RINOS TERERA
versus
ZIMBABWE HOUSING COMPANY (PVT) LTD
and
THE REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
CHILIMBE J
HARARE, 17 JUNE 2022 and 6 July 2022

Opposed Application

Mr.C. *Mukome* for the applicant.
Mr. B. *Majamanda* for the 1st respondent.
No appearance by second respondent

CHILIMBE J

BACKGROUND

[1] Applicant has brought forth an application for the registration of a caveat over an immovable property. The caveat is meant to secure applicant`s interests over the self-same property. This, pending applicant`s aim, in proceedings filed under HC 5713/21, to wrest title in that property from other contestants. This attempt in HC5713/21, to win title to the immovable property concerned is, by no means applicant`s first. There have been several matters filed in this court, including an application to the Supreme Court.
[2] Applicant has not been met with success in any of his endeavour thus far. As in all previous attempts, this latest effort is opposed. A plea of *res judicata* has in fact, been raised as an objection *in limine*. Before I deal with this point, I will outline (a) the underlying cause to the dispute; and (b) summarise the several court matters that have prompted this objection.

THE HEART OF THE DISPUTE
[3] Applicant avers that on 10 July 2014, he purchased an immovable property from joint sellers Laureen Tatenda Mvududu and Maureen Mazvita Middleton. The property was

described as Lot Number 17Weirmouth Smallholdings of Weirmouth situate in the District of Umtali. I will refer to this piece of land as "the Weirmouth Plot". Applicant claims that he adhered to the terms of the agreement, including payment of over fifty per-cent of the agreed purchase price of USD$70,000,00.

[4] That notwithstanding, the Weirmouth Plot was, according to applicant, then sold behind his back. First respondent was the purchaser and it proceeded to obtain title. Applicant responded by instituting several lawsuits in a bid to assert his interests. The turret of his latest suit, under HC 5716/21, is aimed at a total of six (6) defendants. But without a doubt, the cross-hairs are specifically trained on first respondent, the holder of title to the piece of land.

THE VARIOUS LAWSUITS

[5] I set out hereunder the cases in question; -

i. Case Number HC 1377/19, the present first respondent obtained an order by default, on 25 February 2019 to eject applicant from the Weirmouth Plot.
ii. Case Number HC 2042/19, the applicant`s application to rescind the default judgment noted above, was struck off the roll "for being fatally defective". He was chastised with punitive costs.
iii. Case Number HMT 72-20, MWAYERA J (as she then was) sitting at Mutare dismissed applicant (plaintiff in that matter) `s suit with costs. In that matter, applicant had in essence approached the court in a bid to reverse the subsequent sale and its consequences. In dismissing the applicant claim, the court in HMT 72-20 upheld a special plea of res judicata.
iv. Case Number SC 93/21, the Supreme Court dismissed applicant`s application for condonation for late noting of non-compliance with the rules and extension for time within which to note an appeal against HMT 72-20.
v. These matters found the basis of first respondent`s objection *in limine*. I will return to the cases shortly. Before that, it is necessary to refer to the law regarding the plea of res judicata.

THE LAW ON RES JUDICATA.

[6] It is oft stated that the essential elements of *res judicata* are (a) the two actions must be between the same parties or their privies, (b) the two actions must concern the same subject matter; and (c) the two actions must be founded upon the same cause of action. See *Wolfenden v Jackson 1985 (2) ZLR 313; Towers* v *Chitapa 1996 (2) ZLR 261(H); Banda and Ors* v *Zisco*

1999 (1) ZLR340, (S), Kawondera v *Mandebvu* 2006 (1) ZLR 110 (S); *Tobacco sales (Pvt) Ltd v Eternity Start Investments 2006 (2) ZLR 29*3(H *Flowerdale Investments (Pvt) Ltd & Anor* v *Bernard Construction (Pvt) Ltd & Others* 2009 (1) ZLR 110 (S*); Chawasarira Transport (Pvt) Ltd* v *Reserve Bank of Zimbabwe* 2009 (2) ZLR 112 (H),), and many more.

[7] In *Kawondera v Mandebvu 2006 (1) ZLR 110*, the Supreme Court distilled these elements further. A distinction was made between a judgment *in personam* and a judgment *in rem*. The court held as follows at page 112 C-D; -

> "The requisites for a successful plea of *res judicata* based on a judgment *in personam* are threefold, namely, that the prior action:
> • must have been between the same parties or their privies;
> • must have concerned the same subject matter; and
> • must have been founded on the same cause of action."

[8] Similarly, BHUNU J, (as he then was), in my view, essentially took the same approach in *Chawasarira Transport (Pvt) Ltd v Reserve Bank of Zimbabwe 2009 (2) ZLR 112*.The learned Judge cited, at page 116 D, a passage from *Flood* v *Taylor* 1978 RLR 230; -

> "When *res judicata* is pleaded by way of estoppel it amounts to an allegation that the whole of the legal rights and obligations *of the parties* are concluded by the earlier judgment and that the plaintiff is estopped by the findings of fact involved in that earlier judgment (see Halsbury's *Laws of England*, 4 Edition, volume 16, paragraph 1527). The central issue then is what the judgment prayed in aid should be treated as concluding, and for what conclusion it is to stand." [Underlined for emphasis].

[9] What is critical therefore, is that the underlying dispute between the parties must have been decisively concluded for the plea to succeed. KUDYA J (as he then was) in *Tobacco Sales Producers (Pvt) Ltd v Eternity Star Investments 2006* (2*) ZLR 293 (H)*, at page 300 F-G cited *Wolfenden* v *Jackson* 1985 (2) ZLR 313 (S) with approval; -

> "More recently GUBBAY JA (as he then was) commented on the plea of *res judicata* in *Wolfenden* v *Jackson* 1985 (2) ZLR 313 (S) at 316B-C as follows: 'The *exceptio rei judicata* is based principally upon the public interest that there must be an end to litigation and that the authority vested in judicial decisions be given effect to, even if erroneous. See *Le Roux en 'n Ander* v *Le Roux* 1967 (1) SA 446 (A) at 461H. It is a form of estoppel and means that where a final and definitive judgment is delivered by a competent court, the parties to that judgment or their privies (or in the case of a judgment *in rem*, any other person) are not permitted to dispute its correctness." [Underlining mine].

[10] Finally, MAKARAU JP (as she then was) stated, in *Eugene Kondani Chimpondah and Another* v *Gerald Pasipamire Muvami HH 81-07*, that when a "*final and definitive judgment*" has been issued by a court; -

> "To allow litigants to plough over the same ground hoping for a different result will have the effect of introducing uncertainty into court decisions and will bring the administration of justice into disrepute."

APPLYING THE LAW TO THE CIRCUMSTANCES OF THE CASE

[11] The key decisions to consider in reviewing the objection *in limine* are HC1377/19, HMT 72-20 and the subsequent Supreme Court ruling SC 73-21. In HMT 72-20, the present applicant had issued summons against the respondents on 9 June 2020 in HC 107/20 seeking an order: -

(a) that the agreement of sale between the applicant and the first respondent be declared valid and still operational;
(b) declaring the agreement of sale that was entered into between the first, second and third respondents null and void;
(c) nullifying the transfer of title of land by the fourth respondent into the third respondent's name; and
(d) that respondents pay costs of suit.

[12] The suit was unsuccessful. This court therefore, per MWAYERA J (as she then was), upheld the special plea of *res judicata* raised against the applicant. In addition, the Supreme court made the following observations when the applicant approached seeking condonation; -

> "The respondents' Counsel, in seeking costs on the higher scale, alluded to the litigious nature of the applicant in spite of extant court orders against him which he has not challenged and the fact that the property in question was transferred to the third respondent in 2016 to his knowledge. Transfer to the third respondent was effected more than three years ago yet the applicant still drags respondents to court on unsustainable claims. In this regard they submitted that the applicant has been constantly in and out of the courts in a plethora of matters some of which were referred to as case numbers HC 1236/17, HC 8602/17, HC 1377/19, HC 2042/19, MUTP 3015-16/18, Mutare Magistrates Court 2102/17, not to mention open files before the anti-corruption court, the Law Society of Zimbabwe and the Judicial Service Commission Secretariat. The applicant clearly is very litigious and unrelenting despite advice that his complaints were not sustainable. It is in the interests of justice that court proceedings be brought to finality. Competent orders affording real rights to the third respondent remain extant as the applicant has not appealed against them. They thus submitted that applicant be mulcted with costs on a higher scale. I am inclined to agree with the respondents on this point."

[13] In the papers before me, applicant remains untrammelled by the fact that this court has twice handed down decisions specifically dealing with the rights in the Weirmouth Plot. In addition, the Supreme Court has also pronounced itself on the matter. Applicant insisted in launching not only HC 1377, but the present proceedings. It has been argued on behalf of applicant that first respondent has failed to tick off each of the requirements of *res judicata*. Firstly, counsel for applicant submitted that the court was not confronted with the same parties that had appeared in HMT 72-20 and SC 93-21. *In casu*, the Registrar of Deeds has been added to the broil, it was submitted. With respect, I am not persuaded by that argument. The following are my reasons.

[14] The requirement that a dispute must be between the same parties could not have been conceived to mean an exact line-up of litigants in the suits concerned. In any event, as noted in [4] above, whilst the applicant has duelled with various parties, the main target remains first respondent. These parties can be clustered as; -applicant on one side, then the sellers, buyers, agents and now officialdom on the other. Further, the "party" who has been added hereto is but a disinterested official who has taken no part in the proceedings. At the base of it all is the distinction between a judgment *in personam* and a judgment *in rem*. The orders issued thus far against applicant sounded both *in personam* and *in rem*. In that regard, a more expansive interpretation of the requirements of *res judicata* must be made. First respondent referred me to the dicta from *Wolfenden v Jackson* as well as *Towers v Chitapa 1996 (2) ZLR 261* (both *supra).* The same passage in the latter decision was cited with approval by GOWORA J (as she then was) in *S. Makonyere versus Alfred Muchini and The Sheriff and The Master of The High Court HH 46-13* at page 3; -

> "In this case the elements of the defence of res judicata were explained as consisting of an identity of the plaintiff, the defendant, thing in contest and cause of action. It was held that the latter two requirements in particular ought in the appropriate case to be interpreted expansively so as to permit the possibility of a defence of res judicata being invoked in respect of an issue determined as part of the ratio decidendi of the earlier decision, a defence that may conveniently be termed issue estoppel, despite the fact strictly speaking, a different cause of action and different relief may be sued for in both cases. The defence ought only to be allowed, however, with caution, and only where the underlying requirement that the same question should arise in both cases is satisfied." [emphasis mine].

[15] Secondly, it was also argued on behalf of applicant that since the relief sought related to a caveat, it automatically differentiated the causa and subject matter from that in HC 1377/21, HMT 72-20 and SC 93-21. As a result, that position offset the two remaining requirements of *res judicata*. Again, I was not moved by this reasoning. The caveat being sought is anchored on the underlying right or attempt to assert a right over the Weirmouth Plot. A decision regarding the underlying right has already been made, not once but several times. In addition, the authorities are clear; -there is a basis and purpose for *res judicata*; -to lay matters that have been definitely concluded, to rest.

[16] Thirdly, counsel for applicant submitted that despite the several false starts in the courts, applicant always fell on technicalities. The matter was never, in any of these cases, decided on the merits. The court`s remarks in remarks in *Chimpondah* (*supra*) were referred to in support. The court stated thus at page 4; -

> "A judgment founded purely in adjectival law, regulating the manner in which the court is to be approached for the determination of the merits of the matter does not in my view constitute a final and definitive judgment in the matter. It appears to me that such a judgment is merely a simple interlocutory judgment directing the parties on how to approach the court if they wish to have their dispute resolved.

[17] No doubt a most accurate observation and I associate myself with the views therein expressed. It is pertinent, however to note (a) the caution intrinsic in that dictum and (b) the context issuing from the next paragraph in the same judgment which went; -

> "It further appears to me that the judgment by CHATUKUTA J in HC 132/06 was a judgment founded purely in adjectival law and one that did not exhaust the cause of action between the parties. It did not determine whether the applicants were in breach of the agreement of sale or conversely, whether the cancellation of the agreement of sale by the respondent was valid. The rights of the parties in terms of the agreement of sale between them were the broad issue that they brought before the court for determination. The learned judge was of the view that the applicants had not made out a cause of action it their founding affidavit but that this was appearing in the answering affidavit. On that basis, she declined to go into the merits of the matter. In the circumstances of the matter, the learned judge did not therefore exhaust the cause of action between the parties as she could not have exhausted a cause of action that she could not find. In my view, her judgment impliedly directed the applicants to bring a cause of action in their founding affidavits if they wished to have their dispute with the respondent resolved. [Underlined to emphasize the relevant aspects under discussion].

[18] It is quite clear that *Chimpondah* is distinguishable from the facts before me. As already stated, in HMT 72-20 and SC 93/21, the courts made final and definitive finding regarding the rights of the parties before them. I am therefore satisfied that the applicant is estopped by *res judicata* from pursuing the relief sought under the instant application. The point *in limine* succeeds. I steer clear from temptation to further chastise applicant, in word or costs, for his recalcitrance. I believe the Supreme Court said and did enough on the matter.

DISPOSITION

Accordingly, it is hereby ordered that; -

The first respondent`s point *in limine* is upheld and application is hereby dismissed with costs.

M.C. Mukome Legal Practitioners-applicant`s legal practitioners.
Khupe and Chijara Law Chambers-first respondent`s legal practitioners.