FLORENCE PAMBUKANI (NEE BEHANE)

and

FELIX PAMBUKANI

versus

OZIAS BVUTE

and

CROWHILL FARM (PVT) LTD

and

REGISTRAR OF DEEDS N.O

and

MRS MAWARIRE

and

CROWHILL FARMS (PVT) LTD

and

CEPHAS MSIPA

and

THEMBA HLONGWANE

HIGH COURT OF ZIMBABWE

CHITAPI J

HARARE, 9 and 19 September 2019 & 4 June 2020

**Opposed Court Application**

*K Kachambwa*, for the applicants

*L Uriri,* for the 1st & 2nd respondents

CHITAPI J: The applicants have instituted this application claiming for an order as set out and in the draft order. The draft order is worded as follows:

“IT IS ORDERED THAT:

1. The cancellation of the Title Deed No. 2410/2010 in applicants’ name and the subsequent revival of Certificate of Registered Title Number 6754/08 in the name of 2nd respondent in respect of certain immovable property namely an undivided 0,0298% being share number 702 in a certain piece of land situate in the District of Salisbury called Lot J of Borrowdale Estate measuring 724,0475 hectares be and is hereby declared null and void.
2. Title deed number 2410/2010 in applicants’ name in respect of certain immovable property namely an undivided 0,0298% being share number 702 in a certain piece of land situate in the District of Salisbury called Lot J of Borrowdale Estate measuring 724,0475 hectares be and is hereby reinstated.
3. 1st, 2nd and 4th respondents shall pay costs on a legal practitioner-client scale jointly and severally one paying the other to be absolved. “

Subsequent to the filing of this application, the applicants filed an urgent chamber application against the same respondents herein under case No. HC 2456/18. In the terms of the final order sought, the applicants pray for a declaratur to the effect that the first and second respondents herein are not the owners of the same property involved herein. They also claim ancillary relief which it is unnecessary to list down. Pending the granting of the final ought, the applicants were granted by ZHOU J on 23 March 2018, interim relief in the form of an interdict. In terms thereof the first and second respondents were ordered not to deal with the disputed in any manner, not to encumber or dispose of the property pending determination of the final relief. The third respondent herein as similarly cited in HC 2456/18 was ordered to place a caveat on the Title Deed to the property.

Application HC 2456/18 was referred to me and I directed that it be set down together with the current application so that parties could agree on how the application could be handled. On 9 September 2019, counsel submitted that case No 2456/18 had not been set down by any of the parties. It was submitted that the parties had agreed that the application before me be determined first as its outcome had a bearing on the fate of case HC 2456/18. Application No. HC 2456/18 was accordingly removed from the roll for future set down as parties may decide. Parties therefore argued only the application 2427/18. I revert to the application before me. Upon reading through the affidavits filed in support and in opposition as well as heads of argument and listening to counsel’s submissions, the application first presented itself as a complicated application to comprehend because parties have been perennially in and out of court in disputes over the subject matter herein. On deeper analysis of the filed documents, it turns out that the issues for determination are not complicated if one appreciates the paper trail in the matter. The paper trail consists in setting out sequentially, the written evidence or documents which show how the dispute came about.

It is not disputed that the applicants prior to its cancellation were joint registered owners under Title Deed No. 2410/2010 of a property described in the title deed as:

“An undivided 0,0298% share being share No. 702 in:

CERTAIN piece of land situate in the District of Salisbury CALLE: LOT J OF BORROWDALE ESTATE MEASUREING 724.0475 hectares dated 7 June, 2010.”

Prior to the registration of the property into the names of the applicants, the property was held by a company named as Crowhill Farm (Pvt) Ltd by virtue of a certificate of registered title No. 6754/2008 dated 24 June 2008. The holder of the certificate of registered title then was the second respondent herein.

On 13 February 2018, the third respondent cancelled the applicants title deed No. 2410/2010 and endorsed that the Deed of transfer had been cancelled by an order of this court dated 20 November 2017 made in terms of s 8 of the Deed Registries Act [*Chapter 20:05*]. The cancellation was endorsed by the fourth respondent in the performance of her duties in the Deeds Registry as the Registrar of Deeds. The applicants contend that the fourth respondent authorised the cancellation of their Deed of Transfer in the absence of a court order directing the third respondent to cancel their deed of transfer. The fourth respondent contended as follows in response in para 26 of her opposing affidavit:

“**Add para 26**

The Deed of Transfer number 2410/2010 was cancelled in terms of High Court Order case number 7674/2014 which ordered the Registrar of Deeds to reverse the transfer of any and all stands under Crowhill Estate where title was transferred by the third respondent.”

In her answer to para 22 of the founding affidavit, the fourth respondent stated as follows:

“**Add para 22**

As a matter of procedure, the office received the required document for cancellation on Deed of Transfer Number 2410/2010 and revival of Deed Number 6754/2008 as *per* court order (Case No. HC 7674/14) from Pfigu Law Firm (see Annexure A, a copy of which was retrieved from Pfigu Law Firm). The said copy of the court order which was supposed to be filed as consent No. 404/2018 cannot be located in our office which can be attributed to misfiling or (sic) records.”

In her answer to para 29 of the founding affidavit the third respondent stated:

“**Ad para 29**

The 4th respondent cancelled the Deed in terms of a court order case number HC 7674/2014 date stamped 20 November, 2017 by the High Court. I was acting under the scope of my duties of employment lawfully as the Registrar of Deeds who was granted signing powers under s 4 (1) (b) of the Deed Registries Act, [*Chapter 20:05*]”

The third respondent concluded her affidavit by stating:

“Wherefore the 3rd and 4th respondents are not opposed to the relief being sought and will abide by the court’s decision.” (own underlining)

It is implicit in the third and fourth respondent non opposition of the relief sought that they acknowledge or admit that the applicant’s title Deed should not have been cancelled. If the cancellation had been procedurally and therefore lawfully done, the third and fourth respondent would have vindicated themselves of any wrongfulness in the cancellation of the applicants Deed of Transfer.

The determination of the dispute in this application when applying the paper trial approach is resolved by answering the question “Did the High Court by virtue of case No. HC 7674/14 order the cancellation of Deed of Transfer No. 2410/10 in the name of the applicants?” If the court did not make such an order, the matter ends there. It is resolved. The purported cancellation would have to be reversed. If, however this court by its order granted in Case No. HC 7674/14 ordered cancellation of the Deed, then it becomes necessary to consider whether or not there has been established cognizable grounds to interfere with the order of this court ordering cancellation of the Deed. It would then become, under the second consideration, necessary to deal with procedural issues of how a court order can be revisited by the court which granted it taking into account the *functus officio* doctrine.

To further simplify the first enquiry which if granted, resolves this matter, the issue is to determine whether the High Court order in case No. HC 7674/14 which was used as the cause or authority for the cancellation in effect so authorized or ordered the cancellation. In this regard, the court order in case No. HC 7674/14 must be examined. The order in that case was granted in default of the applicants herein and the respondents therein. The applicants were not cited and were therefore not players in that litigation. The parties in case No. HC 7674/14 were cited as follows:

CROWHILL FARM (PVT) LIMITED – APPLICANT

AND

CROWHILL FARMS (PVT) LIMITED – 1ST RESPONDNET

CEPHAS MSIPA -2ND RESPONDENT

THEMBA HLONGWANE – 3RD RESPONDNET

REGISTRAR OF DEED N.O – 4TH RESPONDENT

SHERIFF OF ZIMBABWE – 5TH RESPONDENT

On 29 October, 2014, my sister Chigumba J granted an order in the said case in the following terms;

WHEREUPON, after reading documents filed of record and hearing Counsel:

IT IS ORDERED THAT:

1. The 3rd respondent be and is hereby ordered to hand over possession of all the stands under Crowhill Estate to the Applicant
2. The 4th respondent be and is hereby ordered to reverse the transfer of any and all stands under Crowhill Estate where title was transferred by the 3rd respondent.
3. The 5th respondent be and is hereby ordered to ensure that possession of all stands under Crowhill Estate is restored to applicant and to sign any and all documents necessary to ensure the reversal of transfer of title effected by the 3rd respondent.

The first question to pause is what stands were under Crowhill Estate as at the date of the order? What is Crowhill Estate and how was it created? From the papers filed in this application, Crowhill Estate was created by virtue of a consolidation of Deed of transfer 1214/86 under which pieces of land called Chiruka Extention of Borrowdale Estate and Lot J of Borrowdale Estate were conveyed, as well as Deed of Transfer No. 3530/98 in regard to Lot 1 of Echo of Borrowdale Estate and Deed of Transfer No. 475/94 in regard to Remainder of Borrowdale Estate. The Consolidation and authority for subdivision of the property was granted by virtue of permit No. SAC/SD/25/3/Z granted by the Minister of Local Government, Rural and Urban Development in terms of s 40 (5) of the Regional, Town and Country Planning Act, [*Chapter 29:12*]. The date of the grant of the permit does not appear on the extracts of the permit filed of record.

The property in dispute in this application was not registered under Crowhill Estate at the time that Chigumba J granted the order dated 29 October, 2014 in Case No. HC 7674/14. The property had already been transferred to the applicants on 7 June, 2010 when Deed of Transfer No. 2410/10 was registered in their name. The property was therefore under the applicants’ ownership. Deed of transfer No. 2410/10 shows the transferor as Crowhill Farms (Private) Limited which company appointed the seventh respondent herein to represent the company. The agent does not become the transferor. The property owner who is divested of title which is taken up by the purchaser as transferee is the transferor. It is at this stage appropriate to note that the reference to the transferor as Crowhill “Farms” is clearly an error in typing because the extending clause is the one which gives reference to prior deeds and their sequence. If as shown on the Deed of Transfer No. 2410/10, the immediate prior holding deed was certificate of Registered Title No. 6754/2008 made in favour of Crowhill Farm Private Limited on 24 June, 2008 then it becomes clear that the reference to Crowhill “Farms” in the deed was a typographical error.

The seventh respondent who acted as agent of the second respondent in the transfer of the property in dispute herein from the seller to the purchasers averred that he did not have any stands in Crowhill Estate in his name. Consequently, he did not transfer any stands to anyone in his individual capacity. The seventh respondent also averred that to the extent that the default judgment granted by Chigumba J related specifically to immovable properties under Crowhill Estates, the order could not apply to property already transferred to the applicants. I agree. The applicants’ property being in existence as Lot J of Borrowdale Estate held under Deed of Transfer No. 2410/10 and having prior to that been held under certificate of Registered Title No. 6754/08 was not covered by the order. The court should have been explicit that Deed of Transfer No. 2410/10 should be cancelled. The property was on the date of the order not under Crowhill Estate but in the applicants’ name.

It is a principle applied in the interpretation of court orders and judgments to give them their natural ordinary meaning as is done when interpreting any document. In the case of *Sonnenberg* v S*hwababa* [2010] ZAFSHC 106, lekale aj at para 11 – 13:

“[11] In its technical legal usage, the word judgment refers to the formal order drawn up by the Registrar of the court and embodied in a separate document signed by him. The court order gets served by the Sheriff on the respondents and constitutes the substantive order which can be appealed against and not the reasons for the judgment (see generally *Western Johannesburg Rent Board and Another* v *Ursula Mansions (Pty) Ltd* 1948 (3) SA 355 (A) at 355 and *Administrater, Cape and Another* v *Ntshwagela & Others* 1990 (1) SA 705 (A)

[12] The effect of a court order is ascertained from reading the order or judgment as a whole by giving words their natural and ordinary meaning as the case is when interpreting other documents. As the Court in *Firestone South Africa (Pty) Ltd Genticairo AG* 1977 (4) SA 298 (a) pointed out per Trollip JA at page 304 D – H-

“…the basic principles applicable to the construction of documents also apply to the construction of a court’s judgment or order. The court’s intention is to be ascertained primarily from the language of the judgment or order as construed according to the well-known rules.

[13] The order must be read as a whole by reference to its context and objects. If the meaning is clear and not unambiguous, no extrinsic fact or evidence is admissible to contract, vary qualify or supplement it.” (See *Simon N.O and Others* v *Mitsui and Co. Ltd & Others* 1997 at SA 475 (WLD)”

It is the duty of the court to interpret its judgments. I am aware that courts will also examine a court order in the context of reasons for judgment. Fortunately, I do not have to get entangled in an elucidation of this proposition because Chigumba J’s order was not accompanied by any reasons for judgment. The learned judge granted a default judgment in terms of the draft order prepared by the applicant’s legal practitioner in case No HC 7674/14. In my view, there is nothing ambiguous in the wording of the judgment order. The order speaks to “stands under Crowhill Estate.” (own underlining). The applicants’ property was not under Crowhill Estate but under the joint names of the applicants herein having been transferred to them by the registered title holder or transferor, namely, Crowhill Farm (Private) Limited which held the property under certificate of registered title No. 6754/2008 dated 24 June, 2008.

In terms of s 11 of the Deeds Registries Act, [*Chapter 20:05*], except where that Act provides otherwise or a court otherwise orders, the registration of deeds follow the sequence of transactions in which the deeds were made. In *casu*, title deed No. 2410/10 in favour of the applicants follows from certificate of consolidated title No. 6754/2008. The first and second respondents filed as annexure ‘B’ certificate of consolidated Title No. 3017/2013 dated 1 August, 2013. That certificate consolidates the properties listed in the consolidation and subdivision permit No. SAL/SD/25/3/2 which I have already referred to, to create a property called Crowhill Estate. The applicants title to the property in dispute predates the certificate of consolidated title. There is clearly a lot more involved than meets the eye in this matter. The reason I say so is twofold. Firstly, it would not have been competent for the third respondent having on 7 June 2010 registered title deed no. 2410/10 in the name of the applicants herein to then register a consolidation of that same property in favour of the second respondent without following formalities for such registration and clearly in violation of the provisions of s 11 of the Deeds Registries Act and without the consent of the applicants as registered to the holders. Secondly, the order of Chigumba J must be read within the context that it should be construed in conformity with the provisions of s 11 of the Deeds Registries Act on sequence of Deeds. I do not therefore read or interpret Chigumba J’s order as applying to Deed of Transfer No. 2410/10. It clearly does not state so. If the first and second respondents had intended to have Deed of Transfer No. 2410/10 cancelled, they should have explicitly asked the court to grant such order. The draft order was not crafted by the court but by the respondents in that case. The court obliged them and granted the order as sought. If the first and second respondents subsequently discovered that the order was erroneously worded through their omission or that of their legal practitioner, they should have applied for correction of the order.

Having noted the irregularity of the third respondent’s cancellation of Deed of Transfer No. 2410/10, it is no surprise that the third and fourth respondents do not oppose the relief sought. What also remains unexplained is why Chigumba J’s order was only executed upon or given effect to on February 13, 2018 when the order had been granted on 29 October, 2014, a period in excess of three years. Even the order bears a date stamp of 20 November, 2017 which is the date of upliftment of copy of the order. This is another indication that the circumstances of ownership of the consolidated properties involve more than meets the eye.

It is worth mentioning that under the same case No. HC 7674/14, another application was filed by the first and second respondents herein, on 29 August, 2014. It was an application for a vindication order. The other parties were the same except the applicants herein who were not cited. A consent order was entered into by the parties to that application wherein the first respondent vindicated the property in dispute herein from the fifth, sixth and seventh respondents herein. The order by consent ordered that the property in dispute in this application and one other property called Charika Extension were lawfully owned by the first respondent herein. The property herein was described as having been held under Deed of Transfer No. 1214/86 and had been divided into 42907 certificates of registered title denoted as numbers 1 to 4207. Again this was incorrect because the property was, upon the issuing of the consent order by Bhunu J (as he then was) on 15 January, 2015 registered in the applicants’ name under title deed No. 2410/10 which was extant. Bhunu J’s order did not order cancellation of the applicants Deed of Transfer No. 2410/10. It follows then that if Chigumba J’s order did not order cancellation of the Deed of Transfer 2410/10 and Bhunu J’s order similarly did not, then the Deed of transfer ought not to have been cancelled by the third and fourth respondents who to their credit have consented to the order sought by the applicants.

The above reasons for judgment based on a paper trail sequencing of how the dispute unfolded and what documents show therefore resolve the application. It is unnecessary to look further than answering the question; “Did this court order cancellation of deed of transfer No. 2410/10 in the name of the applicants and if so how?” I should note that I considered Mr *Uriri*’s submission that the applicants had been ejected from the property by order of court. An order for ejectment is of course not one and the same with an order for cancellation of title to property. A person can be ejected from a property registered in such person’s name depending on the circumstances of the case which justify ejectment being ordered. Counsel also submitted that the applicants could only seek a rescission of Chigumba J’s order if they are not satisfied with that order. Having made a determination that the order granted by Chigumba J did not order cancellation of Deed of Transfer No. 2412/10. There would consequently be no reason for the applicants to seek rescission as argued.

I must end by commenting that laws and the degree to which the laws protect private property rights and their enforcement by government has a direct bearing on investments and economic growth. It does not matter whether the investment is foreign or domestic. Both types of investment require security of ownership of property. Individuals must equally be able to enter into property contracts and enforce them. What is revealed by the facts of this matter is very unfortunate because it is not just the parties to this application whose property rights will be impacted by the order prayed for by the applicants. It has been disclosed in the papers that there are third parties who obviously innocently purchased stands in the property in dispute herein. It may well be that there will be more cases to come for resolution by the court involving affected parties who are not cited herein as interested parties. Be that as it may, the property law must be resolutely applied. The resolution of the wrongful cancellation of title Deed No. 2410/10 will also clear the path for interested parties regarding the validity of their titles and other rights if any and to regularize their titles. Deed of transfer No. 2410/10 in the name of the applicants must be restored. CHIGUMBA J’s order in case No. HC 7674/14 did not order cancellation of the said deed. An order to cancel a deed of transfer cannot be inferred or implied. It must be specific and unambiguous.

The only other issue which must be resolved pertains to costs. The applicants pray for costs on the punitive scale of legal practitioner and client against the first, second and fourth respondents. The award of costs and the scale thereof are matters within the court’s discretion. The fourth respondent acknowledged that she inadvertly misinterpreted Chigumba J’s order. She however did not oppose the relief sought and acknowledged her error by implication. There is no justification to order costs against her because both the third respondent and herself acted on instructions from the first and second respondents’ legal practitioners who served Chigumba J’s order on the third respondent. The legal practitioners were to blame because they moved for the cancellation of the Deed of Transfer in issue based upon an order that did not order the cancellation of Deed of Transfer No 2410/10. As regards the first and second respondents, costs must follow the result but on the ordinary scale. There is no malice shown by the first and second respondents in their defence of the application. They held court orders which they wrongly relied upon to opposed the relief sought. They *bona fide* defended the application. Costs are not sought against fifth, sixth and seventh respondents. They did not oppose the application. My order is as follows

IT IS ORDERED THAT

Order in terms of the draft order as amended as follows:

1. The cancellation of title deed number 2410/2010 in applicants’ name and the subsequent revival of Certificate of Registered Title Number 6754/08 in the name of 2nd respondent in respect of certain immovable property namely an undivided 0,0298% being share number 702 in a certain piece of land situate in the District of Salisbury called Lot J of Borrowdale Estate measuring 724,0475 hectares be and is hereby declared null and void.
2. Title deed number 2410/2010 in applicant’s name in respect of certain immovable properly namely an undivided0,0298% being share number 702 in a certain piece of land situate in the District of Salisbury called Lot J of Borrowdale Estate measuring 724,0475 hectares be and is hereby reinstated.
3. 1st and 2nd respondents shall pay costs on the ordinary scale jointly and severally one paying the other to be absolved.

*Samundombe & Partners*, applicant’s legal practitioners

*Pfigu Tanyanyiwa/Gapare Attorneys*, 1st & 2nd respondent’s legal practitioners

*Civil Division of the Attorney General’s Office*, 3rd & 4th respondent’s legal practitioners

*Ngarava Moyo & Chikono*, 7th respondent’s legal practitioners