ZUVA PETROLEUM ONE (PRIVATE) LIMITED
versus
SOLTA TRADING GROUP (PRIVATE) LIMITED
and
CITY OF HARARE
and
REGISTRAR OF DEEDS
and
PICGLOW TRADING (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
MTSHIYA J
HARARE, 1 March 2016 and 27 April 2016

Opposed Matter

T Mpofu, for the applicant
E Matinenga, for the 1st respondent
O Shava, for the 2nd respondent
F Mahere, for the 4th respondent

MTSHIYA J: On 9 April 2015, this court issued the following provisional order:

"**TERMS OF FINAL ORDER SOUGHT**

1. The right of first refusal granted to applicant in terms of a lease agreement signed by applicant and first respondent on 29 September 1998 to purchase an immovable property called stand 10232 of Highfield Township, Harare otherwise known as Machipisa Service Station is valid and subsisting.
2. First respondent shall not sell or otherwise transfer the immovable property without allowing applicant to exercise its rights of first refusal and second and third respondent shall not authorise or register such transfer.
3. The first respondent shall pay costs of suit.

INTERIM RELIEF GRANTED

1. The first respondent is interdicted from transferring the immovable property called stand 10232 Highfield Township, otherwise known as Machipisa Service Station to any party other than applicant.
2. The second and third respondents are interdicted from authorising or registering any transferring any further of the immovable property to a party other than applicant."

The current proceedings are for the confirmation or discharge of the above order.

The background to this case is can briefly be stated as follows.

A property known as Stand Number 10232 Highfield Township, Harare (the property) is registered in the name of the second respondent, namely The City of Harare. In September

1998 the first respondent (Solta Trading Group (Private Limited) acquired the property from the said second respondent. However, transfer has not yet been passed to the first respondent.

On 29 September 1998, in order to purchase the property from the second respondent, the first respondent obtained a loan of ZW$4 500-00 from the applicant (the loan agreement).

On the basis of rights attaching to the acquisition of the property by the first respondent, on 29 September 1998, the first respondent leased the property to the applicant (then known and trading as BP Zimbabwe (Private) Limited).

The record, through a certificate of change of name, shows that on 11 May 2011 the said BP Zimbabwe (Private) Limited changed its name to Zuva Petroleum One (Private) Limited (the applicant herein).

The lease agreement dated 29 September 1998, was given a commencement date of 1 July 1998. It was originally expiring on 31 July 2024 but was, however, extended to expire on 31 July 2054.

For the determination of this case it is important to note that paragraphs 11.2 -11.4 of the applicant's founding affidavit provides as follows:

> "11.2 Applicant would construct a service station and ancillary facilities on the property at its own costs.
> 11.3 The loaned amount and the costs of developing the property would constitute the rentals for the duration of the lease.
> 11.4 Applicant would have a right of first refusal to purchase the property if first respondent received a bona fide offer to purchase from a third party."

The above averments confirm the contents of clauses 3, 4 and 9 in the lease Agreement. However, it is the interpretation and implementation of para 11.4 above and clause 9 in the lease agreement that led to the dispute between the parties. The said clause 9, in the lease agreement provides, in full, as follows:

> "9. <u>FIRST REFUSAL</u>
>
> 9.1 In the vent that the Owner receives a bona fide offer to purchase the Property from a third party, the Owner shall by notification to such effect in writing to BP, first offer the property for sale to BP at a purchase price to be agreed between the parties hereto, or failing such Agreement, at a market-related price determined by a qualified valuer, sitting as an expert and not an arbitrator, upon appointment by the Charman for the time being of the Zimbabwe Institute of Valuers or the successor in title to that organisation from time to time.
>
> 9.2 BP will be entitled, within thirty (30) days of the purchase price contemplated in Clause 9.1 above having been determined, to accept such offer whereupon the parties hereby irrevocably undertaken to do all acts and sign all such documents

as may be necessary in order to give full force and effect to the agreement which will be created by such offer and acceptance.

9.3 In the event that BP does not accept the offer within the time period specified in Clause 9.2 above, then the Owner shall be entitled to sell the property to the third party first contemplated upon terms and conditions no more favourable to that party than those offered to BP."

On 18 Maarch 2015, in an urgent application, which resulted in the granting of the provisional order quoted at p 1 of this judgment, the applicant averred:

"15 On 16 March 2015 applicant obtained information that first respondent is concluding an agreement of sale with an unnamed third party for the property and that the parties are arranging to effect simultaneous transfers from second respondent to first respondent and to the third party. Applicant has been informed that the purchase price has already been paid into a Trust account of the conveyancers and transfer will be passed anytime soon.

20. I submit that the matter is urgent. Applicant will lose the right to exercise its pre-emptive rights if the sale goes through and the property is transferred to the third party. Applicant will also lose the significant investment which it made on the property in terms of the loan and the development of the service station. I also fear that first respondent may not have fully disclosed the circumstances of the matter to the purchaser and in particular the fact that applicant holds lease rights over the property till July 2054.

21. First respondent's conduct in seeking to sell and transfer the property is a repudiation of the agreements between the parties and in particular the applicant's pre-emptive rights. This Honourable Court is requested to declare that the applicant's pre-emptive rights over the property are valid and subsisting."

The above averments explain the reason behind the provisional order that is now before me for confirmation or discharge.

The first, second and fourth respondents are opposed to the confirmation of provisional order and, to that end they filed opposing affidavits. The first respondent's opposing affidavit was only filed on 16 July 2015. The affidavit was filed out of time. However, the other parties consented to its filing. I accepted the late filing.

Initially, when the provisional order was granted, the fourth respondent was not a party to the proceedings. The fourth respondent was, however, joined to the proceedings through a court order on 24 June 2015 following the intervention of the second respondent. The second respondent had, in its opposing affidavit filed on 8 April 2015, alleged that:

"6.5 Such relief is no longer available to the applicant. As it turns out, the property has already been sold to another party. The 1st respondent has already ceded its rights to a third party. In other words what the applicant seeks to stop has already happened.

6.6 On 25 November 2014, the first respondent sold the disputed property to a company called Pickglow Trading (Pvt) Ltd. A copy of the agreement of sale is attached marked 'A'."

It is important to note that the first respondent had never informed the applicant about the said sale to Pickglow Trading (Pvt) Ltd.(i.e. the fourth respondent). This was the first time the applicant was being told. It was being informed of the developments by the second and not the first respondent.

Similar averments from the second respondent were again made on 6 May 2015. It said :

"7. In short, there is a third party who purchased the property which the applicant and the first respondent are fighting over. A copy of the agreement of sale is attached marked 'B'.

8. The 1st respondent held personal rights in the property by virtue of having bought it from the 2nd respondent. Transfer had however not yet passed to the 1st respondent due to certain conditions that were still to be met. Therefore the 1st respondent was still holding personal rights in the property, as real rights have not yet been transferred.

9. It is these personal rights which the 1st respondent has sold to the third party, Pickglow Trading (Pvt) Ltd. Not only has it sold its personal rights, it has also ceded such rights. A copy of such cession is attached marked 'C'.

Apart from whatever other disputes might have arisen earlier between the applicant and the first respondent, it was clear to all during the hearing that issue(s) for determination herein were solely anchored on the interpretation and implementation of Clause 9 of the lease agreement. The applicant prays for confirmation of its rights contractually created in the lease agreement through clause 9.

I am indebted to counsel for all parties for the helpful submissions they presented.

I agree that the starting point is the legal interpretation of the "right of first refusal" as provided for in clause 9 of the lease agreement.

In *Eastview Gardens Residents Association* v *Zimbabwe Reinsurance Corp Ltd and Ors* 2002 (2) ZLR 543 (S) 'right of first refusal' was defined as follows:

> "A right of first refusal or pre-emption is created when in an agreement one party (the grantor) undertakes that when he decides to sell his property he will give the other party (the guarantee) the opportunity of refusing or buying the property at a price equal to that offered by another person. The guarantor is then under an obligation to do, at the time he sells the property, what he voluntarily bound himself to do, that is, offer the property to the grantee first at a price equal to that offered by a third party or which he is prepared to accept from any other would-be buyer. The grantee acquires the correlative right to have the property offered

to him first so that he can match the price offered by the third party or refuse the offer." [emphasis added]

The above definition differs from clause 9 in the lease agreement in that in the lease agreement there is reference to a 'purchase price to be agreed between the parties', whereas the above definition from the Supreme Court refers to "a price equal to that offered by another person."

The above definition also appears in *Sawyer* v *Chioza & Ors* 1999 (1) ZLR 203 (H) and for the sake of clarity, I feel compelled to quote at length from that judgment where Gwaunza J, as she then was, said:

> "I consider it pertinent at this juncture to establish what is meant by a right of first refusal. In Cooper's Landlord and Tenant the learned author states that the right of first refusal is synonymous with the right of pre-emption. He explains that an agreement between the lessor and the lessee that the latter shall have the first right of purchase, should the grantor wish to sell, gives rise to an enforceable right. To be binding, such an agreement, being an agreement of pre-emption, must contain a price which is certain or ascertainable. He continues at p 141:
>
> > 'A price is ascertainable where the grantee has the right at the price for which the grantor is prepared to sell to a third party. In effect, the price is then fixed by a third party… An agreement of pre-emption does not compel the grantor to sell it only compels him to give the grantee the right to purchase if he (the grantor) proposes to sell.'
>
> Kerr The Law of Sale and Lease 2 adds the following:
>
> > "And consequently it too prevents him (the grantor) from selling to third persons during the existence of the right."
> >
> > Cooper Landlord and Tenant at p 143 aptly summarises the grantor's obligations in relation to the exercise by the grantee of his right of pre-emption:
> >
> > "An agreement of pre-emption contains both a negative and a positive element. The negative element is that the grantor is restrained from selling to a third party; the positive element is once he is prepared to sell he is under a 'positive obligation' to sell to the grantee."
>
> In my view, the above captions describe the essential elements of the right of pre-emption (or first refusal) in terms that are both clear and unambiguous. My reading of these requirements is that the following steps must, in that sequence, be followed in the exercise of a right of pre-emption:
>
> (a) An specific third party offers to buy the property at a given price;
> (b) The grantor is prepared to sell at that price; but
> (c) Before accepting the buyer's offer, the grantor reverts to the grantee of the night of pre-emption, informs him of his decision to sell at the price offered by the particular buyer and asks him (grantee) to exercise his right of first refusal.

> Thereafter, the outcome, in terms of who ends up buying the property, depends on the grantee's decision on whether to exercise his right. If he chooses to exercise it, the grantor is obliged to sell the property to the grantee. If the latter chooses not to exercise his right of first refusal, then the property is sold to the third party. The whole arrangement pre-supposes transparency and honest dealing between grantor and grantee."

The above long extract sets out the law relating to the definition and exercise of the right of first refusal. It is very important to note that the process must be clothed with "transparency and honest" between the parties. There should, in my view, be open and full disclosures between the parties until the right is exercised per existing agreement.

It is clear that in *casu*, the parties agreed that the price would become certain or ascertainable upon agreement on same between the parties. Let me, at this stage, hasten to say the price of US$750 000-00 was never placed before the applicant for it to consider same within the thirty days provided for in the agreement.

In order to be properly guided by the law in determining whether or not to confirm the provisional order, it will therefore be necessary to now proceed to see how the applicant and the first respondent sought to execute clause 9 in their lease agreement.

I should also point out that the rights of the fourth respondent are really dependant on how the applicant and the first respondent executed clause 9 of their lease agreement, if at all they executed the clause.

Apart from some clear falsehoods attributable to the first respondent, which falsehoods I will relate to later in this judgment, there is evidence that as at 23 October 2014 the parties had commenced the process of implementing clause 9 of the lease agreement (i.e. implementing the right of first refusal). On that date, the first respondent despatched the following e-mail to the applicant;

> "Subject: Machipisa Service Station
>
> Good day
>
> My apologies for reverting back to you so late. I took some time off from work and secondly, it was also important that I engage fully with the other stakeholders regarding the purchase price of Machipisa service station. Our position is as follows:
>
> 1. The final price that was agreed on was US$800, 000-00 (eight hundred thousand dollars)
> 2. The general sentiment was that it would not be worth our while to sell at below the above-stated price.
> 3. Independent enquiries into the market have indicated that there are parties willing to pay a similar price or more.
> 4. Whilst the valuation of $450, 000-00 may be correct, market prices are currently distorted due to the depressed economy; and we also considered the potential for future developments on the site which was not considered in the valuation

5. We would be willing to negotiate payment by way of instalments.

I shall be pleased to meet with you to discuss this further at a date and time that suits you.

Warm Regards

Felicity Tawengwa
SOLTA TRADING COMPANY (PVT) LTD"

It is important to note that in terms of the above correspondence, the process had already started before that date and further discussions were contemplated. It is also important to note that the e-mail gave a final price of US$800 000-00 as opposed to a price of US$750 000-00 which the first, second and fourth respondents claim was the final purchase price. Furthermore, the counter offer of $450 000-00 was already known to the first respondent and hence the need "to discuss this further at a date and time that suits you."

As already stated, the final purchase price of US$750 000-00 allegedly fixed by the fourth respondent as a third party was never relayed to the applicant for its considerations as the law requires.

On 4 November 2014, the applicant responded to the issue in the following terms:

"We have noted the contents of your correspondence of 23 October 2014 in which you stated that you are interested in selling the site and there are third parties willing to purchase it at US$800 000-00.

In an attempt to reach a final, mutually beneficial, conclusion to our relationship, And without prejudice to our rights in terms of all of the agreements aforementioned and at law, we hereby propose that we proceed as follows:

i. In terms of clause 9 of the Head Lease as detailed above, we will need to agree on a purchase price between ourselves, as we intend exercising our first option to purchase and you hereby formally advised of that.
ii. With a view to agreeing on a price we obtained a valuation of US$450 000-00 from Tunmer Ridley Property Brokers, Valuers and Auctioneers. We believe that this is a fair price and, if agreed, we would be prepared to immediately conlude the sale using the value of $450 000-00, with the said purchase price being set off against the aforementioned US2, 355 000-00 which would be owed by you in the event of early termination of the lease, as well as unpaid rentals in terms of the lease-back.

If we have not heard from you **and** concluded a sale agreement in respect of the site by 11 November 201 we may be forced to take steps to protect our interests.
By copy of this letter the Registrar is requested to place an XN caveat over the above-mentioned property.

Yours faithfully,

ZUVA PETROLEUM (PVT) LTD"

It is clear from the above correspondence that, although as at 23 October 2014, the first respondent was already aware of the applicant's counter-offer of US$450 000-00 it was maintaining an alleged third party price of US$800 000-00 and not US$ 750 000-00.

The parties, as at 4 November 2014, were clearly engaged in discussions aimed at agreeing on a purchase price as envisaged in clause 9 of the lease agreement. The applicant's letter did not spell out a final position. It, as per clause 9, envisaged an agreed price arrived at through a clear process.

Whilst I accept that, generally, in transactions of this nature the ruling or ultimate price is dictated by a third party, there is nothing in law that prevents the parties from proceeding on the basis of a negotiated price. That is what the parties intended to do in *casu*. That, in my view, was perfectly legal. The price from a third party provided a guide to the final purchase price. I therefore do not agree that failure to include the clause "a price equal to that offered by another person" invalidates clause 9. The parties were free to contract as they did. They spelt out the process they would follow to arrive at an agreed purchase price.

Furthermore, if the first respondent were genuine and wanted to proceed in terms of the law, the price of US$750 000-00 ought to have been offered to the applicant for consideration within thirty days. The applicant was entitled to full disclosure with respect to the final offer from the third party, namely the fourth respondent. The procedure envisaged in clauses 9.2 and 9.3 of the lease agreement would only be triggered after full disclosure to the applicant.

Despite indicating the need to be guided by "a *bona fide* offer" from a third party, the parties were willing to proceed: "at a purchase price to be agreed between the parties hereto, or failing such agreement, at a market-related purchase price determined by a qualified valuer, sitting as an expert and not an arbitrator, upon appointment by the Chairman for the time being of the Zimbabwe Institute of Valuers or the successor in title to the organisation from time to time." That was the agreement.

The need for an expert valuer would only arrive upon the parties formally declaring disagreement on the supposed negotiated price. That stage was never reached and until that stage was reached, each party was free to research for an acceptable price. The first respondent says it "made independent enquiries", whilst the applicant also says it "obtained a valuation of US$450 000-00 from Tunmer Ridley property Brokers Valuers and Auctioneers." There is no suggestion on the part of the applicant that it approached the valuers in terms of clause 9. What the applicant did was exactly what the first respondent did

by making "independent enquiries" from unnamed parties. Both parties were endeavouring to establish "a market related purchase price."

The agreed way of reaching an agreed price envisaged a process of negotiations and that process, in my view, is still in progress. The first respondent was therefore, as at 26 March 2015, partly correct and partly confused in saying:

> "2.5 Further, since Applicant did not accept the initial offer from 1st Respondent within the time frame stipulated in Clause 9.2 of Annexure "B1", it has no say whatsoever in the manner 1st Respondent seeks to dispose of the Service Station. The buyers that offered to buy the Service Station in 2014 are still there and no agreement has been made with anyone as yet. Nothing has changed since the parties' last meeting in 2014 because the situation that prevailed at 31 December 2014 is the same situation that is prevailing at this juncture. The Applicant thus has created its own urgency by purporting to be aware of an immediate transfer of the Service Station on 16th march 2015.
>
> 4.5 Applicant claims to have got wind of an imminent sale between 1st respondent and a so called unnamed third party in respect of the Service Station but has not furnished any proof to that effect. If anything, this application is mere speculation because the situation that prevailed in October 2014 when 1st Respondent received offers is the same today. 1st Respondent therefore wonders how and where Applicant has fished that 'information'.
>
> 4.6.2 Even if assuming but not admitting that 1st Respondent is seeking to sell and transfer the service station to a third party, it would be folly for Applicant to allege that it's a repudiation of agreement between the parties because Applicant failed to exercise its right first refusal. The fact that Applicant despite being given the first option to purchase the Service Station refused not agree on a purchase price with the 1st Respondent and subsequently to have a price determined by a Valuer appointed by the Chairman of the Institute of valuers strips Applicant of any right, prima facie or otherwise as it is already in breach of Annexure "B1".

I say partly confused because the first respondent cannot say the applicant has lost its right and at the same time declare that the position remains as it was as at 31 December 2014. The first respondent even goes further to say that no agreement has been reached with anyone. The contradictions, in my view, only serve to confirm lack of transparency and honest on the part of the first respondent.

I must also say that in the event of failure to agree on a price, either party is at liberty to suggest the services of an independent valuer as provided for in Clause 9 of the lease agreement. That obligation does not only lie with the applicant.

Given the fact that as at 4 November 2011, when the applicant formally responded to the first respondent's e-mail of 23 October 2014, the parties were still negotiating, it was imperative that the new purchase price of US$750 000-00 should have been placed before the applicant. If thereafter the applicant had insisted on US$450 000-00, then the parties should

have declared a disagreement and called for an independent valuer as provided for under clause 9. That stage has not yet been reached. It is therefore not correct to say negotiations failed. The only stage where the deal can be declared to have failed between the parties is, when, after failing to reach agreement on the price the parties approach a valuer as envisaged in clause 9, and thereafter the applicant fails to pay the price declared by the valuer.

I earlier on alluded to falsehoods on the part of the first respondent. I have already quoted some of the falsehoods which actually confirm that the parties are yet to finalise discussions.

The paragraphs quoted above from the first respondent's opposing affidavit of 26 March 2015 are confirmed in the second respondent's opposing affidavit of 8 April 2015 to be what they are. They are falsehoods. Whilst the first respondent had, under oath, declared before the court that there was no sale and no buyer, the second respondent came in to say:

> "6.5 Such relief is no longer available to the applicant. As it turned out, the property has already been sold to another party. The 1st respondent has already ceded its rights to a third party. In other words what the applicant seeks to stop has already been happened.
>
> 6.6 On 25 November 2014, the first respondent sold the disputed property to a company called Pickglow Trading (Pvt) Ltd. A copy of the agreement of sale is attached marked 'A'."

Confirming the falsehoods further, the agreement of 25 November 2014 is signed by the same person who deposed to the opposing affidavit placed before this court on 26 March 2015, wherein the sale of the property was denied.

In a totally unacceptable manner, the same person, in yet another opposing affidavit, says:

> "15. 1st Respondent will not stand by contents of this provisional order opposing affidavit filed before this affidavit stating that there was no agreement with any party."

All falsehoods were made under oath and there is no explanation as to why they were ever made. The papers before me clearly show that the first respondent has not been honest with the court. In heads of argument filed on 29 September, 2015, the first respondent, however, made the following correct admission:

> "3. It is clear that there is a right of first refusal as far as it regards to BP Zimbabwe (Pvt) Ltd in the stand. The real issue is does Applicant being Zuva Petroleum One (Pvt) Ltd entitled (sic) to enforce an agreement that was made by and between Solta Trading Group (Pvt) Ltd and BP Zimbabwe (Pvt) Ltd."

The first respondent then proceeds to suggest, without proof, that BP Zimbabwe (Pvt) Ltd sold its entire interests and rights to Masawarara. It alleged that the sell to Masawara was in violation of the lease agreement. In fact, that was the thrust of the first respondent's arguments in the heads of argument filed on 29 September 2015. However, as it turned out, the assertion was incorrect and the issue was never pursued when the matter was argued in court. There is evidence that the applicant legally changed its name from BP Zimbabwe (Pvt) Ltd to Zuva Petroleum One (Pvt) Ltd.

The urgent chamber application which resulted in the provisional order of 9 April 2015 was filed on 18 March 2015 but was only heard on 9 April 2015. I believe that, because there were no issues for determination by the court, the parties had elected to negotiate.

The following confirms the election to negotiate:

On 7 April 2015, having been served with the notice of the hearing of the urgent application, the first respondent's legal practitioners wrote the following letter to the applicant's legal practitioners:

> "**RE: ZUVA PETROLEUM ONE (PVT) LTD VS SOLTA TRADING GROUP (PRIVATE) LIMITED AND ANOTHER: CASE NO. HC 2483/15**
>
> We refer to the above and further to your letter dated 2nd of April 2015.
>
> We do not see the need to set the matter down in light of the fact that parties agreed all issues and what is outstanding are:-
>
> 1. That City of Harare put in writing what it has already told us that purchase price was paid by our client and what is needed is any possible adjustment that has to do with survey of the stand.
>
> 2. That consent papers be drawn as you have already done, forward them in hard copies for any signing by parties
>
> In our view you may proceed to send us the consent paper you have already signed and we impress upon City of Harare lawyers to sign the confirmation so that our client can mandate us to sign the consent document.
>
> We believe there may not be any need to set the matter down on issues already Agreed by parties.
>
> Yours Faithfully
>
> _____
> MUGIYA & MACHARAGA LAW CHAMBERS"

On 26 March 2015, the parties had already appeared before Mathonsi J, who had then made the following endorsement in the record:

> "The matter has been settled between the parties. They will now prepare and file a consent order by close of business tomorrow 27/03/15"

Indeed the record has an unsigned consent order prepared on 31 March 2015. I believe it was the failure by the parties to file the consent order on 27 March 2015 that led to the hearing of 9 April 2015 when the provisional order was then granted. However, on a balance of probabilities, I am certain that the contents of the unsigned consent order, which is part of these papers, reflects the true position of the applicant and the first respondent in this matter. To that end, I think it is important to reproduce the main provisions of that unsigned order.

The unsigned consent order reads, in part, as follows:

"BY CONSENT OF THE PARTIES IT IS ORDERED THAT;

1. the first respondent is interdicted from selling and/or transferring to any party other than applicant the immovable property called Stand 10232 Highfield Township, otherwise known as Machipisa Service Station, held under ceratin piece of land situate in the district of Salisbury, called the remainder of Highfield and held under Deed of Grant number 650/76 dated 6 January 1976, before the applicant has exercised its right of first refusal as provided in this order.

2. The second and third respondents are interdicted from authorising or registering any transfer of the immovable property to any other than applicant if applicant exercises its right of first refusal in terms of this order.

3. The right of first refusal granted to applicant in terms of a lease agreement signed by applicant and first respondent on 29 September 1998 to purchase an immovable property called Stand 10232 of Highfield Township, Harare otherwise known as Machipisa Service Station, is valid and subsisting and is to be exercised in terms of this order.

4. Applicant and first respondent shall cause an independent valuer to be appointed by the Chairman of the Zimbabwe Institute of Valuers for the purposes of determining the fair market value of Stand 10232 Highfield Township, Harare, otherwise known as Macipisa Service Station. The independent valuer shall determine the fair market value of the property and provide the parties with the valuation report within 7 days of being appointed.

5. Applicant shall exercise its right of first refusal and communicate its decision to first respondent within thirty days from date of receipt of the valuation report prepared by the independent valuer whether or not to purchase the property at the value determined by the independent valuer.

6. Applicant shall be entitled to purchase and first respondent shall be obiged to sell Stan 10232 Highfield Township, Harare otherwise known as Machipisa Service Station, at the price determined by the independent valuer appointed in terms of paragraph 4 of this order or such other price as may have been offered by genuine third party. First respondent shall not sell the Stan to any third party at a price lesser than that offered to applicant."

With reference to the above, all the first respondent would say at the hearing was that the document merely reflected the legal practitioners' views and not the position at law. I am unable to accept that because I believe that the first respondent, in addition to being dishonest with the court, has also, unfortunately, misled its Legal Practitioners or purported to disown its instructions to its legal Practitioners.

Faced with the first respondent's proved falsehoods, I find it extremely difficult to accept its story. In the comfort of numerous case authorities on how to deal with an untruthful litigant, I am quick to say the first respondent has no story to tell at all.

In *Leader Tread Zimbabwe (Pvt) td* v *Smith* HH131/03, Ndou J sated as follows:

> "It is trite that is a litigant gives false evidence, his story will be discarded and the same [1949] AC 253 and *South African Law of Evidence* by H Hoffman and DT Zefferet (3ed) at page 472. If a litigant lies about a particular incident, the court may infer that there is something about it which he wishes to hide."

In *casu*, the falsehoods of the first respondent, backed by the second respondent, are intended to hide the truth about the applicant's rights created under clause 9 of the lease agreement.

Given the first respondent's admissions, quoted at p 9 and 10 herein, the contents of the unsigned consent order, the first respondent's proved falsehoods, and the fact that BP Zimbabwe (Pvt) Ltd legally changed its name to Zuva Petroleum One (Private Limited, one wonders why I am writing this judgment when the truth is clear to all parties concerned. The applicant's counsel was, to that end, correct in asking: "Why are we here?"

In view of the foregoing I totally reject the first respondent's case.

I have indicated elsewhere in this judgment that the fourth respondent's case is dependent on how the applicant's right of first refusal was carried out. My rejection of the first respondent's story confirms the applicant's position and the need for the relief sought. Furthermore it is common cause that, apart from the cession confirmed by the second respondent, the property has not yet been transferred to the fourth respondent. In any case, there was no evidence placed before this court to confirm payment of the alleged purchase price ofUS$750 000-00.

Given the tone of the second respondent's opposing affidavits, I have no doubt in my mind that there was an attempt, on the part of the second respondent, to boost the first respondent's case. The opposing affidavits were virtually saying: "Leave the first respondent

and the fourth respondent alone." It was the second respondent who brought in the fourth respondent into this case. However, I am glad that at the hearing of the matter, counsel for the second respondent acknowledged that the arena was for the applicant, first and fourth respondents.

In conclusion, I am satisfied that the applicant's case has merit and therefore agree that its right of first refusal is valid and still subsists. To that end, the applicant has a right to interdict the first respondent from selling the property to any third party until it has exercised its right of first refusal in terms of Clause 9 of the lease agreement.

I therefore order that:

1. The provisional order granted by this court on 9 April 2015, be and is hereby confirmed; and
2. The first and fourth respondents shall pay costs of suit.

Scanlen & Holderness, applicant's legal practitioners
Mugiya & Macharaga Law Chambers, 1st respondent's legal practitioners
Mbidzo Muchadehama & Makoni, 2nd respondent's legal practitioners
Ngarava, Moyo & Chikomo, 4th respondent's legal; practitioners