupied by them, of the first and fourth respondents, and anyone else claiming occupation through them.

The first and fourth respondents oppose the claims. Among other things, the first respondent maintains that the first applicant was paid all her dues long back and that therefore she has no basis to seek cancellation, let alone to vindicate.

The simplicity with which the relief sought and the defences proffered were cast belied sixteen years of complex and ferocious legal wrangling.

[d] **Points in limine**

The first respondent said the first applicant had no business being in the proceedings. She might have been the mother of the other applicants. However, that did not constitute such legal interest in the suit as might have clothed her with *locus standi*. At any rate, applicants 2 to 4 were majors. They did not require another major to assist them in their legal suits.

In response, the applicants said in no way could the suit happen without the first applicant. She was at the heart of the dispute. She was the one with the original title to the original property before the illegal subdivisions and the illegal transfers by the deceased. She was the one that had donated the original property to applicants 2 to 4. She had an interest in the efficacy of that donation. It was after that donation that the first respondent had unlawfully taken transfer from applicants 2 to 4.

In my ruling, I find that the first applicant was at the centre of the dispute. She was the one with the original story, not merely as a witness, but actually as a party in her own right.

Over time, the original dispute, like a cancer, had regenerated and mutated into numerous other facets. But neither the passage of time nor that cancerous growth had diminished or even affected its character. The original dispute was whether or not the agreement of sale of the original property had been cancelled, or cancelled properly. The first applicant was the seller. The Late Dzingayi was the buyer. It was the first applicant who maintained that the agreement had been duly cancelled. So I find that the first applicant has a **direct and substantial** interest in the *lis*. That is the test for *locus standi*: see *Zimbabwe Teachers Association & Ors v Minister of Education and Culture*¹.

The first respondent's second point *in limine* was that the applicants' hands were dirty. As such, they were unfit for the audience of the court. On 28 February 2002, this court, per HLATSHWAYO J, as he then was, had barred the first applicant from selling or disposing of that property to any third party without an order from this court. The second respondent, i.e. the Registrar of Deeds, had equally been barred from registering transfer of the original property to any person other than the deceased. However, in defiance of that order, the first applicant had purported to donate the original property to applicants 2 to 4 without a court order. Applicants 2 to 4 had subsequently proceeded to take transfer.

First respondent's second point *in limine* hit a brick wall. The interdict by HLATSHWAYO J was only an interim one. It had been operative only pending the finalisation of some arbitration proceedings then underway. Those arbitration proceedings had been finalised on 17 May 2002. The donation had been on 2 August 2002. The transfer in pursuance thereto had been registered on 31 January 2003. Mr *Uriri*, for the first respondent, readily conceded the point and wisely abandoned the objection.

[e] **The dispute**

The main dispute, as already mentioned, was whether the agreement of sale of the original property between the first applicant, as the seller, and the deceased, as the purchaser, was ever duly cancelled. The applicants said it was. The first respondent said it was not. Within that main dispute were several others.

As time went on there were new developments. They gave birth to new disputes. These included:

¹ 1990 (2) ZLR 48 (HC); also *Deary NO v Acting President & Ors* 1979 RLR 200 (G) and *Molotlegi & Anor v President of Bophuthatswana & Ors* 1989 (3) SA 119 (B)

- the propriety or lawfulness of the Late Dzingayi getting an extension, with the City of Harare – the local authority with jurisdiction over the property – of the expired subdivision permit which had been in the name of the first applicant as the owner and seller of the property;
- the propriety or lawfulness of the Late Dzingayi taking transfer of the original property, not from the first applicant who, because of the donation, no longer had title, but from the applicants 2 to 4 who now had title;
- the propriety or lawfulness of the Late Dzingayi, not only in taking transfer from applicants 2 to 4 whom he had no relationship with, but also in doing so on the basis of a superannuated court order that not only had given him no right to take transfer as such, but also whose main direction, i.e. to pay the balance of the purchase price within 30 days, he had failed to comply with;
- the propriety or lawfulness of the second respondent, the Registrar of Deeds, agreeing to register transfer in favour of the Late Dzingayi, and subsequently, the fourth respondent, in the face of not only pending court proceedings to which he had been cited as a party, but also in the face of specific XN caveats that he himself had noted, or ought to have noted, on the properties at the specific instance and request of the applicants;
- the propriety or lawfulness of Ceceliah selling and transferring one of the subdivisions to the fourth respondent in the face of pending litigation;
- whether or not the fourth respondent was an innocent buyer.

[f] **The facts**

At the hearing in February 2016 there were two properties. The first was Stand 552 Quinington Township of Subdivision A of Subdivision F of Quinington of Borrowdale Estate [hereafter referred to as “*Stand 552*” or “*552*”]. It was 3 999m² in extent. It was registered under Deed of Transfer No. 3030/2006 in the name of the Late Dzingayi. As said already, this Deed was one of two the applicants wanted set aside.

The second property was Stand 553 Quinington Township [“*Stand 553*” or “*553*”]. It was a twin subdivision of Stand 552, except that at 4 002m², it was slightly larger. This property was registered under Deed of Transfer No. 773/2011 in the name of the fourth respondent. It was the second Deed the applicants wanted set aside.

Sixteen years ago, at the start of the dispute, there had been only one property, i.e. the original property. It was known as the Remainder of Subdivision A of Subdivision E of Quinington of Borrowdale Estate. It was 1, 2141 hectares in extent. It had been registered under Deed of Transfer No. 350/2003 in the name of the first applicant.

How the original property became two, and how those two subdivisions came to be registered in names other than that of the first applicant, has been the controversy that has seen the parties being in and out of court more than seven times. I have to deal with the developments in stages.

Phase 1

This phase is May 1999. By a written Deed of Sale [*“the DOS”*] signed by the parties on 11 and 12 May 1999, the first applicant sells the original property to the Late Dzingayi who buys it. The payment of the purchase price is spread over a period of time in excess of seventeen instalments. In the event that the purchaser fails to pay, the seller is entitled to cancel, but upon 14 days’ notice requiring payment. If the DOS is cancelled for reasons of breach, the purchaser forfeits, and the seller keeps as *rouwkoop* [i.e. pre-estimate of damages] any payments already made.

The other significant aspect of the DOS is that the original property is described as two stands, namely Stand 552 and 553 Quinnington Township. But on the ground it is one property. This reality is later to be confirmed by this court when GOWORA J, as she then was, refuses to grant an interdict on the basis that the two purported stands are non-existent in the Deeds Office.

However, by referring to two stands in the DOS, the parties are in agreement that the first applicant is in the process of subdividing the original property into two. She already possesses a conditional subdivision permit. As it panned out, this permit is extended from time to time. The DOS captures this reality. It refers to the two stands as undeveloped pieces of land. It names the sub-division permit that has already been approved by the City of Harare and makes reference to survey diagrams that “... *are being approved by the Surveyor General ...*”

Phase 2

The Late Dzingayi does pay part of the purchase price. However, in this phase he is seen failing, or neglecting, to pay the balance of the purchase price in accordance with the DOS. The first applicant cancels, or purports to cancel, the DOS. Apparently in her endeavour to cancel, she overlooks the provisions of the Contractual Penalties Act, [*Chapter 8:04*]. In terms of it, no cancellation of an instalment sale of land on account of breach where the purchase price is paid over three or more instalments, or by way of a deposit and two or

more instalments, is valid unless the purchaser is given not less than 30 days' notice, or the number of days stipulated in the agreement, whichever is the greater, to rectify such breach.

Phase 3

The Late Dzingayi rejects the first applicant's purported cancellation. He sues. On 9 May 2001, this court, per BARTLETT J, in HC 1 0065/2000, grants the following relief:

- “1. That the purported cancellation of the agreement of sale between Dzingayi Kashumba and Mavis Shorai Nzara be and is hereby declared null and void and set aside.
2. That the purchaser, Mr Dzingayi Kashumba, be and is hereby directed to pay the balance of the purchase price due and outstanding within 30 days of the date of this order.
3. That the Respondent be and is hereby ordered to transfer to Dzingayi Kashumba the properties known as Stands 552 and 553 Quinington Township of Subdivision F of Quinington of Borrowdale Estate measuring in extent 3999 square metres and 4002 square metres respectively by signing all the necessary transfer documents within 10 days of payment of the balance of the purchase price.
4. That in the event of the Respondent failing to comply with the provisions of paragraph 3 hereof that the Deputy Sheriff for Harare be and is hereby authorised and empowered to sign the relevant transfer papers.
5. That the Respondent pays the Applicant's costs of this application.”

There is an immediate major fall-out over this order. The parties read or discern different things into and from it. Despite further subsequent proceedings and further court orders, the major controversy over the order remains unresolved right up to the date of the hearing before me.

Phase 4

In this phase the Late Dzingayi complies, or purports to comply, with the order of BARTLETT J. He tenders, or purports to tender, and indeed does forward, a cheque in an amount which he considers to be the balance of the purchase price under the DOS. The amount of the cheque is \$337 178-77, old Zimbabwean currency.

Immediately there are sharp differences between the parties over this tender and or payment. The first applicant says, firstly, that the payment has been made outside the 30 day period set by the court, and secondly, that it is not the full balance outstanding. She rejects, or purports to reject, the cheque. She returns, or purports to, return it.

On the other hand, the Late Dzingayi is adamant that his payment is within the 30 day deadline and that the amount represents the full balance of the purchase price.

At the hearing before me, there was another dimension to this particular controversy. Despite the purported rejection of the cheque, and despite certain correspondence on behalf of the first applicant suggesting that the cheque had indeed been returned, Mr *Uriri* maintained that the cheque had, in fact, never been returned, and that the applicant had in fact, helped herself to the proceeds.

I must briefly focus on some of the contemporaneous communication regarding this particular cheque dispute. Whether or not this cheque was paid timeously, and whether or not the first applicant in fact returned it, is a matter of fact.

In the founding affidavit, the applicants, speaking through Veronica, stated that the cheque for \$337 178-77 was paid on 5 July 2001. She said that that date was outside the 30 day period. But no supporting documents were tendered to show that it had been paid on 5 July 2001. In the opposing affidavit, the Late Dzingayi insisted that the cheque had in fact been released by his lawyers before the 30 days were up and had been receipted by the first applicant's then lawyers, Munangati & Associates [*"Munangati"*] well within that 30 day period. He produced two documents as proof. The first was a copy of a delivery note from his lawyers. It showed a list of items delivered by his lawyers on 31 May 2001. One of those items was the cheque. It had been signed for by Munangati on the same day. The second document was a receipt for the cheque payment. It had been issued by Munangati on 4 June 2001.

In the answering affidavit Veronica, despite Late Dzingayi's proof aforesaid, was adamant that the cheque for \$337 178-77 had been received on 5 July 2001 and that therefore it had been paid outside the 30 day period. She made reference to an Annexure VN 17. But there was no such annexure attached.

Whichever method of computation one uses, the 4th of June 2001 was within 30 days of 9 May 2001, the date of the order by BARTLETT J. At the hearing, Mr *Mpofu*, for the applicants, was in obvious difficulty on this point. His position was, with all due respect, at best equivocal, but otherwise incoherent. In one breath he would argue that the 4th of June 2001 was outside the 9th of May 2001. In another, he would argue that Munangati might have receipted the cheque on 4 June 2001 but that it was known that the cheque necessarily had to be cleared. As such, it would take some days before the cheque proceeds would be available

to the applicants. He said the cheque proceeds had only become available to the first applicant on 5 July 2001, thus outside the 30 day period.

But obviously, the applicants could not rely on that argument. Receipt of the Late Dzingayi's cheque by Munangati on 31 May 2001 was payment within 30 days of the order of BARTLETT J on 9 May 2001.

Strangely, that was not the end of this particular side-show. Given that this matter had commenced by notice of motion, given the developments that had occurred over time, and given the fact that at some stage it had been referred to trial but had subsequently gone back to motion court, I had purposefully given the parties, both during the case management meeting in Chambers, and at the end of the hearing, a kind of open cheque to submit as much further information or argument on any aspect of the matter as they might feel could assist, and I would consider such information if it reached me before I concluded my judgment. The parties obliged. As I began writing this judgment, I received further information that sort of threw open again the question of when exactly the Late Dzingayi had submitted that cheque, and when exactly Munangati had received or receipted it.

Among the documents that I subsequently received was one that I found rather curious. It was a letter from Late Dzingayi's then legal practitioners, Wintertons, to Munangati. It made reference to an enclosed cheque for the same \$337 178-77 amount. The letter was dated 2 July 2001. It had been received and signed for by Munangati on 5 July 2001. This was intriguing. But I shall revert to the intrigue later on.

Phase 5

Some aspects of the controversy whether or not the Late Dzingayi has paid the balance of the purchase price spills back to this court, back to BARTLETT J. The specific aspect on this controversy is whether or not the Late Dzingayi paid the balance of the purchase price in full, not whether or not he had paid it within the 30 days deadline.

There are other fresh disputes the court is seized with. The conditional permit over the original property to create the two subdivisions had since expired. The first applicant is now refusing to proceed with the agreement of sale, her argument being that the DOS will be in violation of the Regional, Town and Country Planning Act, [*Chapter 29:12*]. It is trite that in terms of this Act, an agreement to, among other things, sell a subdivision of a piece of land without a subdivision permit is invalid and therefore unenforceable.

On 11 December 2001 BARTLETT J issues his second order. The issue whether or not the Late Dzingayi has paid the balance of the purchase price in full in terms of the earlier order on 9 May 2001 is referred to arbitration. The issue whether or not the agreement has become unenforceable, by reason of want of compliance with the Regional, Town and Country Planning Act, is withdrawn.

Phase 6

The arbitrator finds that the Late Dzingai has not paid the balance of the purchase price in full. He determines the amount by which it had been underpaid. The arbitration outcome is the source of new further wrangles.

Phase 7

On the basis of the arbitrator's award, the first applicant takes the view that the Late Dzingayi, not having paid the balance of the purchase price in full, the DOS has definitely been cancelled. On 4 June 2002, about two weeks after the arbitration award, her new lawyers, Mudambanuki & Associates [*Mudambanuki*'] write to Wintertons, Late Dzingai's lawyers, drawing attention to the award, and stating, categorically, that the agreement has now been cancelled. From then on events unfold quickly and the matter completely goes off rail.

Phase 8

Late Dzingayi does not accept the first applicant's purported cancellation. A month later his lawyers send over a cheque for \$454 037-93 being, according to them, the balance outstanding, plus accrued interest. Two days later, Mudambanuki reject it. They promise to work out all the other previous payments made by Late Dzingayi in order to refund him. They also advise that the first applicant is no longer interested in the DOS and the subdivision and will now be building on the property.

Five months later, the Late Dzingayi applies for an order condoning his non-compliance with the order of BARTLETT J on 9 May 2001. But he does not pursue this application. It is dismissed for want of prosecution. This is now February 2003.

Another three months later, the Late Dzingai makes yet another application for condonation. But he soon changes lawyers. The new lawyers, Kantor & Immerman

[“*Kantor*”] withdraw this application. They file their own, to make it the third application for condonation in a row.

To this third application for condonation, the first applicant files heads of argument. But they are out of time. So she has been barred. Her new lawyers, Mutamangira & Associates [“*Mutamangira*”] try to argue a technicality. It fails. HUNGWE J writes a judgment stressing that she is barred. No determination is made on the substantive relief of condonation.

The first applicant appeals to the Supreme Court against the order of HUNGWE J. Later on, in June 2006, the parties’ lawyers negotiate. Eventually both the Supreme Court appeal and the main application before this court, i.e. the third application for condonation, are withdrawn. Apparently by this time the Late Dzingayi has already managed, not only to have the City of Harare extend the subdivision permit, but also to get transfer of the twin subdivisions. So before I proceed I have to dwell on the transfers to applicants 2 to 4 and the subsequent ones to Late Dzingayi.

Phase 9

As the Late Dzingayi’s third application for condonation is pending, and as her own appeal to the Supreme Court regarding the bar is pending, the first applicant’s ex-husband, the father to applicants 2 to 4, sells, or purports to sell, the original property to a third party. The Late Dzingayi gets wind of it. He brings an urgent chamber application to bar the sale. He fails. That is when GOWORA J says there is nothing to bar if the subdivisions are non-existent in the Deeds Office. But apparently this sale fizzles out anyway. Among other things, the prospective buyer backs off.

It seems it is in this phase that both parties now decide to take matters in their own hands, aided and abetted by their lawyers. They resort to naked guerrilla tactics.

The judgment by HUNGWE J, confirming the first applicant’s bar, is in June 2005. A day after that judgment is handed down, the Late Dzingayi submits a cheque for \$773 445-72 which his lawyers, Kantor, claim is the balance of the purchase price, plus accrued interest. The following day Mutamangira reject the cheque. In their covering letter they say they have returned it. But at the hearing Mr *Uriri* maintained that contrary to that claim the cheque had in fact been banked and the Late Dzingayi’s bank account debited. He drew attention to a contemporaneous bank statement.

But whilst the Late Dzingayi is making application after application for condonation, it turns out that on 31 January 2003, i.e. two years before the judgement of HUNGWE J, the first applicant has already transferred the property to applicants 2 to 4. The *causa* in the Deed of Transfer is stated as donation *inter vivos*. In their declaration for stamp duty purposes the applicants 2 to 4 say the donation had been made on 2 August 2002. None of this has been disclosed to anyone.

In the same month that HUNGWE J is confirming the first applicant's bar, the Late Dzingayi is seeking an extension of the subdivision permit from the City of Harare. He goes through a firm of land surveyors. Amongst the reasons the land surveyors, in their letter dated 22 June 2005, give to the City of Harare for the delay in completing the subdivision is:

“... because there was a legal battle between the owner and the purchasers of the said stands. However, this has since been resolved through the courts. The courts have directed that the said properties be transferred to the purchasers.”

The land surveyors must be referring to the order of BARTLETT J on 9 May 2001, more than 4 years earlier. This, of course, is misleading. None of the legal battles has been resolved. Among other things, the Late Dzingayi is still to get condonation. Furthermore, the order of 9 May 2001 was conditional. His applications for condonation are confirmation of that condition. Still further, at this stage the original property has already changed hands. It is now owned by applicants 2 to 4, not the first applicant in whose name the subdivision permit had initially been granted.

The withdrawal of both the Late Dzingayi's third application for condonation and that of the first applicant's appeal to the Supreme Court is made at the instance of Kantor. Their letter to Mutamangira, containing the withdrawal proposal, is dated 2 June 2006. It reads:

“We refer to the above matter and advise that our client is considering withdrawing his opposition in this matter² as well as the High Court matter. What would be your client's attitude towards costs in the event of withdrawal?”

The letter is completely lacking in candour. It does not disclose that on 3 May 2006 the Late Dzingayi has already taken transfer of the original property. It does not disclose that the Late Dzingayi had applied for an extension of the subdivision permit in his own right and

² That is, opposition to the Supreme Court appeal by the first applicant under SC173/05

had got it. It does not disclose that the subdivision creating the two Stands 552 and 553 had already gone through. Thus, by now the Late Dzingai has the twin subdivisions registered in his name under Deeds 3030/2006 and 3031/2006. Those transfers had been registered by Kantor. The power of attorney to pass transfer had been signed by the deputy sheriff for Harare. His authority for doing so was allegedly the Order of BARTLETT J, some five years ago.

Before the registration of Stands 552 and 553 into Late Dzingayi's name, Kantor apply to the Registrar of Deeds for a replacement deed. Someone from their firm submits an affidavit in support of that application. The affidavit is misleading in material respects. Among other things, it claims that the holding deed for the twin subdivisions has been brought forward for transfer in terms of *inter alia* High Court Order HC 10065/2000. But the affidavit conceals the true and obvious purport of that order. Quite apart from the problem of Late Dzingayi not having paid within the 30 days, he manages to take transfer from applicants 2 to 4 in whom the property is now registered. Yet the order court referred to the first applicant.

So obviously, with title to the original property tucked in his bag, the Late Dzingayi can now afford to be magnanimous. He offers to withdraw his application for condonation and nudges the first applicant to withdraw her appeal from the Supreme Court.

Phase 10

This is the phase in which the applicants institute these proceedings. The application is filed in September 2006. A month before, the applicants write to the Registrar of Deeds complaining about the wrongful manner the Late Dzingayi, assisted by Kantor, had taken transfer. In that letter, Mutamangira request that an XN caveat be placed on the property. The Registrar of Deeds obliges, but warns that this kind of caveat is only temporary. He says a court order is needed for a permanent interdict.

In their request for an XN caveat, Mutamangira specifically cite Deed of Transfer No. 3030/06. This of course, is for Stand 552. They do not cite Deed of Transfer No. 3031/06, the one for Stand 553. It was a loophole through which, it seems to me, the fourth respondent is able, later on, to take transfer from the estate Late Dzingayi, now represented by Ceciliah, the executrix.

Late Dzingayi passes on in April 2007. In February 2011 Ceciliah sells Stand 553 to the fourth respondent. The third respondent, the Master, approves the sale. On 17 February

2011 the fourth respondent takes transfer under Deed No. 773/2011, the second one the applicants want nullified. Cecilia swears to an affidavit and says that there are no objections to the proposed transfer. The applicants blast this apparent falsehood. They say Cecilia knew, not only as the executrix, but also as the wife of the Late Dzingayi, of the raging battles over the property. They also blast the Registrar of Deeds. He could not possibly have transferred the property with so many impediments in place, in the form of not only the caveats that he himself had registered, but also in the face of the court documents that ought to have been filed in the registers of the two stands, given that he had been cited as a party right from inception.

Even though in their request for an XN caveat Mutamangira have only cited Deed of Transfer No. 3030/06 for Stand 552, it transpires that on 21 September 2007, another law firm, V.S. Nyangulu & Associates, who had registered the donation transfer from the first applicant to applicants 2 to 4, had also written to the Registrar of Deeds, separately from, and independently of, Mutamangira, expressly requesting that XN caveats be placed on the two Deeds of Transfer Nos. 3030/2006 and 3031/2006 and advising that the applicants wished to take legal action to have them cancelled. However, there is no indication whether or not the Registrar of Deeds has received these letters, let alone, acted on them.

In September and October 2007 there is some kind of dance-around between Mutamangira and Kantor over yet some other cheque payment. It appears Kantor are the first to forward the cheque to Mutamangira. Mutamangira reject and return it. Kantor send it back saying they no longer have the mandate to receive it back. They suggest that Mutamangira may send it directly to their client. Mutamangira say they will, but stress that the cheque stands rejected.

The amount on, and the purpose for this latest cheque was not clarified. The pleadings did not talk about it. The story about it emerged from the consolidated bundle of documents filed just before the hearing.

The fourth respondent said he was an innocent purchaser. The property had been advertised in the press. He had done a due diligence. Among other things, he had checked with the Master. He had been assured that Cecilia had the requisite authority to sell. At any rate, the first and final distribution account in the estate Late Dzingayi had been published in the Government Gazette as a matter of course. The property would have been listed. The applicants had raised no objection.

The fourth respondent also said that he had checked the deeds registry. The property had been free from any encumbrances. He had gone through a firm of legal practitioners for both the agreement of sale and the registration of transfer.

The applicants argued that the fourth respondent was far from being an innocent buyer. They said he must have been aware of the raging battles. Among other things, all the pleadings had been filed with the Deeds Office. This office is a public office. If he had checked he would have been alerted to the court cases.

That was the case before me. I now proceed to deal with such of the issues as will, in my view, dispose of the matter.

[g] **Determination of the issues**

[i] **Whether the DOS was ever cancelled**

Mr Mpofo argued that after the order by BARTLETT J on 9 May 2001 that *inter alia* gave the Late Dzingayi 30 days within which to pay the balance of the purchase price, the DOS stood cancelled since, as it subsequently transpired, Late Dzingayi had in fact not paid within that period. Not only that, *Mr Mpofo* submitted, but on 17 May 2002 the arbitrator, having ruled that the balance had not been paid in full, the first applicant had unequivocally cancelled the DOS. *Mr Mpofo* relied on the letter from Mutamangira to Wintertons on 4 June 2002. It read:

“We trust by now you are in receipt of the Arbitrator’s award. The award was in favour of our client and we now treat this matter as finalised. The agreement of sale is therefore cancelled.”

Mr Mpofo said the need to give a notice of cancellation had been obviated by the 30 day clause in the court order. I disagree. In my view, that was the Achilles tendon in the applicants’ case. The court order, in giving the Late Dzingayi 30 days within which to pay the balance of the purchase price, did not say that if he failed or neglected to do so the DOS would stand cancelled. *Mr Mpofo* said this was implied. I disagree for three reasons: one, the DOS required a positive act of cancellation if the purchaser should fail or neglect to pay the balance of the purchase price in accordance with its provisions. It required 14 days’ notice. The Contractual Penalties Act overrides such short notices and provides for 30 days. It is not clear whether or not before the fights started the first applicant had ever given any period of

notice. But this is immaterial. On 9 May 2001 this court, in the very first paragraph of its order, declared the purported cancellation null and void. So with that ruling the legal position was that the DOS had never been cancelled.

Two, the remedy proffered by the order of 9 May 2001 was, in my view, inchoate. It was preliminary or intermediary. I construe it to mean that if the Late Dzingayi failed or neglected to pay the balance of the purchase price within the stipulated 30 days, then the first applicant could cancel the DOS as required by its terms, as read with the Contractual Penalties Act. The Act merely gives the period of notice. It is not the notice itself. The court order was not the notice itself. If Late Dzingayi paid within the 30 days, the first applicant would be obliged to transfer to him within 10 days of the payment, failing which the deputy sheriff would step into her shoes and sign the transfer papers.

Courts do not make contracts for the parties. They interpret and enforce them. Whatever form of cancellation the first applicant had given previously was blotted out by the court order. So by giving the Late Dzingai 30 days within which to pay, the court was merely reading into the DOS the period of cancellation as set out in the Contractual Penalties Act, seeing that the first applicant had not complied with it, and that, in any event, the period in the DOS was unenforceable.

Three, the Late Dzingayi did in fact make payment within the 30 day period. I resolve in his favour the controversy whether his cheque for \$337 187 -77 was received by Munangati on 31 May 2001 [receipting it on 4 June 2001] or on 5 July 2001. I do so for four reasons. Firstly, it seems when the parties came back to court for the second time on that same issue the applicant's actual grievance was that the Late Dzingayi's payment had been inadequate, not that it had been made out of time. That, in my view, explains why in his second order on 11 December 2001 BARTLETT J phrased it thus:

“2 The issue whether the purchase price was paid in full in terms of the Court order of the 9th of May , 2001, be and is hereby referred to arbitration ... whose decision shall be final.”

Secondly, when the parties went for arbitration, it must have been common cause that the cheque for \$337 178-77 had been paid on 31 May 2001. That should explain why in his award the arbitrator used the 31st of May 2001 as the cut-off date for payments made by the Late Dzingayi from the inception of the DOS. In the course of his award the arbitrator said:

“The amount tendered on 31st May 2001 was \$337 187-77 which is less than the amount then due by \$166 394-25.”

Thirdly, at the hearing, Mr *Mpofu* all but admitted that the cheque for \$337 187-77 had been received by Munangati on 31 May 2001 who had receipted it on 4 June 2001. His argument was that owing to the required clearance period, the proceeds of the cheque had become available to the first applicant only on 5 July 2001. But that would not detract from the fact that it had been paid within the 30 day period.

I am conscious of the fact that the first applicant was subsequently vindicated by the arbitrator. He ruled that the Late Dzingayi had, in fact, not paid the balance of the purchase price in full by the expiry of the 30 day deadline. However, in my view, this finding merely entitled the first applicant to either cancel the DOS in accordance with its provisions, as read with the Contractual Penalties Act, or to pursue the outstanding amount. Apparently, the first applicant chose to cancel. But as I have said already, and as she had done before, she once again botched the procedure.

If the DOS was never cancelled, what then was the effect? This leads me to the next issue, namely the conduct of the Late Dzingayi in unilaterally and, in his own name, seeking an extension of the subdivision permit and thereafter taking transfer on the basis of the order of 9 May 2001.

[ii] Whether the extension of the subdivision permit and the subsequent registration of transfer in the name of Late Dzingayi were lawful.

I have already indicated that the letter by the land surveyors to the City of Harare seeking an extension of the subdivision permit was misleading. Furthermore, it carefully avoided mentioning whose agent they had been when they made that application.

The issue whether or not, apart from the seller or owner of a piece of land, any other interested party, such as a purchaser, can legitimately apply for a subdivision permit, or an extension thereof, in respect of the land that he might be interested in, was not properly argued before me. The applicants accused the Late Dzingayi of fraud, and the City of Harare of collusion. I understand that it was largely on account of these accusations that the matter had initially been referred to trial. However, before me the parties were agreed that this issue was really immaterial. I agree. Therefore I express no view. It was water under the bridge. The subdivision had become a *fait accompli*. At any rate, the main aspect relating to the

extension of the subdivision permit was whether or not the DOS had become illegal in terms of the Regional, Town and Country Planning Act if that permit had expired. That aspect was expressly withdrawn before BARTLETT J in December 2001.

That leaves the question of the legality of the transfers of the original property to the Late Dzingayi on 3 May 2006. I have no doubt that they were fraught with illegality. Firstly, the order of this court on 9 May 2001 did not grant the Late Dzingayi, *carte blanche*, the right to transfer. The right had been conditional upon him paying the balance of the purchase price. Not only that, but that payment had to be made within 30 days of the date of that order. Even though he might have made some payment within the 30 day period, as it later turned out, that payment had been inadequate. So when Kantor made the representation before the Registrar of Deeds, they knew very well that the Late Dzingayi had not paid the balance of the purchase price within the 30 day period. Among other things, they were still seeking condonation for their client to pay outside the 30 days. That is the one aspect.

The second aspect is that Kantor, in the face of uncompleted litigation, could not just abandon that, retrieve from their drawers the old order of 9 May 2001 and, five years later, present it before the Registrar of Deeds as the authority for their client to take transfer of the property without warning the applicants. To their knowledge, that order referred to the first applicant. To their knowledge, she no longer had title. At the very least, and in my view, they would have had to seek rectification of that order. But they could not. They did not want to let the applicants know. They then ended up filing an affidavit with the Registrar of Deeds that was misleading for its lack of candour. In the end, transfer of the original property was taken from persons other than the first applicant to whom the order of 9 May 2001 related.

The third aspect was not canvassed. It is that by the time the Late Dzingayi purported to take transfer, the original property had become *res litigiosa*. An object that is *res litigiosa* may not be disposed of after *litis contestatio*: see *Ex parte Deputy Sheriff, Salisbury: In re Doyle v Salgo*³; *Zimbabwe Banking Corporation Ltd & Anor v Shiku Distributors [Pvt] Ltd & Ors*⁴ and *Chenga v Chikadaya & Ors*⁵.

Quite apart from the fact that transfer was taken, purportedly from the first applicant who by that time had already lost dominion by reason of her own donation transfer to applicants 2 to 4, the mere fact that the property had become *res litigiosa*, even if such

³ 1957 [3] SA 740 [SR]

⁴ 2000 [2] ZLR 11 [H], at p 18F

⁵ SC 7/13

donation transfer had not occurred, would have militated against the transfer to Late Dzingayi because the first applicant's rights in the property had become diminished or qualified: see *Doyle, (supra)*, at p 742. The Registrar of Deeds should not have passed transfer, especially where he had been cited as a party in all the cases that had been brought to court, or were still pending.

The fourth aspect was whether on 3 May 2006, when the Late Dzingayi purported to take transfer, the order of BARTLETT J on 9 May 2001 had become superannuated. To Mr *Mpofu's* argument that an order of court becomes superannuated after 3 years, Mr *Mhlanga*, for the fourth respondent, submitted in his heads of argument that in terms of Order 49 r 448 of the Rules of this court judgments become superannuated only after 6 years. Obviously, he was unaware that r 448 had been repealed in 1992 by Statutory Instrument 80/2000⁶.

Mr *Uriri* argued that the order had not become superannuated and that the repeal of r 448 could not have taken away pre-existing rights.

With all due respect, the arguments by all counsel on the question of superannuation of judgments were not very illuminating. Apart from citing a repealed rule, I failed to appreciate how on 3 May 2006 the Late Dzingayi could still cling to a right the source of which had been repealed in March 2000. With that repeal the right had been extinguished. On the other hand, the argument that a judgment becomes superannuated after 3 years was just a bald statement which was not backed up by any authority.

In terms of Part IV of the Prescription Act [*Chapter 8: 11*], a judgment debt becomes extinct by prescription after the lapse of 30 years. But prescription is irrelevant here. In the context of court judgments, prescription and superannuation may be cognates. But they are different concepts. Once it has run its course, prescription constitutes an absolute bar to claim. On the other hand, superannuation refers to something that may just be too old to be used. It still can be revived and be used.

The Roman-Dutch law provided for the superannuation of judgments. In South Africa, when the case of *Segal & Anor v Segil*⁷ was determined, the Rules of Court still provided for the superannuation of judgments. The period was 3 years. The court noted that the superannuation rule, as incorporated in the Uniform Rules, was a restatement of the common-law. The rule had been received in South Africa and had consistently been applied.

⁶ S 11[b] of the High Court [Amendment] Rules, 2000 [No.35] published on 24 March 2000

⁷ 1992 [3] SA 136 [C]

However, in that case, one judge differed sharply with the other two. She held that the superannuation rule, a mere provision of the Rules Board, was *ultra vires* their Prescription Act. Her argument was that the Prescription Act is superior legislation, it being one made by the Legislature. In South Africa the period of prescription of judgments in terms of their Prescription Act is also 30 years. So to the dissenting judge, the Rule providing for superannuation should be unenforceable.

In the course of their judgments, the judges noted that in Holland, in the 16th century, there had developed, alongside prescription, a rule of practice whereby the executability of a judgment debt would lapse after a certain period⁸. According to that rule, the judgment became superannuated and execution could not be carried into effect unless the judgment was revived.

The *ratio* of the superannuation rule was to prevent a judgment debtor being taken by surprise when the plaintiff suddenly executed some years later. Thus, the rule was introduced for the benefit of a debtor, who, however, could waive it.

In *Segal* all the three judges urged the scrapping off of the superannuation rule. Their reason was that it no longer served any useful purpose. It was felt that the instances in which revival of judgments would be refused would be rare. It was argued that there was no justification for putting a judgment creditor to the expense and trouble of an application for revival. Among other things, a debtor who had been served with a summons and was aware of the outstanding judgment and who, probably because of his absence or impecuniosity execution had been omitted within the 3 years, could hardly complain that the timing of the execution had not met his financial convenience.

Before its repeal, and some inconsequential amendment in 1992, r 448 read as follows:

“Superannuation of judgment and revival

448. A judgment shall become superannuated after six years from the date thereof but may be revived by the court on notice of motion to the debtor issued for the purpose but in such case no new proof of debt shall be required. In the case of a judgment for specific payments the six years shall run in respect of any payment from the due date thereof.”

⁸ At p 141

In *Segal* the court said the South African rule was a re-statement of the Roman-Dutch common-law position. By virtue of s 192 of the new Zimbabwean Constitution⁹, as read with s 89 of the old Constitution¹⁰, Roman-Dutch is also our common-law. The period of superannuation was 3 years. Therefore, when r 448 was repealed, it means the common law position revived. That should explain the continued existence in our Rules of court of another rule on superannuation. This is r 324 in Order 40. It provides that no writ of execution shall be issued after the judgment has become superannuated, unless that judgment has first been revived.

Therefore, in my view, despite the repeal of r 448, the superannuation rule is still part of our law.

However, that the superannuation rule may still be part of our law does not completely conclude the particular problem in this matter. It was not argued whether the reference to superannuation applied *carte blanche* to all judgments, or only to those judgments sounding in money the enforcement of which is by means of a writ of execution, or judgments for the delivery up of goods or premises, or judgments for ejectment. In terms of r 324 a writ of execution is issued for the purpose of execution of any judgment for the payment of money, the delivery up of goods or premises, or for ejectment.

In my view, the superannuation rule may not apply to all judgments *carte blanche*. For example, in matrimonial proceedings, once an order of annulment, or decree of divorce, is granted, the result is that the putative or pre-subsisting marriage immediately terminates. Even if the ex-spouses do not immediately uplift the certificate of annulment, or order of divorce, there can be no question of the marriage registrar considering the annulment or divorce superannuated should the ex-spouses visit him 3 or more years later to have their former marriage deleted from his register.

However, I conceive of no reason why the superannuation rule should not apply to a judgment for the transfer of an immovable property which involves the delivery up or transmission of real rights from one person to another. In my view, a judgment directing the transfer of an immovable property becomes superannuated after the lapse of 3 years in

⁹ Section 192 of the new Constitution says: “**Law to be administered:** The law to be administered by the courts of Zimbabwe is the law that was in force on the effective date, as subsequently modified.”

¹⁰ Section 89 of the old Constitution said: “**Law to be administered:** Subject to the provisions of any law for the time being in force in Zimbabwe relating to the application of African customary law, the law to be administered by the Supreme Court, the High Court and by any courts in Zimbabwe subordinate to the High Court shall be the law in force in the Colony of the Cape of Good Hope on 10th June, 1891, as modified by subsequent legislation having in Zimbabwe the force of law.”

accordance with the common law. That being the case, *in casu* the transfer of the original property to the Late Dzingayi, on 3 May 2006, on the basis of the order of this court on 9 May 2001, was incompetent because that order had become superannuated.

[iii] Whether the transfer to fourth respondent was valid

The fourth respondent took transfer of Stand 553 on 17 February 2011. That transfer was invalid for the same reasons that the transfer to the Late Dzingayi on 3 May 2006 was invalid.

In addition, the transfer to the fourth respondent was invalid on the ground that Ceciliah, even in her capacity as the executrix to the estate Late Dzingayi, had no title to pass. Furthermore, Stand 553 was *res litigiosa*. This case had already been instituted and was now pending determination.

To facilitate the transfer, Ceciliah filed an affidavit with the Registrar of Deeds in terms of s 73 of the Deeds Registries Act, [*Chapter 20: 05*]. The affidavit is required in a transfer of an immovable property by an executor. It must state, among other things, that no objection to such transfer exists. Ceciliah was aware, or ought to have been aware, of such objection. The court pleadings in this and the other matters had been filed with the Deeds Office.

Although an XN caveat is an administrative encumbrance noted on the title of an immovable property and is therefore not a legal impediment to the registration of transfer, in practice, the Registrar of Deeds does not register transfer of a property that is encumbered with such a caveat without reference to the party at whose instance it would have been noted. In this case, V.S. Nyangulu & Associates had requested the noting of XN caveats on both Stand 552 and 553. In registering transfer in favour of the fourth respondent in spite of those caveats, and in spite of the numerous pleadings filed with him, the Registrar of Deeds was either wilfully complicit or culpably negligent.

The applicants argued that the fourth respondent was not an innocent buyer and that he must have been aware of the legal fights concerning the properties when he bought Stand 553. However, there has been no evidence of such knowledge. On the contrary, the fourth respondent made the point that the first and final distribution account of the estate Late Dzingayi had been published in the Government Gazette. The properties had been listed. The applicants had filed no objections with the Master or anybody else. So it is probable that the fourth respondent had not been aware.

However, despite his innocence, the transfer to the fourth respondent cannot stand for the reason that Ceciliah had had no capacity to transfer.

[iv] Whether the Late Dzingayi paid the balance of the purchase price

The applicants said the Late Dzingayi never paid the balance of the purchase price. They said all the payments that he tried to make after the order of 9 May 2001, including that cheque for \$337 178-77, had been rejected and returned to him. On the other hand, Ceciliah maintained that none of the cheques was returned.

Thus there appeared to exist a dispute of fact. But I will take a robust approach to resolve it. I believe there is sufficient information on the record to enable me to do so. The approach on apparent disputes of facts has been set out in a number of cases. In *Zimbabwe Bonded Fibreglass[Pvt] Ltd v Peech*¹¹ GUBBAY JA, as he then was, stated as follows¹²:

“It is, I think, well established that in motion proceedings a court should endeavour to resolve the dispute raised in affidavits without the hearing of evidence. It must take a robust and common sense approach and not an over fastidious one; always provided that it is convinced that there is no real possibility of any resolution doing an injustice to the other party concerned.”

See also *Room Hire Co [Pty] Ltd v Jeppe Street Mansions [Pty] Ltd*¹³; *Masukusa v National Foods Ltd & Anor*¹⁴ and *Van Niekerk v Van Niekerk & Ors*¹⁵.

In the present case, the evidence tendered on this point was in the form of contemporaneous correspondence between the parties’ respective legal practitioners. It showed that each time the Late Dzingayi sent a cheque, it would be returned. The first applicant was steadfast in her view that she had cancelled the DOS. Whether, this view was right or wrong is not the point. The point is that on a balance of probabilities, all the cheques were returned. A trial in a civil case involves making findings or inferences of facts by balancing probabilities and selecting a conclusion which seems to be the more natural or plausible one from several other conceivable ones, even though that conclusion may not be

¹¹ 1987 [2] ZLR 338 [SC]

¹² At p 339

¹³ 1949 [3] SA 1155 [T], at p 1165

¹⁴ 1983 [1] ZLR 232 [HC]

¹⁵ 1999 [1] ZLR 421 [SC]

the only reasonable one: see *Joel Melamed and Hurwitz v Cleverland Estates (Pty) Ltd*; *Joel Melamed and Hurwitz v Vorner Investments (Pty) Ltd*¹⁶

The first of the first applicant's cheques was for \$337 178-17 in May or June 2001 which was the Late Dzingayi's attempt to comply with the 30 day deadline in the court order of 9 May 2001. Munangati returned it. The next cheque was for \$454 037-93 in July 2002, after the arbitrator had ruled that there had still been a balance outstanding. Mudambanuki returned it. The next one was for \$773 443-72 in June 2005 soon after the judgment of Hungwe J confirming the bar against the first applicant's notice of opposition to Late Dzingayi's third application for condonation. Mutamangira returned it. In paragraph 14 of his opposing affidavit the Late Dzingayi acknowledged that Mutamangira rejected this cheque but claimed that it had not been returned. He said he later learnt that his bank account had been debited with the amount of the cheque.

The amounts on all these cheques represented the Late Dzingayi's unilateral calculation of the balance of the purchase price and the interest accrued. But in spite of his assertion regarding the last cheque for \$773 443-72, I still consider that the probabilities favour a finding that that the cheque had also been rejected and returned.

I do not believe that having been so resolute in her belief all along that the DOS had been cancelled the first applicant would then suddenly veer so late in the day and accept such payment.

Secondly, Late Dzingayi's evidence that the cheque had not been returned was his lawyer's letter and his own bank account showing a debit of the amount when it was withdrawn. That was hardly proof that the cheque had not been returned subsequently.

Thirdly, and as explained previously, as late as September and October 2007 the parties were still haggling over some other cheque payment the amount of which was not disclosed. Mutamangira, on Kantor's suggestion, finally returned it directly to the Late Dzingayi. Thus, if the cheque for \$773 443-72 had been tendered as being the full balance of the purchase price, as had been the case with the previous cheques that had been returned, there would have been no reason why in September or October 2007, more than two years after his account had been debited, the Late Dzingayi would still be sending yet another cheque. But even then, this last cheque was still returned.

¹⁶ 1984 (3) SA 155

Therefore, it is my finding that apart from the payments that he made prior to his cheque for \$337 178-17, the Late Dzingai did not pay the final balance of the purchase price and the interest accrued.

[h] **Synthesis**

It is nearly an impossible situation now. It has been sixteen years of protracted wrangling. In my disposal of the matter, I have to avoid a half-baked solution that will leave the parties thirsting for more answers. Except perhaps, for the third respondent, the Master, and to an extent the fourth respondent, none of the other parties are free from blame.

I have to defer to the proverbial wisdom of Judge Jackal in African folklore. One day as he is wandering about, he chances upon Leopard and Man in mortal argument. Leopard wants to eat Man. Man cannot understand Leopard's morbid ingratitude, insatiable greed and profound selfishness. Both Leopard and Man implore Judge Jackal to be judge over their cause. Judge Jackal agrees. He soon establishes the facts. Man had been on about his duties in the forest. He had come across Leopard languishing in a trap or snare. Leopard had been seven days and seven nights trapped like that. He had been seven days and seven nights without food or drink. Feeling sorry for him Man had freed Leopard. Thereupon Leopard had jumped upon Man wanting to eat him.

That is the case before Judge Jackal. But he pretends not to have fully comprehended the circumstances. He orders an inspection *in loco* and a return to the status *quo ante*. Leopard is impatient. He is hungry. He wants to have his meal but grumpy Judge Jackal is dragging the case. Judge Jackal will not be hurried. The status *quo ante* has to be restored. To expedite the proceedings Leopard leaps back into the trap. Judge Jackal quickly snaps it shut. He then turns to Man and asks him what exactly he had been doing when he had chanced upon Leopard in the trap. "I was walking along this footpath here", Man replies. "Then do carry on walking along this footpath here and do never come back!" The case ends.

My findings in this judgment throw the parties back to the position that they were in on 9 May 2001 when BARTLETT J issued his first order. This means that the DOS had not been cancelled; the Late Dzingayi had not paid the balance of the purchase price, and no transfer of the original property to the Late Dzingayi had yet taken place, let alone the subsequent transfer of Stand 533 to the fourth respondent.

In my view, the donation transfer from the first applicant to applicants 2 to 4 was of no real consequence, even though at that stage the property had become *res litigiosa*. Among other things, the property had remained with the applicants. It had remained in the family.

I have to dispose of this matter in a manner that brings closure to the endless disputes, or failing that, a manner that considerably narrows down any further argument. It is time litigation comes to an end.

In a nutshell, in my judgment, the applicants must, in principle, get back their properties. The first respondent must be given the chance to pay off what her husband, or the estate that she represents, ought to have paid, but failed, or neglected to pay, or was prevented from paying. If the first respondent pays, she keeps “her” property. The transfers stand. In this regard, the fourth respondent’s fate is tied up with that of the first respondent. However, if after being given the chance to pay, the first respondent fails or neglects to do so, then the DOS, by a mere declaration by the applicants, irrevocably and finally gets cancelled. The current title deeds get set aside. The first and fourth respondents must surrender the properties. The issues of compensation for improvements, if any, would have to be the subject of debate or judgment another day.

So here is how I dispose of the matter, my order of costs reflecting the attitude that I have taken of the conduct of the parties:

[i] **DISPOSITION**

1 It is hereby declared as follows:

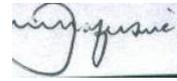
- 1.1 That the Deed of Sale between the first applicant and the Late Dzingayi Kashumba [hereafter referred to as “*the deceased*”] on 11 and 12 May 1999 in respect of the property described as Stands 552 and 553 Quinington Township of Subdivision A of Subdivision F of Borrowdale Estate, measuring 3 999 square metres and 4002 square metres respectively [hereafter referred to as “*the original property*”], was never cancelled.
- 1.2 That the balance of the purchase price due and owing by the deceased to the first applicant as at 9 May 2001, in respect of the Deed of Sale aforesaid, was never paid.

- 1.3 That the transfer on 3 May 2006 in favour of the deceased of the two properties known as certain pieces of land situate in the District of Salisbury, respectively measuring 4 001 and 4002 square metres, and respectively called Stands 552 and 553, Quinington Township of Subdivision A of Subdivision F of Quinington of Borrowdale Estate, respectively on Deeds of Transfer Nos. 3030/2006 and 3031/2006 [hereafter referred to as “*Stands 552 and 553 Quinington Township*”], was unlawful and therefore invalid.
 - 1.4 That the subsequent transfer of Stand 553 Quinington Township on Deed of Transfer No. 773/2011 on 17 February 2011 in favour of Tafirenyika Kambarami, was unlawful and therefore invalid.
 - 1.5 That the balance of the purchase price outstanding, due and owing by the deceased to the first applicant as at 9 May 2001 in respect of the sale and purchase of the original property was in the sum of ZW\$503 573-02, being the total of ZW\$337 178-77, reflected on the deceased’s cheque subsequently rejected by the first applicant, and ZW\$166 394-25 subsequently found by the arbitrator to have been the shortfall on the cheque amount aforesaid.
- 2 Notwithstanding the declaration of invalidity of the transfers referred to in paragraph 1 above, but subject to paragraphs 3, 4, 5 and 6 below, if the first respondent pays, or causes to be paid, to the applicants, or one or other of them, the one receiving payment, the others to be bound, the equivalent of the balance of the purchase price referred to in paragraph 1.5 above in the functional currency current at the time of payment, together with interest thereon as envisaged herein, then the title deeds in respect to which the transfers aforesaid have been declared unlawful and invalid shall not be set aside, and the declarations of invalidity herein shall automatically lapse.
- 3 Unless the equivalent amount of the balance of the purchase price referred to in paragraph 1.5 above is otherwise agreed to in writing within thirty [30] calendar days of the date of this order, or such other extended period not exceeding a further thirty [30] calendar days as they may agree to in writing, the parties shall engage the

Commercial Arbitration Centre in Harare solely to determine the equivalent amount of that balance, in any of the functional currencies, and the decision of the arbitrator shall be final and binding.

- 4 The first respondent shall pay the equivalent amount of the balance of the purchase price referred to above within thirty [30] days of the date the amount is ascertained, either by agreement between the parties, or through determination by arbitration as contemplated by paragraph 3 above, together with interest thereon at the prescribed rate from the date of such agreement or determination, whatever the case might be, to the date of payment.
- 5 In the event that the first respondent fails or neglects to pay as envisaged in this order, then the applicants, or one or other of them, shall *ipso facto*, forthwith have the right to declare in writing, the immediate and automatic cancellation of the Deed of Sale aforesaid and, without prejudice to any other rights they might have at law, shall be entitled to keep as *rouwkoop* all such monies as they might have received as purchase price for the original property.
- 6 Subject to any rights to compensation for improvements that they might have, in the event that the title deeds mentioned herein have been cancelled as aforesaid, the first and fourth respondents, and all those claiming occupation through them, shall, within thirty [30] calendar days of the date of such cancellation, vacate the respective properties occupied by them, failing which the Sheriff for Zimbabwe, or his lawful deputy or assistant deputies, or such of his agents as might be duly authorised by him, shall be empowered, authorised and directed to evict the aforesaid respondents and all those claiming occupation through them.
- 7 Save and except for the fourth respondent whose costs of suit shall be borne by the first and second respondents, jointly and severally, the one paying the other to be absolved, each party shall bear its own costs.

24 February 2016

A handwritten signature in black ink, appearing to read 'M. Mutamangira', written over a horizontal line.

Mutamangira & Associates, applicants' legal practitioners
Kantor & Immerman, first respondent's legal practitioners
Chihambakwe, Mutizwa & Partners, fourth respondent's legal practitioners