RUSAPE TOWN COUNCIL
versus
SHADRECK MUSHAMBI
AND
JOSEPH NYATORO

HIGH COURT OF ZIMBABWE
MWAYERA & MUNANGATI-MANONGWA JJ
HARARE, 9 February and 22 February 2017

Civil Trial

M Chiwanza, for the applicant
L Uriri, for the 1st & 2nd respondents

MUNANGATI-MANONGWA J: On 9 February 2017 this court upheld an appeal by Rusape Town Council and gave the following order:

1. The appeal be and is hereby upheld. The decision of the court *a quo* is set aside and substituted as follows:
2. The plaintiff's claim is dismissed.
3. The first respondent shall bear the costs of the appeal.

Parties were duly advised that reasons for such were to follow, these are they.

The background facts of this matter are as follows: The second respondent entered into a lease to buy agreement with the appellant Rusape Town Council in respect of stand 820 Mabvazuwa Township Rusape. It was a term of the lease agreement that the lessee shall not cede or assign this lease or sublet or part with possession of the stand or any part thereof, or alienate or donate or otherwise dispose of the same or cede or assign any right acquired by him without the prior written consent of the lessor or until title to the stand had been granted to him. The second respondent built houses on the stand. Before getting title to the stand the second

respondent went on to sale one of the houses on the stand to the first respondent without written consent of council. Despite there being no formal subdivision, the parties in their agreement of sale self-styled the stand 820A.

Cession seems to have taken place and the first respondent then started to receive bills in his name. It is not clear from the record how the stand which was sold to the first respondent as 820A became known as 820B but this has not been an issue between the parties so I will refer to the stand as 820B as it became known as. The second respondent later purported to cancel the sale and it is common cause that the cession to first respondent was reversed. The first respondent sued council to effect cession of stand 820B back into his name. He got an order by default, and council was forced to implement the cession. The second respondent applied for rescission of judgment and joinder the relief of which was granted. The matter proceeded to trial with all the three parties participating wherein the first respondent sought the cancellation of the cession of stand 820B Mabvazuva from the second respondent into his name and registration of the stand in to his name.

The court *a quo* granted the relief and the appellant appealed on the following grounds.

"GROUNDS OF APPEAL

1. The Trial Court in making a finding that the stand should reflect the name of the 1st Respondent when the facts proved that there was only one stand and that the stand had not been subdivided.

2. The Trial Court erred in finding ordering that there be created a stand in 2nd Respondent's name without any specific details as to the size of the land which has to be in the name of the 2nd Respondent.

3. The Trial Court erred in accepting that Appellant had accepted cession fees from the 1st Respondent and had changed the statements to reflect 1st Respondent's name and had issued 1st Respondent with a Lease as evidence that Appellant had effected a cession to 1st Respondent when in fact all the changes had been effected in compliance with the Default Judgement of the 17th of December 2008.

4. The Trial Court erred in failing to accept the evidence from the Appellant that the letter by Barbra Matsanga accepted as an exhibit had only been written to facilitate the 1st Respondent in obtaining a loan from the bank.

5. The Trial Court erred in failing to take into account that apart from the letter form Barbra Matsanga there was nothing else to show that a cession had been effected. No cession fees had been paid; no Application was submitted to the relevant committee. No statements for rates and other charges were being issued in 1st Respondent's name.

> Wherefore Appellant prays that the judgement be set aside and that the Application be dismissed with costs."

The appellant's submissions zeroed on the fact that, the cession by council of stand 820B to the first respondent was null and void as no such stand existed. Council had not consented to the sale hence the sale was illegal, further in the absence of an approved subdivision there was no stand to talk about. That council had effected the cession was of no consequence as it was in compliance with a court order but such order could not create a stand. The same sentiments were echoed by Mr Dondo for the second respondent.

Mr *Uriri* for the first respondent argued that having effected cession to the first respondent it was not open to the appellant to undo its compliance in the absence of an order of court allowing that conduct. He submitted that the appellant had acquiesced to the order and had not challenged that stand 820B did not exist but rather sent bills and rates in the first respondent's names. This constituted willful compliance hence the appellant was estopped from stating that stand 820B did not exist.

It is pertinent to note that when the court order that was granted by default was served on the appellant, it had to be complied with upon service, and this the appellant did. It is however, not in dispute that the order was then rescinded, this explains why the appellant was then able to participate in trial proceedings to that extent the first respondent's counsel cannot rely on the default judgment.

The decisive question is whether the agreement between the first and second respondent was lawful and whether cession or change of ownership could be effected in terms of that agreement. Clearly the lease agreement between the appellant and the second respondent prohibited alienation of any part or portion of the stand without council approval and no such approval or consent was ever sought nor granted. This then rendered the sale itself unlawful. The other issue becomes whether there was anything to sale (the merx) to the first respondent. Simply put, the question is does stand 820B exist. Evidence on record clearly shows that no subdivision of stand 820 Mabvazuva was ever approved, and this is why the second respondent sought to repudiate the sale. A new stand could only be created from stand 820 by a subdivision. None was done or approved. In that regard no stand came into existence. Section 39 of the Regional Town

and Country Planning Act [*Chapter 29:12*] prohibits entering into an agreement for change of ownership without prior permit. Section 39 (1) of that Act provides:

> "Subject to subsection (2), no person shall-
> (a) subdivide any property; or
> (b) enter into any agreement-
> (i) for the change of ownership of any portion of a property; or
> (ii) for the lease of any portion of a property for a period of ten years or more or for the lifetime of the lessee; or
> (iii) conferring on any person a right to occupy any portion of a property for a period of ten years or more or for his lifetime; or
> (iv) for the renewal of the lease of, or right to occupy, any portion of a property where the aggregate period of such lease or right to occupy, including the period of the renewal, is ten years or more; or
> (c) consolidate two or more properties into one property except in accordance with a permit granted in terms of section forty."

In considering the provisions of this section MCNALLY JA stated in *X-trend-a-home (Pvt Ltd* v *Hose Law Investments (Pvt) Ltd*[1] that:

> "The agreement with which we are concerned is clearly 'an agreement for the change of ownership' of the unsubdivided portion of a stand. What else could it be for? Whether the change of ownership is to take place on signing, or later on an agreed date, or when a suspensive condition is fulfilled, is unimportant. It is the agreement itself which is prohibited. The evil which the statute is designed to prevent is clear. Development planning is the function and duty of planning authorities, and it is undesirable that such authorities should have their hands forced by developers who say 'but I have already entered into conditional agreements, major developments have taken place; large sums of money have been spent. You cant possibly now refuse to confirm my unofficial subdivision or development'".

The law is therefore clearly settled. As the subdivision was not authorised by a permit and the respondent did not have councils' authority to alienate part of the land the agreement was invalid and therefore a nullity.

The argument by Mr *Uriri* that council is estopped cannot be sustained. It was held in *Hunda* v *Murauro*[2] that the fact that the council had gone on to consent to an agreement of cession in compliance with a court order was not a waiver of rights by council. Such act of compliance did not validate the cession at all.

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[1] 2000(2) ZLR 348 at 355 B-C
[2] 1993 (2) ZLR 401

Apart from the absence of consent from council, no stand existed known as 820B. Any transaction to change ownership of an undivided stand being prohibited by the law, the decision by the court a quo authorizing same was a misdirection. The cession itself was a legal nullity at law as there was nothing to cede. As Mr *Dondo* rightly argued, council had nothing to acquise to. Due to the aforegoing, the judgment of the court *a quo* cannot stand. This explains why this court upheld the appeal with costs.

MWAYERA J: agrees:…….

Chiwanza & Partners, applicant's legal practitioners
Chigadza & Associates, 1st respondent's legal practitioners