

EARLY BIRD EDUCATIONAL CENTRE  
versus  
EARLY BIRD EDUCATIONAL CENTRE (PVT) LTD  
and  
ENERGY PARK (PRIVATE) LIMITED  
and  
GERALD SAIDI  
and  
MUNICIPALITY OF MARONDERA  
and  
THE REGISTRAR OF DEEDS N.O.  
and  
OFFICE FOR THE REGISTRATION OF COMPANIES &  
OTHER BUSINESS ENTITIES  
and  
THE CHIEF REGISTRAR OF COMPANIES & OTHER  
BUSINESS ENTITIES N.O.

HIGH COURT OF ZIMBABWE  
**ZHOU J**  
HARARE, 28 August & 27 September 2024

**Urgent Chamber Application**

*K Gama*, for the applicant  
*E Samukange*, for the second respondents  
No appearance for the first respondent  
Third respondent in person  
*E Jera*, appearing as Curator for third respondent

ZHOU J: This is an urgent chamber application for an interdict *pendente lite*. The interim relief sought is that pending the return date of the instant matter the first, third and fifth respondents be barred from transferring either Stand 2594 Marondera Township of Marandellas Township Lands measuring 11, 5843 hectares, held under Deed of Transfer No. 4793/2022 or Stand 8928 Marandellas Township of Stand 2594 Marandellas Township measuring 5 hectares, to the second respondent or to any other person except to the applicant. Applicant also seeks an order interdicting the third respondent from alienating his shareholding in the first respondent to any person. Finally

the applicant seeks an order directing the fifth respondent to register a judicial caveat against the title deed to the properties mentioned above.

In the terms of the final order sought the interdicts pertaining to the transfer of the immovable properties and the transfer of shares held in the first respondent by the third respondent are repeated save that this time around they are being sought pending determination of an *actio rei vindicatio* instituted by the applicant. The details of the case number of the *actio rei vindicatio* are not mentioned as the space where the case number ought to have been stated was left blank suggesting that it was perhaps not yet known at the time that the papers were filed. However, it appeared to be common cause at the hearing of the matter that an *actio rei vindicatio* had been instituted by the applicant to recover the property described as Stand 2594 Marondera Township of Marandellas Township Lands measuring 11, 5843 hectares and held under Deed of Transfer No. 4793/2022. The further relief sought on the return date is an order that the agreement of sale entered into between the first respondent and the second respondent on 3 March 2020 in respect of Stand 8928 Marandellas Township of Stand 2594 Marandellas Township measuring 5 hectares, be not enforced and, further, that the third respondent shall not perform any act or deed on behalf of or in the name of the first respondent or the applicant. Costs of suit on the attorney-client scale are being sought against the third respondent only.

The application is opposed by the second and third respondents. These two respondents filed opposing papers and heads of arguments. In addition to contesting the matter on the merits the two respondents have raised the following objections *in limine*:

- a) that the matter is not urgent and;
- b) that applicant is guilty of lack of probity.

### **Urgency**

The objection to the urgent hearing of the matter is predicated upon the contention that the deponent to the applicant's founding affidavit sold the 5 hectares to the second respondent in 2020 and has always been aware of the sale since then. This is a contested factual issue. For the purposes of the instant matter, I am prepared to proceed on the basis that what triggered the applications are alleged discoveries made by the applicant after the arrest and incarceration of the third respondent. For these reasons the objection to the urgent hearing of the matter must fail.

### **Lack of Probity**

The contention that the applicant has misled the court as regards her instruction to the third respondent to sell 5 hectares of land from the 11 hectares allocated by the fourth respondent is the basis upon which it is contended that she is guilty of a lack of probity. This objection is also based on facts that are in dispute. The factual issue cannot be resolved on the papers without making findings on credibility. For this reason, the objection cannot be sustained.

### **The Merits**

From all the papers filed, the following facts are common ground or are not in dispute. The applicant is an entity that belongs to and is controlled by the deponent to the founding affidavit, Alice Chitumba Pangwai. The said Alice Chitumba Pangwai states in the founding affidavit that she is “a female adult with the capacity to sue and be sued” in her own name. She states that she is the responsible authority of the applicant which is said to be a *universitas*. The third respondent is an attorney whose law firm has been placed under curatorship. Apparently he was acting as the legal practitioner of the said Alice Chitumba Pangwai in matters some of which are connected to the dispute *in casu*. Alice Chitumba Pangwai applied for land from the fourth respondent, a municipality incorporated according to law, with the aim of establishing an educational institution. She was allocated Stand 2594 Marondera Township of Marandellas Township Lands. A lease agreement with an option to purchase was signed between the fourth respondent and the applicant represented by Alice Chitumba Pangwai. The exact date of signature of the lease agreement and option to purchase does not appear *ex facie* the written document but the year 2006 appears typed thereon. The letters produced show that the land was for the purpose of constructing a private school under the auspices of the applicant. At the time that the offer of land was made the land had not yet been surveyed hence its area is described as “in excess of almost 11 000 hectares”. The exact area is now known to be 11, 5848 hectares, as appears from the papers filed in this matter.

It appears that the applicant (or Alice Chitumba Pangwai) was unable to develop the immovable property, hence the third respondent was engaged. The exact mandate of the third respondent is in dispute. Applicant states that Alice Chitumba Pangwai signed various documents on the advice of the third respondent which would enable the second respondent to partner the applicant in the school project. It is common cause that the first respondent was duly incorporated and the immovable property was duly transferred by the fourth respondent to first respondent as

per the Deed of Transfer No. 4793/2022. The first respondent is therefore the registered owner of the property having received such title from the fourth respondent. The immovable property was then subdivided and a portion thereof, the subdivision, measuring 5 hectares, was created, which is Stand 8928 Marandellas Township of Stand 2594 Marandellas Township. Pursuant to an agreement of sale concluded with the second respondent, the subdivision, Stand 8928, is due to be transferred to the second respondent. A version apparent from the second respondent's and third respondent's papers is that the sale to the second respondent was in terms of instructions given to the third respondent by Alice Chitumba Pangwai in order to raise funds for the development of the property. The applicant and Alice Chitumba Pangwai challenge both the incorporation of the first respondent and the sale of the 5 hectares to the second respondent.

At the parties' initial appearance on 27 August 2024 when the parties moved a postponement of the matter before argument, I flagged the issue of the basis upon which the interdict was being sought with reference to the papers filed on behalf of the applicant. In particular, I had noted that the interdict was being sought pending determination of an *actio rei vindicatio*, and, also that the instant application is predicated upon the right of ownership to the piece of land being asserted by the applicant. I raised the issue because upon a reading of the papers filed it did not appear then that the applicant had ever acquired ownership of the land in question. Proof of such ownership would be important not only because it is the basis upon which the instant application was anchored, but also the basis and an essential of the main matter, the *actio rei vindicatio*. All the parties offered to file heads of argument prior to the date of the hearing of the matter. The heads of argument were dully filed.

What is being sought *in casu* is an interim interdict. The requirements for such an interdict to be granted are settled. They are:

- 1) that the right which is sought to be protected is clear; or
- 2) that (a) if the right is not clear, it is *prima facie* established, though open to some doubt; and (b) there is a well-grounded apprehension of irreparable harm if interim relief is not granted and the applicant ultimately succeeds in establishing his right; and
- 3) that the balance of convenience favours the granting of interim relief; and
- 4) the absence of any other satisfactory remedy.

See *Econet (Pvt) Ltd v Minister of Information* 1997 (1) ZLR 242 (H) at 344G – 345B; *Watson v Gilson Enterprises & Ors* 1997 (2) ZLR 318 (H) at 331D – E; *Nyika Investments (Pvt) Ltd v ZIMASCO Holdings (Pvt) Ltd & Ors* 2001 (1) ZLR 212 (H) at 213G – 214B; *Nyambi and Ors v Minister of Local Government and Another* 2012 (1) ZLR 559 (H) at 572C – F.

The words “clear” and “*prima facie*” relate to the degree of proof that is required to establish the right. The existence of a right is a matter of substantive law; whether that right is clearly or *prima facie* established is a matter of evidence, see B. Prest, *Interlocutory Interdicts* p 47; Erasmus, *Superior Court Practice* pp E8 – 6A; Herbstein and Van Winsen, *The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* 5<sup>th</sup> Ed. Vol. 2, p 1457. The right must be one that exists in law, statutorily or under the common law.

The applicant alleged the right of ownership in the immovable property to which the application relates. The assertion of ownership is contained in para 1 of the notice of the urgent chamber application as follows: “Applicant is the lawful owner of a piece of land called Stand 2594 Marondera Township of Marandellas Township Lands measuring 11 5843 hectares”. The contention is repeated in para 30 of the founding affidavit as follows: “Applicant is the lawful owner of Stand 2594 Marondera Township which is described in full above”.

However, the documents attached to the applicant’s papers show that the applicant is not the owner, and never at any time became the owner of the immovable property in question. The deed of transfer No. 4793/2022 attached to the applicant’s founding affidavit shows that the first respondent acquired its ownership from the Municipality of Marondera. The transfer was done in August 2022. The letter dated 23 June 2017 written by the Acting Director of Housing and Community Services of the fourth respondent is not proof of ownership of an immovable property as suggested by Mr *Gama* for the applicant. That document flies in the face of the clear wording of the deed of transfer that was executed more than five years after that letter was written.

The question of how ownership in immovable property is constituted and transferred is a matter of law which the court expects every lawyer to know. Ownership in land cannot be constituted by or passed verbally or by letter. It is a deed of transfer that constitutes ownership of immovable property. Section 14 of the Deeds Registries Act [*Chapter 20:05*] to which the applicant’s attention was drawn in the second respondent’s heads of argument provides as follows:

“Subject to this Act or any other law –

- (a) the ownership of land may be conveyed from one person to another only by means of a deed of transfer executed or attested by a registrar.”

Silberberg and Schoeman, *Law of Property* 3<sup>rd</sup> Ed. at p 14 which was also cited in the second respondent’s heads of argument reiterates the trite position of the law as follows:

“If A is the owner of a land with a building which he sells to B, then the real right of ownership vests in A until the land and building have been transferred to B. The contract gives B a personal right to demand the transfer of the real right of ownership and imposes a corresponding personal obligation on A. Both remain in existence until the contract has been performed (or otherwise discharged). When transfer takes place, B’s personal right and A’s obligations are extinguished.”

In the case of *Takafuma v Takafuma* 1994(2) ZLR 103(S) at 105H-106A, the Supreme Court set out the principle that registration is essential to establish the right of ownership in immovable property as follows:

“The registration of rights in in immovable property in terms of the Deeds Registries Act.....is not a mere matter of form. Nor is it simply a device to confound creditors or the tax authorities. It is a matter of substance. It conveys real rights upon those in whose name the property is registered .....The real right of ownership, or *jus in repropria*, is the sum total of all possible rights in a thing....”

More recently, in the case of *Judith Ishemunyoro v Anthony Ishemunyoro & Ors* SC 374-17, GWAZINZA JA (as she then was) said:

“The right of ownership to immovable property must be registered with the Registrar of Deeds. A title deed is thus *prima facie* proof that a person enjoys real rights over the immovable property defined in the Deed.”

In light of the welter of authorities cited above and many others, not cited herein, Mr Gama’s submission that because the respondents did not dispute applicant’s right of ownership then the right is established is startling. The right of ownership must be established through the founding affidavit and not by the parties mistaken view as to its existence. Proof of ownership is by deed of transfer and not by a mere averment in an affidavit. The case of *Chenga v Chikadaya & Ors* SC 7-13 is not authority for the proposition that the real right of ownership in immovable property can be transferred in the absence of a deed of transfer duly executed before the registrar of deeds. To the extent that it may be interpreted as suggesting that a holder of rights, title and interest in immovable property who has no deed of transfer registered in his or her name is an owner of the immovable property to which those rights relate, then the judgment would be in clear conflict with the other authorities, including the judgments of the Supreme Court referred to earlier on. Where a lower court is confronted with conflicting decisions of a higher court the approach is

to be bound only by that judgment which is legally correct upon a reading of the law. In this instance the *Chenga* judgement did not purport to overrule the settled position of the law under both the common law and statute which is that the real right of ownership in immovable property can only be constituted or passed by a deed of transfer registered in the Deeds Office. The judgment makes no reference to the law. It elevates the personal rights in immovable property to the status of a real right, thereby blurring the legally recognized dichotomy between real rights and personal rights in immovable property. For these reasons it cannot be followed.

Mr *Gama* for the applicant made the alternative argument that if the *Chenga* judgment is found to be in conflict with the other Supreme Court authorities then a conclusion must be reached that the applicant has established a *prima facie* case. What is required for an interim interdict to be granted is the establishment of a *prima facie* right. Nothing short of a deed of transfer would be *prima facie* evidence of such a right as was aptly held in the case of *Judith Ishemanyoro v Anthony Ishemunyoro*, (*supra*). If the applicant had produced a deed of transfer that was being contested it would then have claimed to have established a *prima facie* right though open to some doubt. In this case none of the documents produced by the applicant proves its ownership, past or present, of the property in dispute. On the contrary, the deed of transfer produced by the applicant shows that the first respondent acquired ownership by transfer of that right from the fourth respondent which was the previous owner of the property.

The further alternative case advanced in argument on behalf of the applicant was that in the event that it is found that the applicant was not the owner of the immovable property in dispute, the interdict could still be granted on the basis that the applicant had paid for the property and was therefore entitled to claim the same. This is not the case that was pleaded in the court application. The right pleaded is of ownership, not the personal rights conferred by the agreement of lease or sale. The position of the law is that an application stands or falls on its founding affidavits. The essence of this principles is that an applicant must make out his or her case in the founding affidavit. That is why it is said that in application proceedings the affidavits constitute not only the evidence but also the pleadings, see *Transnet Ltd v Rubenstein* 2006 (1) SA 591(SCA) at 600; *Hart v Pinetown Drive-in Cinema (Pty) Ltd* 1972(1) SA 464(D) at 469C-E; *Pearson v Magreph Investments (Pty) Ltd* 1975(1) SA186 (D).

The failure to establish a *prima facie* right means that the application for an interim interdict cannot succeed.

The next requirement to be established is that there is a well-grounded apprehension of irreparable harm if the interim relief is not granted and the applicant ultimately succeeds in establishing its right. In *casu*, that which the applicant would reasonably apprehend has already taken place, since the property has been transferred from the fourth respondent to the first respondent. The proposed transfer of the subdivision to the second respondent is not irreparable harm because it is not irreversible if the applicant ultimately proves ownership of the property. There is no suggestion that if the second respondent takes transfer it will dispose of the property. After all, land is not a consumable good that would be depleted or altered in its substance by the transfer of the subdivision to the second respondent.

The balance of convenience does not favour the granting of the interim relief. The absence of irremediable harm to the applicant if the interdict is not granted weighs against the relief that is being sought.

This is not a case in which there is no alternative remedy. If the applicant succeeds in the main matter to prove its ownership, then whatever transfer would have taken place can be reversed, and the effect of the indicatory action is to entitle the owner to recover the property from whoever might be in possession of it. There are therefore adequate remedies to restore both possession and ownership if the applicant was to succeed in the main case.

As for costs, the general rule is that these must follow the cause. No argument was submitted to justify a different approach.

In the result, **IT IS ORDERED THAT:**

- 1) The application is dismissed.
- 2) Applicant shall pay the costs.

**ZHOU J:**.....

*Gama & Associates*, applicant's legal practitioners  
*Samukange & Hungwe*, second respondent's legal practitioners