THE COLD CHAIN ZAMBIA LTD
versus
KURAI JESINA KINGSLEY (NEE NEHONDE)
and
DAVID TATENDA KINGSLEY
and
MANASE & MANASE
and
THE REGISTRAR OF DEEDS
and
THE SHERIFF OF ZIMBABWE

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 18 March 2020 & 10 June 2020

Opposed Application

.Adv L Uriri, for the applicant
Adv T Zhuwarara, for the 1st respondent
Adv T Nyamakuva, for the 2nd respondent
Adv R Goba, for the 3rd respondent

MANGOTA J: The second and first respondents are former husband and wife respectively. They were married under the Marriage Act [*Chapter 5:11*]. They divorced on 28 July 2011. They did so through a court order, HC 4865/07.

As part of their divorce settlement, the second respondent transferred title of their matrimonial home— stand 41A, Avondale West portion of Lot 21, Block D portion of Avondale ["the property"]— into the name of the first respondent. The property is in the District of Salisbury. It is 2359 square meters in extent.

During the subsistence of their marriage, the property was registered in the second respondent's name. It was registered under Deed of Transfer number 8778/2000. The first respondent took title of the property on 28 November 2011. Its new Deed of Transfer is number 5530/11.

The transfer of title of the matrimonial home from the second, to the first, respondent constitutes the applicant's cause of action. It states that the transfer of title was, or is, unlawful. It moves me to cancel Deed of transfer No. 5530/11 and, as a consequence of the cancellation,

Deed of transfer number 8778/2000 would be restored. It chronicles its reasons for the same. These are based on its employer-employee relationship with the second respondent.

It is common cause that the second respondent worked for the applicant. He started his employment in Zimbabwe. He was later transferred to Zambia where its Head Office is situated. He worked as its general manager. It was in the stated capacity that he was accused of misappropriating the applicant's money. He was arrested, prosecuted, convicted and sentenced to a prison term which he served in full after which he returned to Zimbabwe where his family remained resident.

The applicant successfully sued the second respondent in an effort to recover the misappropriated money. The suit, it would appear, took place in Zambia. It registered the order of the court of Zambia with this court on 23 April 2009. The order appears under HC 5116/07.

Following the successful registration of HC 5116/07 with this court, the applicant applied under HC 127/07 for a caveat to be placed against title deed number 8778/2000. Caveat 73/2007 was, therefore, noted on the property which, at the time, was registered in the name of the second respondent. The second caveat, 316/2009, was noted against the property by the fourth respondent when Notice of Attachment and Seizure of the property was served upon him on 18 September 2009.

On 19 August, 2009 the applicant issued a warrant of execution against the second respondent's movable and immovable property. On 24 September 2009 the fifth respondent attached the movable and immovable property of the second respondent.

Confronted with the above-described set of circumstances, the first respondent launched interpleader proceedings. She did so under HC 5520/2009. She claimed title to the property as well as to the movables.

The interpleader proceedings prevented the sale in execution of the movable goods and the immovable property. She sought referral of the matter which related to the attachment and seizure of the property to the Supreme Court pursuant to s 24 (2) of the repealed constitution.

The court dismissed her application for referral. The dismissal notwithstanding, she did not prosecute the interpleader cause. This, therefore, remains alive but apparently neglected.

The applicant's contention is that transfer of title of the property from the second to the first respondent took place when:

(a) two caveats were, and are, extant;

(b) the property which is the subject of its dispute with the first respondent was under judicial attachment– and

(c) the interpleader proceedings which the first respondent filed was, and is still, active.

It submits that the transfer is unlawful and, therefore, void. It also criticises the deed of transfer which transferred title of the property from the second to the first respondent. The deed, it argues, does not have a vesting clause which divests the second respondent of his ownership of the property and vests the same in the first respondent. It couched the draft order which it moves me to grant to it in the following terms:

"IT IS ORDERED THAT:

1. Deed of Transfer number 5530/2011 registered in the first respondent (sic) favour on 28 November 2011 be and is hereby declared to be null and void and, consequently set aside.
2. The 3rd respondent firm of legal practitioners be and are hereby ordered to pay the costs of this application on the scale as between legal practitioner and client."

The first, second and third respondents oppose the application. The fourth and fifth respondents who were cited in their official capacities did not file any notice of opposition. My assumption is that they intend to abide by my decision.

The first and second respondents do not dispute the existence of the two caveats which the applicant placed on the property. They also do not dispute the fact that the property was under judicial attachment when transfer of the same took place. Nor do they dispute that the interpleader proceedings which the first respondent filed have not been finalised. Both of them state that the property was transferred from the second to the first respondent on the strength of HC 4865/07 which the court granted to them on 28 July 2011.

The first respondent asserts that she was not aware of the two caveats which were placed against the property. She accepts, as he does, that title was in the name of the second respondent when the caveats were placed on the property.

The second respondent went to great lengths to prove his innocence concerning his prosecution in Zambia. He states, as she does, that transfer of title from him to her cannot be said to be unlawful when the same was done pursuant to the order which the court granted to them at their divorce.

The third respondent sings from the same hymn book which the first and second respondents are singing from. It states, as they do, that transfer which it effected in terms of HC 4865/07 cannot be said to be unlawful. It insists that the caveats were lawfully uplifted

through the order of this court. It argues on the principle of the balance of convenience in support of the assertion that cancellation of the Deed of transfer which vests ownership of the property in the first respondent would visit the latter with undue hardship. It denies that it acted in a fraudulent manner when it conveyed title of the property from the second to the first respondent. HC 4865/07, it alleges, directed the Sheriff for Zimbabwe to uplift the caveats. All the three respondents move me to dismiss the application with costs.

The case which I am called upon to determine went through many applications as well as counter-applications. The stated fact persuaded the applicant and the first respondent to record a consent order which they placed before CHIWESHE J P on 19 December, 2019. They couched it in the following terms:

> "It is ordered by consent that:
>
> 1. The parties are to proceed to argue the main matter, being case No. HC 2590/16, which was removed from the roll *per* Honourable Justice MANGOTA.
> 2. All previous orders and judgments granted in HC 2590/16 be and are hereby rescinded to enable the parties to argue the main matter.
> 3. All other interlocutory judgments and orders issued in case Nos HC 5488/17 and HC 6740/17 be and are hereby rescinded.
> 4. All interlocutory applications save for the main matter in HC 2590/16 and the provisional order granted in HC 8097/15, on the 10th of September 2015, be and are hereby withdrawn to enable the parties to argue the main matter in case no. HC 2590/16 as referred to in paragraph I herein
> 5. The Registrar of this Honourable Court be and is hereby directed to set down HC 2590/16
> 6. There shall be no order as to costs."

The above order of the Judge President came in handy. It allowed the parties to focus on nothing else but the main application. It dissuaded them from wasting the court's time and their own time on matters which did not resolve the issue for which the applicant filed this application.

The position which the applicant and the first respondent took in the mentioned regard deserves commendation. They are, after all, the main protagonists to the issue of title deed number 5530/2011 in terms of which the property which is the subject of their dispute changed hands from the second to the first respondent.

Before I delve into the merits of the application, it is pertinent for me to consider preliminary matters which the three respondents raised. I mention, in passing, that a preliminary matter which does not dispose of the case is better not raised than raised. It is a futile exercise which does not add value to a case which is before the court. It is a waste of the court's time. It should not, therefore, be allowed to detain the court.

Each of the three respondents raised an *in limine* matter or two. The first respondent's preliminary matter relates to service of the application on the second respondent. The *in limine* matter cannot be said not to have been without merit. The applicant's case was against the second respondent more than it was against the first respondent. The second respondent, it was obvious, had to be heard. He could not be condemned without him having been heard.

The preliminary matter was, however, amicably resolved when the applicant complied with my directive which was to the effect that the application should be served upon the second respondent. The applicant served the application upon the second respondent who filed his notice of opposition to the same as well as his heads. He was, therefore, accorded a hearing in line with the rules of natural justice. The *in limine* matter is, therefore, no longer a live issue. The other issue which the first respondent raised will be considered together with the substance of this application.

The first preliminary matter which the second respondent raised relates to his non-citation in the application. The direction which I gave to the applicant which complied with the same puts that issue to rest. The issue which relates to his arrest, prosecution, conviction and sentence which he raised in his notice of opposition is misplaced. It has little, if any, bearing on the application which is before me. His innocence, or otherwise, in respect of his prosecution and conviction should not detain me at all. It is a matter for another day. It will, therefore, be considered when, as he seems intent to do, he raises that matter at a stage which is convenient to him.

The second respodent returned to Zimbabwe in November 2011. He had all the time to seek justice if such was, or is, his intention. What he terms background to the application does not add any value to the same. His first preliminary matter was resolved in his favour at my direction. His second in *limine* matter is devoid of merit. It is, therefore, dismissed.

The third respondent's first in *limine* matter is that the applicant improperly cited it. It states that Mr *A J Manase* who conveyed the property is no longer a partner in it. It insists that the applicant should have cited Mr *Manase* in his personal capacity.

The applicant's statement on the above matter is that it cited the first respondent as a partnership in which Mr *Manase* was a member and partner. It submits that when Mr *Manase* ceased his membership of the third respondent, the latter did not advise anyone let alone itself of the stated matter. It insists that the third respondent remained bound by the unwholesome conduct of Mr *Manase*.

The third respondent's above mentioned preliminary point is not only ill-conceived. It is also without merit. It is not denied that Mr *Manase* was working as a partner of the third respondent when he conveyed the property from the second to the first respondent. He acted with the authority of the third respondent.

The applicant states, and I agree, that a partner is an agent of his co-partners. The authority of a partner extends to all matters which are necessary for carrying on the business of the partnership. (See *Braker and Co* v *Deiner*, 1934 TPD 203 at 206 – 7). Mr *Manase* had the authority to bind the third respondent and himself in effecting the transfer. His conduct, as the applicant correctly states, fell within the third respondent's business. (See *Setzkorn*v W*essels*, 1962 (2) 5 of 218 at 274 E.)

The third respondent's second preliminary point falls into the substance of the application. It invites me to decide if the conduct of the first and second respondents was not made lawful by HC 4869/07. I will consider that matter when I deal with the application as a whole.

The applicant, it is common cause, placed two caveats against the title deed of the property. The property was registered in the name of the second respondent. The second respondent was, therefore, the owner of the property when the two caveats were noted against it.

The question which begs the answer centres on what compelled the applicant to place the caveats against the second respondent's property. The answer is not difficult to observe: The applicant had obtained judgment against the second respondent under HC 5116/07. HC 5116/07 was a result of civil proceedings which it mounted against the second respondent. It, therefore, had a direct and substantial interest in his property.

The second question which stems from the above-stated matter relates to what the caveats were meant to achieve. They were, in my view, meant to protect the applicant's interest in the second respondent's property. They were, therefore, to remain in place until the judgment which the court granted to it under HC 5116/07 had been satisfied.

Caveats cannot be taken lightly. They have some force of law. Their meaning, purpose and effect were aptly and succinctly discussed in *Stenhop Investments (Pvt) Ltd* v *Mukoko and Anor* HH 132/18 which states that:

> "term caveat is a Latin term which means let a person beware. It is a notice or a warning that is registered over a property by a person who claims to have some interest in the property concerned.

> The purpose of a caveat is to preserve and protect the rights of a person who seeks to have a caveat placed on a property, known as a caveator. The effect of a caveat on a property is that the property cannot be sold or disposed of without giving effect to the caveator's interest. Once a caveat is placed over a property, the said property cannot be transferred, mortgaged or disposed of without the caveator's consent. No further dealings over the property are allowed unless the caveator consents to the upliftment of the caveat, it lapses, is cancelled, withdrawn or removed. Any person who deals with the property does so at his own risk. The law does not permit a person to lodge a caveat over another's property without good cause. An applicant who applies to place a caveat over a property must show that he has an interest in the property concerned. The interest claimed must exist at the time the caveat is lodged and should not be an interest that arises in the future. The caveator must show that his claim arises from some dealings with the owner of the registered property. It is only those interests that are connected to the land that can be subject of a caveat. The interest must attach to the property. Thus a person seeking to place a caveat over a property is required to show that he has a caveatable interest to lodge the caveat. A caveator does not have to show that the other party is about to dispose of the property. The applicant has to show that he has a matter pending that concerns the property. The moment that the pending matter is determined, the caveat lapses by operation of law. The caveat cannot continue in perpetuity. The interest claimed by the caveator may be challenged by the owner of the property." (Emphasis added)

Ten pertinent matters are discernible from the above cited *dictum* which, in my view, was born out of an incisive research of unparallel proportions. These are that:

(a) the caveat preserves and protects the rights of the caveator;
(b) it bars the owner of the caveated property from disposing of the same without the caveator's consent;
(c) only the caveator can, in general terms, consent to the upliftment of the caveat;
(d) a caveat can, in some instances, be cancelled or removed from the caveated property;
(e) the caveator's interest must be in existence at the time the caveat is lodged;
(f) the caveator must show that his claim arises from some dealing which he had with the owner of the caveated property;
(g) the caveator's interest must attach to the property
(h) the caveator must show that he has a matter pending which relates to the property;
(i) when the pending matter is decided, the caveat lapses– and
(j) a caveat can only be placed on another's property where the caveator has shown good cause for the same, like an interest in the property.

It is clear, from the foregoing, that the caveats which the applicant placed on the second respondent's property were not without justification. They were meant to preserve and protect its rights in the property. They acted as a bar to the second respondent. They did not allow him to dispose of the property pending finalization of its execution of HC 5116/07. Its interest was in existence when it lodged the caveats. Its claim arose from the money which the second

respondent misappropriated when he was its employee. Its interest is attached to the property. Its case against the second respondent is still pending. The caveats could not, therefore, have lapsed. It showed good cause for placing the caveats against the second respondent's property.

The respondents submit that the caveats were lawfully removed from the property. They place reliance on HC 4865/07 for their assertion. HC 4865/07, they argue, removed the encumbrances from the property.

HC 4865/07 appears p 23 of the record. It does not make any reference to the caveats. The attention of the court which dealt with the divorce of the first and second respondents does not appear to have been drawn to the presence of the caveats on the property. If it was, it would, in all probability, have had its mind focused on the same. It would, in my view, have stated in specific terms that the caveats which were noted against the property had been uplifted from the same. The fact that HC 4855/07 remains silent on that very important matter persuades me to entertain the view that the first and the second respondents withheld from it information which related to the presence of the caveats on the property.

It is a fact that the applicant placed the caveats against the property prior to the divorce of the first and second respondents. The encumbrances were, therefore, extant when transfer of the property took place. HC 4865/07, it had already been found, did not uplift the caveats from the property. It has no clause which mentions the caveats, let alone their removable from the property. It is, accordingly, erroneous for the respondents to submit that HC 4865/07 uplifted the caveats from the property. It did not.

The purported removal of the caveats is contained in a letter which the Sheriff of Zimbabwe addressed to the Registrar of Deeds on 14 December, 2011. The letter appears at p 8 of the record. It refers to the caveat which the applicant placed against the property under HC 127/07. The Sheriff states, in the same, that he received instructions to uplift caveats Nos 73/07 and 316/09 which were noted against the property. He does not state the person, entity/or authority who/which instructed him to remove the caveats.

The Sheriff, it is noted, acted upon an instruction which he received from the person/entity/authority whom/which he did not mention. The person, entity or authority could not have been the applicant. It was someone who is not it.

The applicant states that it did not instruct the Sheriff, or anyone else, to uplift the caveats. It asserts that it received news of the transfer of the property from the second to the first respondent with a sense of shock. It, therefore, did not instruct the Sheriff to uplift the caveats.

The first and the second respondents are the persons who had an interest in the property. They withheld from the court, which dealt with their divorce, information which related to the existence of the encumbrances which were placed against the property. They moved the court to transfer the property from one of them to the other as part of their divorce settlement.

The probability that the first and the second respondents instructed the Sheriff to remove the caveats from the property is more real than it is far-fetched. A *fortori* when they plead as their defence that HC 4865/07 removed the caveats from the property. They, in my view, showed HC 4865/07 to the Sheriff who, at the sight of the case, erroneously removed the caveats from the property.

The Sheriff could not have acted on his own accord. He neither has the power nor the authority to do so. His mandate is circumscribed in court orders which he is enjoined to enforce. The court order which the first and second respondent displayed to him must have satisfied him that the caveats which were placed against the property had been removed. The error which he made in the mentioned regard is unfortunate but understandable. A *fortori* when HC 4865/07 was presented to him as the circumstances of the case appear to suggest.

The first and second respondents could not remove the caveats which they did not place against the property of the second respondent. They had neither the power nor the authority to do so without the knowledge and/or consent of the applicant which placed the caveats against the property. The purported removal of the caveats from the property cannot, therefore, hold. It is an ill-conceived idea which has no legal basis at all.

It is trite that the person against whose property the caveat is placed cannot remove the same himself. He can only have it removed through a court order. The order should relate to the removal of the caveat from the property. The court order would state, in specific terms, the caveat number, the title deed against which it is placed and the fact that the caveat has been so removed from the property. Removal of a caveat must arise from an application which the applicant files with intent to achieve his purpose. It is not removed indirectly or by reference to a case, such as HC 4865/07, which has no bearing on the caveats.

The first and the second respondents, it is evident, did not challenge the caveats when the applicant placed them against the second respondent's property. They, in the mentioned regard, accepted the import and purpose of the caveats. They cannot now turn around and suggest, as they are doing, that HC 4865/07 which relates to their divorce removed the caveats from the property. It did not.

Because the caveats were purportedly removed, they were not so removed. They remain in place from the time that the applicant registered them against the property to date. They are extant.

The law which relates to transfer of property against extant caveats is aptly stated in *Burdock Investments (Pvt) Ltd* v *Time Bank of Zimbabwe Ltd & Ors* HH 194/03. Its effect is that no transfer of an immovable property can be lawfully effected when there is a subsisting and extant caveat registered against the title deed of the property. The relevant portion of the judgment reads:

> "It is tried that, unless it (i.e. caveat) is uplifted, no registration of a real right can be effected against the title to the property."

Sithole v *Sithole* HH 83/05 repeats the *dictum* which the court stated in the *Burdock Investments* case (*supra*). It reads, in the relevant part, as follows:

> "…the property has not been transferred [….] because the two caveats have not yet ben uplifted. The purported sale cannot therefore affect the plaintiff's rights in the property."

One of the caveats, it goes without saying, is a judicial caveat. It was placed against the property by the court. The order which placed the caveat is valid and binding. It was not set aside by review, appeal or rescission. The court order is, therefore, extant. No transfer of the property from the second to the first respondent could validly or lawfully have occurred under the stated set of circumstances. [*Hadkinson* v *Hadkinson* (1952) 2 All ER 567, *Dudka & Ors* v *Cheni Investments (Pvt) Ltd & Ors*, 2011 (1) ZLR 1].

The first respondent submits that the right which she acquired when the property was transferred into her name is superior to the applicant's right which arose out of the placement of the caveats on the property. Her argument would have held if the property was lawfully transferred into her name. The reality of the matter is that there was a purported transfer of title to her. That is not the same as lawful transfer of the property into her name.

The first respondent's further submission is that she had a real right in the property before her divorce. She places reliance on *Gonyora* v *Zenith Distributors (Pvt) Ltd*, 2004 (1) ZLR 195 for the statement which she makes. She alleges that *Gonyora*'s case contains *dicta* which deal with spousal co-ownership of immovable property.

Gonyora v *Zenith* remains irrelevant to the submissions of the first respondent. It is distinguishable from the present case. The distinction lies in that, in *Gonyora* v *Zenith*, the property was registered in the joint names of the husband and wife. The property *in casu* was,

and remains, registered in the name of the second respondent who, before divorce, was the husband of the first respondent.

The submissions of the first respondent, it is observed, do not hold. The purported transfer of the property in the presence of two caveats which had been noted against it renders the transfer void. The stated matter is the unchallenged fact of the case.

It is not in dispute that the property was under judicial attachment when the purported transfer took place. The transfer occurred in 2011. The attachment was effected on 24 September, 2009. The same was served on the first respondent on the mentioned date.

The submissions of the applicant are that the fifth respondent could not authorize transfer of property in the absence of a court order which quashed the process of execution which was underway. It states further that the attachment of the property gave birth to a judicial mortgage, *pignus judiciale*, in its favour.

The first respondent appears to have misconstrued the contention of the applicant on the point which is under consideration. She refrains from dealing with the issue of the attachment of the property. She focuses her attention on the allegation that the applicant should have attached the movable goods of the second respondent. She suggests that it should have attached the immovable property only if the movable goods failed to realize sufficient money to satisfy the second respondent's indebtedness to it.

The argument of the first respondent is specious. The fact of the matter is that the applicant attached both the movable and immovable property of the first and second respondents. It is immaterial that it should have proceeded against the movable goods and later the immovable property. It attached both. The principle of the attachment of property spells the position of the applicant.

It is trite that, the moment the property was attached, it became vested in the Sheriff. Nothing could be done with it without the Sheriff's consent or authority. The attachment in execution of property at the instance of the judgment creditor creates a real right in favour of the judgment creditor in the property in question (*Industrial Development Corporation of Zimbabwe* v *Saruchera*, HH 21/06).

The applicant submits, and 1 agree, that property attached in execution cannot be transferred outside the execution process without an order of court which authorizes the same. The attachment in execution placed the property beyond the reach of the first respondent. The transfer is, on the mentioned basis, void.

It is common cause that transfer of property took place when the interpleader proceedings which the first respondent filed under HC 4520/09 were still pending. She applied for referral of the same to the Supreme Court. Her application was dismissed. The dismissal of the application notwithstanding, she did not prosecute the interpleader proceedings. Those proceedings remain pending from the date that she filed HC 5520/09 to date.

The first respondent advances no reason for not prosecuting HC 5520/09. Her reason for filing the same remains as unclear as she states that matter in her notice of opposition. She evinces confusion on the same.

Paragraphs 23.4 and 23.7 of the first respondent's notice of opposition bring out the confusion which is attendant on the filing by her of the interpleader proceedings. The paragraphs appear at pp 44 and 45 of the record respectively. She states, in para 23.4 that:

> "I deny that I sought to frustrate the execution by the applicants. The property that it (sic) sought to attach belonged to me and not to the 2nd respondent. I was therefore well within my rights to file the interpleader summons (sic) as I did. I had acquired title of the said property in terms of a court order…." (emphasis added).

She states, in para 23.7 as follows:

> "As at the time I was advised by my attorneys that they had effected transfer during the subsistence of the interpleader because this was not an ordinary case. This is a case where title to the property had been awarded to me by way of a court order and at the same time the applicant sought to sale (sic) the property in execution thus the (sic) I could only safeguard my rights in the property by lodging an interpleader whilst awaiting to effect transfer to me. (emphasis added).

The first respondent, it is evident from a reading of the above two statements, confuses the sequence of events. She justifies the existence of the interpleader proceedings on the allegation that the property had been awarded to her by the court. She remains oblivious to the fact that title in the property was supposedly transferred to her well after execution had already commenced. The interpleader proceedings which she filed was in response to the attachment of the property which the applicant had effected upon the same. The attachment took place in 2009 and the supposed transfer of the property into her name occurred two years later. It occurred in 2011. Her statement which is to the effect that she instituted interpleader proceedings to safeguard her title in the property is, therefore, misplaced. She had no title in the property which she was to protect when she filed HC 5520/09. Title remained with the second respondent at the time that the property was attached and taken into execution.

The reason for which the first respondent filed the interpleader notice is evident from a reading of the last sentence of para 23.7. Her reason was to delay execution. She delayed it to enable her to take transfer of title in the property.

The interpleader process served no useful purpose. It was the first respondent's delaying tactic. It is for the mentioned reason that she abandoned that process mid-stream. She disregarded that process when she thought that she had achieved the purpose for which she had filed the same.

The first respondent failed to realise that transfer could not take place before the interpleader proceedings had ben conclusively dealt with. They should have been withdrawn or finalised before the alleged transfer was allowed to take place.

In filing them, the first respondent was *mala fide*. She knew when she filed HC 5520/09, that the property which she claimed as hers did not belong to her. She knew that the same belonged to her husband. The statement which she made in para 23.8 of her notice of opposition is to the observed effect. She states, in the same, that when the attachment took place, the property was registered in the name of the second respondent. Her interpleader proceedings were, therefore, frivolous and vexatious. They achieved nothing other than to frustrate the effort of the applicant which rightly moved to execute upon the property.

It follows, from the foregoing, that transfer of property in the circumstance of pending litigation cannot be valid. It is, as the applicant correctly asserts, void. It is, in short, a nullity.

It is a fact that the first and second respondents divorced on 28 July, 2011. Their divorced took place under HC 4865/07. Paragraph 3 of HC 4865/07 directed transfer of the property from the second to the first respondent. The direction of the court seems to find its foundation from the consent paper and supplementary consent paper which the parties signed and filed of record in the case. The same is captured in para 4 (iii) of the divorce order of the parties.

The question which begs the answer centres on whether or not the court which dealt with the divorce of the first and second respondents would have entered para 3 of the divorce order in the form and substance that it appears if it had known the true and correct circumstances of the parties' case. Put differently, the question is: would the court have ordered that title in the property be transferred from the second to the first respondent if its attention was, at the time of divorce, drawn to the existence of:

(i) the two caveats which were noted against the property;

(ii) the notice of attachment which had been effected on the property - and

(iii) the interpleader proceedings which were, and are, pending at court in respect of the property.

The appropriate answer to the above question is in the negative. A corollary question which arises from the answer is: what then is the position of the applicant which proved, to the satisfaction of the court, that title in the property in which it has an interest was erroneously allowed to pass from the second to the first respondent in circumstances where it should not have.

The applicant is not a party to HC 4865/07. It cannot appeal, review, or rescind it. It cannot, in other words, set HC 4865/07 aside.

All the three respondents have taken refuge under HC 4865/07. They insist that it should not be disturbed. The introductory remarks which the first respondent made in her Heads confirm the position which the respondents have taken in respect of the court order in terms of which the court granted the decree of divorce to the first and second respondents. The remarks read:

> "An order of a court of law stands until set aside by a court of competent jurisdiction. Until that is done the court order must be obeyed even if it may be wrong see *Culverwell* v *Beira* 1992 (4) SA 490 (W) (at 494 A-C) and Beherend Bpk 2001 (2) SA 224 € (at 229 B-D)."

The respondents' submission which is to the effect that the applicant should rescind HC 4865/07 is misplaced. Observations have shown that the applicant which is not a party to the case cannot appeal, review or rescind the same. It, therefore, cannot do anything at all about HC 4865/07. Its position *vis-a-vis* HC 4865/17 remains invidious.

The allegation of the applicant was that the respondents were fraudulent in their dealing with the property. It, however, did not prove any fraud against the one or the other or all the three respondents. It did not establish the elements of fraud. The allegation which it made is, therefore, without merit.

The conduct of the first and the second respondents was, in my view, unwholesome. It left a lot to be desired. It was, as I have already stated, *mala fide* which was short of fraud.

It is my considered view that the first and second respondents genuinely but mistakenly believed that, once the property has been transferred from one of them to the other, all the issues which related to the two caveats, the interpleader proceedings and the attachment of the property would vanish into thin air. They shared the observed error between them. The error was or is, therefore, common to both of them.

The third respondent, it is my view, suffered from the belief that HC 4865/07 removed the caveats which were placed against the property. The statement which it made in its notice of opposition was to an equal effect. It stated in para 12 of the same that the caveats were lawfully uplifted by the court order.

HC 4865/07 is an extant order of this court. It cannot be disturbed unless the applicant or the court interferes with it. The applicant, it has already been observed, cannot disturb it. But the court can.

The court's power to interfere with the order is specified in r 449 of the High Court Rules, 1971. The court can rescind, correct or vary its judgment or order in circumstances which are described in the rule. The rule confers a discretion upon it to interfere where such is, in its view, unavoidable.

Clause 3 of the divorce order is a product of a patent error. The error is patent from a consideration of the circumstances of this application. The order can, therefore, be corrected under r 449 (1) (b) of the rules of court.

I reiterate that the error which the court made when it transferred title in the property from the second to the first respondent should not have been allowed to occur. In the circumstances of HC 4865/07 as read with the two caveats which were noted against the property, the judicial attachment of the property and the unconcluded interpleader proceedings, title should not have been allowed to change hands at all. It changed hands as a result of the unwholesome conduct of the first and second respondents.

That para 3 of the divorce order was entered in error requires little, if any, debate. It has already been observed that the court which dealt with the divorce of the respondents was not aware of the circumstances which related to HC 2590/16. Its attention was not drawn to the existence of the caveats which were on the property, the attachment of the property and interpleader proceedings which related to the property. The patent error which is evident in HC 4865/07 resulted from the fact that the parties who were before the court withheld vital information from it. The error cannot stand. It should be corrected under the rule which I have made reference to. The correction only relates to para 3 of HC 4865/07. All the other matters which were, or are, stated in HC 4865/07 will remain undisturbed.

The applicant proved its case on a balance of probabilities. It is, accordingly, ordered that:

1. Deed of transfer number 5530/2011 registered in the 1st respondent's favour on 28 November, 2011 be and is hereby set aside.

2. The 1st and 2nd respondents shall jointly and severally pay the costs of this application.

Atherstone & Cook, applicant's legal practitioners
Messrs Gill, Godlonton & Gerrans, 1st respondent's legal practitioners
Mtetwa & Nyambirai, 2nd respondent's legal practitioners
Messrs Manase & Manase, 3rd respondent's legal practitioners