UNITIME INVESTMENTS (PRIVATE) LIMITED
versus
ASSETFIN (PRIVATE) LIMITED
and
ONIYAS GUMBO
and
RUTH RUNYARARO GUMBO
and
WADZANAYI BERNICE CHIRIMA
and
LAZARUS TAKAWIRA CHIWESHE
and
SIKANGEZILE CHIWESHE
and
GUTU & CHIKOWERO LEGAL PRACTICE
and
THE REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE, 26 October 2021 & 20 February 2023

Opposed Application-Cancellation of Deeds of Transfer

Mr *M Ndlovu,* for the plaintiff
Mr *T Mpofu*, for the 1st, 2nd & 3rd respondents
Mr *T Zungura*, for the 5th, 6th and 7th respondents

MUSITHU J: The applicant seeks relief by way of a *declaratur*. The relief sought is captured in the draft order as follows:

"IT IS HEREBY ORDERED THAT;-

i) An order declaring Deed of Transfer 6618/03 dated 9th September 2003 registered in the name of Unitime Investments (Private) Limited as the holding deed for Stand 825 Bannockburn of Stand 1 Bannockburn.
ii) An order cancelling Deed of transfer 3678/03 registered in the name of 5th and 6th Respondent.

iii) An order cancelling the Deed of Transfer 3677/03 that had been registered in the name of 4th Respondent.
iv) In terms of paragraph (i) the 8th respondent be directed to issue a replacement title deed in terms of Section 38 of the Deeds Registry Act Cap 20:05 to the Applicant.
v) The Respondents pay costs of suit on legal practitioner-client scale jointly and severally the one paying the other to be absolved."

FACTUAL BACKGROUND AND APPLICANT'S CASE

The factual background as set out in the applicant's founding affidavit is as follows. The applicant is the registered owner of Stand 825 Bannockburn Township of Stand 1 Bannockburn measuring 3235 square metres held under Deed of Transfer 6618/2003 of 9 September 2003 (the property). The property was one of the four properties that the applicant purchased from the first respondent in terms of an agreement of sale of 6 August 2002. The applicant is currently in occupation of the property having put a cabin at the property. The applicant claims that the fifth and sixth respondents instituted proceedings to evict the applicant from the property.

The applicant claims that sometime in 2018, it made an application for the replacement of a title deed with the eighth respondent after the original deed went missing. The applicant was advised that the original title deed could not be replaced since there were two title deeds with different owners for the same property. Investigations revealed that the fifth and sixth respondents held the other title deed registered under Deed of Transfer 3678/2006. The applicant instructed its legal practitioners to investigate how the same property ended up with two title deeds. The duplicate copies in the custody of the eighth respondent were however found to be missing.

Further investigations, revealed that the property had originally been registered in the name of the third respondent under Deed of Transfer 9556/2002. The third respondent happens to be the daughter of the second respondent. She was still a minor at the time she received title. The property was transferred from the third respondent to the fourth respondent pursuant to a court order under HC 6475/2003. The application in HC 6475/2003, was made on the basis that the second respondent had purchased Stand 723 of Lot 2A of Bluffhill from an entity called Zimbos (Private) Limited. A clerical error resulted in an agreement being prepared by the first respondent in terms of which the third respondent is alleged to have purchased the stand in question from the first respondent. On 6 August 2002, the first respondent purported to transfer the said property to the third respondent pursuant to the agreement of sale. The eighth respondent registered the property

under Deed of Transfer 9556/2002. Since the third respondent was a minor, the second respondent represented her as her natural guardian.

According to the applicant, it was further revealed that the property had been erroneously transferred to the third respondent since it was the fourth respondent that had purchased the property. The said application in HC 6475/2003 accordingly sought the cancellation of the deed of transfer 9556/02, and that the property be transferred to the fourth respondent. The applicant contends that since there was no valid explanation save for what was termed a clerical mistake, the whole transaction was an elaborate stunt to disfranchise the applicant of its property.

Further, according to the applicant, it was important to note that the properties were being sold by two different entities, although they were referred to as sister companies. The properties were located in two different suburbs. For that reason, the parties would have noted on signing the transfer documents that they pertained to a different property. It was also suspicious that two agreements would be signed months apart. The manner in which the stand was paid for should have raised a red flag as well when the parties attended the Zimbabwe Revenue Authority (ZIMRA) interviews. These issues were not canvassed since the matter was not opposed, with the eighth respondent being the only respondent. This also happened, notwithstanding the fact that the same property had been sold to the applicant.

Following the cancellation of the Deed of Transfer 9556/02, the property was transferred from the third respondent directly to the fourth respondent. This was done notwithstanding a query raised by the examiner on 12 June 2006. The query was to the effect that the third respondent was not supposed to draw a power of attorney to transfer the property to one W.B. Chirima. The deed was supposed to revert back to the first respondent. What was also strange was that the transfer was made in terms of the court order granted in HC 6475/2003, yet that court order only referred to a cancellation of the title deed 9556/02. The draft order had sought an order for the transfer of the property from the third respondent to the fourth respondent, but the court declined to grant that request. According to the applicant, after the unlawful transfer to the fourth respondent under Deed of Transfer 3677/2006, the property was immediately transferred to the fifth and sixth respondents under Deed of Transfer 3678/2006, which was the other current deed.

The applicant contends that the transfer to the fourth respondent was irregular. After the cancellation of Deed of Transfer 9556/02, the property should have reverted to the first respondent.

Thereafter the property should have been transferred to either the applicant or the fourth respondent assuming the agreement of sale with fourth respondent was genuine. The transfer to the fifth and sixth respondents was therefore tainted and the deed of transfer had to be cancelled.

The applicant also averred that it received title of the property on 9 September 2003 under Deed of Transfer 6618/03, some three years before the fifth and sixth respondents got theirs. The applicant claims that its transfer papers were lodged simultaneously with one of the properties listed in the agreement of sale, which was transferred under Deed of Transfer 6615/2003 dated the same day as Deed of Transfer 6618/03. The applicant contends that the eighth respondent ought to have picked the anomaly when the paperwork for the subsequent deeds were processed. The eighth respondent was also a party in HC 6475/03, and should have been aware of the cancellation of Deed of Transfer 9556/02.

The applicant contends that the seventh respondent as conveyancers attended to all the transfers in question, from the first respondent to the third respondent, then again from the first respondent to the applicant. They then attended to the transfer from the third respondent to the fourth respondent, and then from the fourth respondent to the fifth and sixth respondents. Further, they had also represented the second respondent in HC 6475/03, and for that reason were aware of what the court had ordered.

According to the applicant, it would not be unreasonable to conclude that the seventh respondent deliberately misled the eighth respondent to register the transfer in the face of a clear court order and a query from an examiner. This is because it was strange that after transferring the property from the first respondent to the third respondent, the seventh respondent agreed to transfer the same property from the first respondent to the applicant. This was despite the fact that the seventh respondent had represented the second respondent in the cancellation of Deed of Transfer 9556/02. It was unbelievable that the conveyancers were not aware that they had transferred the property before. Further, the transfer to the applicant had occurred almost at the same time that the application in HC 6475/03 was heard.

In HC 6475/03, the second respondent alleged that he never purchased Stand 825 from the first respondent. Instead he had purchased Stand 723 Adylin Township of Lot 2A Bluffhill and it was this property that should have been transferred to the third respondent but for the clerical error. The applicant claims that the property was never transferred to the third respondent, but was

transferred to a third party. That gave credence to the conclusion that there was never a mistake and that there was never a sale. The transfer from the first respondent to the third respondent was merely an attempt by the second respondent, a director of the first respondent, to defeat the agreement of sale between the first applicant and the first respondent.

The applicant maintains that it is the legitimate owner of the property. It purchased three other properties together with the said property. All these other properties were transferred to the applicant in terms of the agreement of sale between the applicant and the first respondent. The seventh respondent were the conveyancers in all the transactions. It was also clear that the fifth and sixth respondents bought a property that had already been transferred to the applicant.

It was on that basis that the applicant persisted with its claim that Deed of Transfer 6618/03 dated 9 September 2003 should be declared the holding deed of the property, with the eighth respondent being directed to issue a replacement deed in terms of s 38 of the Deeds Registries Act[1], since there was no duplicate copy.

FIRST AND SECOND RESPONDENT'S CASE

The second respondent deposed to his and the first respondent's affidavit as a shareholder and director in the first respondent. His opposing affidavit raised the following preliminary points. The first was that the court application was not served on the first and second respondents in terms of the rules of court. He also claimed that the third respondent was also not served with the application. They only became aware of the application through the seventh respondent herein. The failure to serve the application on the said respondents was fatal to the application making it susceptible to dismissal with costs on the attorney and client scale.

The second preliminary point was that the relief sought by the applicant was incompetent. The first respondent sold and transferred the property in question to the third respondent on 23 September 2002. It followed therefore that on 9 September 2003 when the same property was purportedly transferred to the applicant, the third respondent and not the first respondent was the owner of the property. In the circumstances, the first respondent could not have sold and transferred the property in question to the applicant.

The third preliminary point was that the transfer of the property from the third respondent to the fourth respondent was sanctioned by this court in HC 5475/03. The relief sought by the

[1] [*Chapter 20:05*]

applicant was therefore an attempt to reverse a transaction that was sanctioned by the court through the backdoor. The applicant was effectively trying to rescind the court order granted in HC 5475/03, when it ought to have done that through a proper application. In the absence of a proper rescission of that order, the relief sought in *casu* was therefore incompetent. The court was urged to dismiss the application with costs on the legal practitioner and client scale on the basis of these preliminary points.

As regards the merits, the second respondent insisted that the purported transfer of the property from the first respondent to the applicant in September 2003 was irregular and impossible at law as at that time the property was owned by the third respondent. The third respondent had taken ownership of the property through registration on 23 September 2002. As was clear from the power of attorney to pass transfer to the third respondent, the agreement to sell the property to the third respondent was concluded before the incorporation of the applicant.[2] The applicant's certificate of incorporation showed that it was incorporated on 23 July 2002.[3]

The second respondent averred that the purported agreement of sale between the applicant and the second respondent was fraudulent for the following reasons. The applicant was purportedly represented by one Christopher Wesley Takura Tande (Tande) who had no relationship with the applicant. He was neither a director, shareholder nor an employee of the applicant at the time. He therefore had no legal right to represent the applicant. The said Tande got involved with the applicant in 2003, yet he purported to execute the agreement of sale on 6 August 2002. He was appointed director and secretary of the applicant on 10 July 2003, as was clear from the register of directors and secretaries for the period 23 July 2002 to 31 December 2007.[4]

One Emildah Tendai Mapanzure (Mapanzure) who purportedly represented the first respondent had no authority to act in that manner. All transfers from the first respondent's Bannockburn property were in terms of the first respondent's board resolution of 8 February 2001.[5] The deponent contends that it was mischievous for Mapanzure to purport to conclude an agreement of sale of the property with the applicant. The purported board resolution attached to the applicant's founding affidavit was a fraudulent document. The deponent denied ever executing the said

[2] See the power of attorney on p25-26 which is annexure D to the applicant's founding affidavit.
[3] Annexure B1 to the second respondent's opposing affidavit.
[4] Annexure C1 on p 91 of the second respondent's opposing affidavit.
[5] The board resolution is annexure D1 to the second respondent's opposing affidavit, p 93 of the record.

resolution. He suspected that his signature may have been electronically uplifted and superimposed on the document. He further averred that it would not be the first time that Tande would have pulled a similar stunt. He had also done so in a matter which was pending before the court under HC 8497/18 where his co-defendant had confirmed a similar fraudulent act. The second respondent also claimed that the applicant never paid for the property in question. For the said reasons, the second respondent averred that the applicant had no reason to be in occupation of the property. The applicant was also holding a fraudulent title deed. It must have known that there was a legitimate title deed for the same property.

The second respondent defended the transfer of the property to the fourth respondent. At the material time the first respondent was parceling out a number of stands and by error the same stand was allocated to the fourth respondent. Instead of inconveniencing the fourth respondent, it was easier to allow him to have the stand and compensate the third respondent, who was the second respondent's daughter. Since the third respondent was a minor, they had to approach the court under HC 5475/03 to sanction the transfer of the property to the fourth respondent. As the owner of the stand, the fourth respondent had every right to sell and transfer it to the fifth and sixth respondents.

Attached to the second respondent's opposing affidavit was an affidavit by Engineer Antony Tadiwa Parehwa (Parehwa). He was the project manager for the first respondent during the period 1999 to 2005. Between 2003 and 2007 he was a 100% shareholder in the first respondent. From 2007 to 2016, he was a 50% shareholder and director. He was the project manager when Stand 825 Bannockburn Township was sold and transferred to the third respondent and then to the fourth respondent. He associated himself with the averments made by the second respondent. He averred that all the transactions were well known and occurred some sixteen years back. The applicant's alleged recent discoveries of anomalies in the registration of the property were just a ruse meant to avoid the issue of prescription.

THIRD RESPONDENT'S CASE

Her opposing affidavit was very brief. At the material time the transaction took place, she was a minor and was represented by her father, the second respondent. By and large she associated herself with the deposition by the second respondent. She claimed that she was never served with

a copy of the application and only got to know of it in the circumstances alluded to by the second respondent.

FOURTH RESPONDENT'S CASE

The fourth respondent stated that whilst the property was once registered in her name, the person who had interest in it was her father, Kudzai Chirima. He was the person who actually owned the property. She denied any dealings with the applicant. Her averments were supported by Kudzai Chirima who in his supporting affidavit claimed that he used to work for the first respondent. When he left employment he was given some undeveloped stands as part of his exit package. The property in dispute was one of them. The property was only to be transferred after compliance with the subdivision permit requirements. Sometime in 2003, the second respondent informed him that a court order was required to facilitate transfer. He was further informed that there was an issue in connection with the title deed. An agreement of sale was apparently prepared for use in court. The court papers were signed by his wife on behalf of their daughter.

Kudzai Chirima further claimed that he was unaware of the sale between the applicant and the first respondent. The property had been given to him in lieu of what he was owed by the first respondent. He could not comment about whether the property should have reverted to the first respondent after the court order in HC 6475/2003. He did not really care who transferred the property to him for as long it was in his nominee's name. After all the transaction was being handled by the first respondent's regular legal practitioners. He confirmed selling the property to the fifth and sixth respondents.

FIFTH AND SIXTH RESPONDENT'S CASE

The fifth respondent deposed to the main opposing affidavit. In her opposing affidavit, the sixth respondent essentially associated herself with the deposition made by the fifth respondent who happens to be her husband. The fifth respondent's averments were as follows. On 21 August 2003, he and the sixth respondent entered into a memorandum of agreement with the fourth respondent for the sale of the property. Their agreement of sale was handled a firm of Estate Agents known as Ned Realty. After the completion of the sale formalities, the property was transferred into their names under Deed of Transfer No. 3678/2006. He averred that the applicant was actually in unlawful occupation of the property having erected a makeshift cabin. They had since instituted eviction proceedings against the applicant at the Harare Magistrates Court.

The fifth respondent averred that it was absurd for the applicant to make an application for a replacement title deed, when for a period of about 12 years, the applicant knew or ought to have known that title in the property had since been passed to him and the sixth respondent. He attributed the misapprehension to what he referred to as corporate and contractual wars between the applicant and the first and second respondents. He claimed that the corporate and contractual wars were so deep rooted and complex that it was impossible for the court to resolve them without hearing oral evidence. The fifth respondent further contended that the applicant ought to have foreseen that the dispute could not be resolved without resorting to oral evidence. It was therefore misdirected to have proceeded by way of motion proceedings instead of summons.

The fifth respondent averred that the applicant's version of events was confused in as much as it was similarly confusing. It was weird because the eighth respondent would not have registered Deed of Transfer No. 3678/2006 if it was clear that the fifth and sixth respondent could not legitimately receive title. The seventh respondent merely acted in its professional capacity as a conveyancer who must comply with all conveyancing formalities before transfer of title. In any event, the eighth respondent employed a thorough examination process before registering any transfer of title. The fifth respondent further argued that it was absurd for the applicant to claim that the 7th respondent misled the eighth respondent. Deed of Transfer No. 3678/2006 was registered 13 years ago, yet the applicant had not taken any action to redress a process that it claimed to be irregular and unlawful.

The fifth and sixth respondents moved for the dismissal of the application with costs on the punitive scale of legal practitioner and client arguing that the application was tantamount to a gross and unmitigated abuse of court process.

SEVENTH RESPONDENT'S CASE

The opposing affidavit was deposed to by Obert Chaurura Gutu, the senior and founding partner of the seventh respondent. In his affidavit he referred to an acrimonious corporate and contractual fall out between the applicant and the first and second respondents as the genesis of the dispute before the court. As the conveyancer, he claimed that he had nothing to do with the dispute between the said parties. He further averred that the founding affidavit was littered with numerous factual inaccuracies and unfounded allegations against his professional standing. That

made it wrong for the applicant to proceed by way of court application instead of the action procedure. The factual disputes were clearly unresolvable on the papers.

It was further averred that the conveyancing paper trail at the eighth respondent's offices confirmed that everything done by the seventh respondent was clearly above board. The eighth respondent would not have registered Deed of Transfer 3678/06 in favour of the sixth and seventh respondents if the conveyancing paper trail was irregular. The seventh respondent also averred that in its draft order, the applicant was seeking the cancellation of Deed of Transfer 3678/03 purportedly registered in the names of the fifth and sixth respondents when no such Deed of Transfer existed.

The application was dismissed as misguided and hopelessly devoid of merit. The applicant should have simply proceeded against the first and second applicant for a claim for damages, if it was convinced it had a valid claim against the two parties. There was no point in dragging uninterested parties into its fights with the first and second respondents. The court was urged to dismiss the application with costs on the punitive scale to show its disdain to such abuse of its processes.

ANSWERING AFFIDAVIT

The reply to the first and second respondents' notice of opposition was as follows. The applicant dismissed the preliminary point that it deliberately abstained from serving the application on the said respondents. It averred that it was actually in the process of serving the first and second respondents when it received their notices of opposition. The applicant also dismissed the second preliminary point that the relief it sought was incompetent arguing that though it was a point of law, it had a bearing on the merits. It could therefore not be argued as a preliminary point. Concerning the third point that the impugned transaction was sanctioned by an order of this court, and therefore the application was an attempt to rescind the order of the court through the back door, the applicant averred that the point also had a bearing on the merits. The court order in HC 6475/03 did not sanction the transfer of the property to any party.

As regards the merits, the applicant denied that the third respondent ever owned the property. According to the applicant, this was confirmed by the contents of the second respondent's affidavit in HC 6475/03. The transfer to the third respondent was done in error and no title vested in her in respect of the property. Accordingly, this meant that the transfer from the

first respondent to the applicant was valid and unimpeachable. The property was sold to the applicant by the first respondent in terms of an agreement dated 6 August 2002. That date was significant because it confirmed that the first respondent was already divested of dominium before the mistaken transfer to the third respondent occurred. The applicant was the only party whose transfer followed the *causa* in its contestation with the fourth respondent.

The applicant dismissed the averment that its agreement with the first respondent was invalid on the basis that the person who represented the applicant had no right to represent it. The applicant was at large to choose its own agent as it saw fit. It also denied that the date of the applicant's incorporation was of relevance to the dispute. The applicant dismissed the argument as an act of desperation on the part of the first respondent. The acts of desperation were also confirmed by the following: the first and second respondents sought to challenge Mapanzure's authority to act on behalf of the first respondent in the transaction, yet they accepted her authority in the other transactions. The deed of transfer in favour of the applicant stated that the power of attorney on behalf of the first respondent was granted to the conveyancer by Mapanzure and the second respondent, yet the second respondent did not put the power of attorney for this transfer in issue.

The conveyancer responsible for the transfer was the same conveyancer used by the first respondent in all of its transfers, and he would therefore know who signed the power of attorney permitting him to divest the first respondent of its property. The first respondent had not taken any action against the alleged fraudster Mapanzure or the conveyancer Obert Chaurura Gutu if at all they acted without its authority. The title deed in favour of the applicant attested to the fact that the purchase price was satisfactorily secured if not paid. The allegation of fraud was only made in respect of this property, yet no allegations were made in respect of the other pieces of land purchased together with the property under the same agreement.

The applicant dismissed as patently false, the averments made pertaining to the passing of title to the third respondent leading to the granting of the order under HC 5475/03. It said for the following reasons: while the second respondent was alleging that the third respondent actually purchased the property and there was a double sale with the fourth respondent, in HC 6475/03 the second respondent alleged that a clerical error resulted in the third respondent receiving title. He claimed that in HC 6475/03, the court sanctioned the transfer of the property from third respondent

to fourth respondent when in fact the court sanctioned the cancellation of the third respondent's title deed since she had never held title over the property. The fourth respondent could never have owned the property as a result of defects in title. She never purchased the property from the third respondent, but purportedly purchased it from the first respondent. The title ought to have been derived from the first respondent.

The applicant denied all the averments in the supporting affidavit of Parehwa. It insisted that its title was unimpeachable. The applicant also averred that even assuming that its title was found to be invalid, it also followed that the fourth respondent's title was similarly afflicted since she did not get title from the party that allegedly sold the property to her. The title would have to revert to the first respondent. The first respondent was then obliged to transfer the property to the applicant who was the first purchaser and possessor for more than seventeen years.

As regards the opposing affidavit of the fifth and sixth respondents, the applicant insisted that their title was tainted. The property was transferred to the applicant by the first respondent together with three other stands well before the alleged sale to the fifth and sixth respondents. Transfer was only delayed because the first respondent had to first of all comply with the conditions of the subdivision permit. After compliance, all the four stands were transferred to the applicant. The applicant obtained title way before the fifth and sixth respondents. Had they cared to check, they would have discovered that title in the property was already registered in the applicant's name.

The applicant denied that there existed material disputes of fact which were unresolvable on the papers. The transfer to the third respondent was without basis as admitted by the second respondent in HC 6475/03. That made the transfer to the fourth respondent unlawful and the subsequent transfer to the fifth and sixth respondent suffered the same fate.

As regards the opposition by the seventh respondent, the applicant avers that the conveyancer was central to the dispute since he was involved in all the transfers surrounding the property. The initial registration into the third respondent's name was done by the same conveyancer. He was also involved in the registration of the three stands purchased simultaneously with the property in dispute. He also represented the applicants in the application that resulted in the cancellation of Deed of Transfer 9556/02. The conveyancer was responsible for the transfer

from the first respondent to the applicant. He was also involved in the transfer from the third to the fourth respondents, and from the fourth respondent to the fifth and sixth respondents.

There was no explanation from the seventh respondent as to why he proceeded to transfer the property to the third respondent in the face of a court order cancelling Deed of Transfer 9556/2002, and the protestations by the eighth respondent. Once a deed was cancelled, the previous deed was automatically revived. The was no explanation as to why the title deed made the court order the cause of the transfer despite the query raised by the examiner.

The Submissions and the Analysis

At the commencement of oral submissions, the first to third respondents raised seven preliminary points which are that: the failure to serve the application upon them rendered it defective; the answering affidavits were irregular since they were issued, filed and served after heads of argument had been filed; the applicant's heads of argument were filed out of time; the applicant's claim had prescribed; absence of cause of action; the application was based on hearsay and consequently invalid; and that the application was replete with disputes of fact. I now turn to determine these preliminary points in detail.

Failure to serve the court application

Mr *Mpofu* appearing for the first to third respondents submitted that the application had still not been served on the said respondents even by the time the matter was being heard. The failure to serve the application and the founding affidavit offended r 231 of the High Court Rules, 1971(the Rules). Counsel further submitted that after the service of the application, there was also need prepare and file a certificate of service. No such certificates were filed in respect of the service on the first to third respondents. Counsel submitted that this was an elementary irregularity which had not even been cured by an application for condonation. The fact that the respondents had filed notices of opposition in the absence of a service did not make the application regular. There was therefore no application before the court.

In his response, Mr *Ndlovu* for the applicant argued that the application was properly before the court. The issue concerning the service of the application was dealt with in correspondence between the parties and in the applicant's answering affidavit. One of the letters referred to by counsel was a response to a letter from the seventh respondent, who also happen to be the fifth and sixth respondent's legal practitioners. In their letter of 12 November 2019, Messrs *Gutu* &

Chikowero wrote to the applicant's legal practitioners reminding them of the need to file an answering affidavit following the filing of opposing affidavits of first to third respondents and the fifth and sixth respondents. They gave them until 14 November 2019 to set the matter down failing which they would proceed to apply for the dismissal of the application for want of prosecution. In their response dated 19 November 2019, the applicant's legal practitioners advised that they had been unable to serve the application on the fourth respondent, and they were looking for an alternative address. It was for that reason that they could not set the matter down. Attached to the letter was the Sheriff's return of service, which confirmed an attempted service. Both letters were copied to the first to third respondents' legal practitioners of record.

Mr *Ndlovu* further submitted that the question of the service of the application fell away in the face of the opposing affidavits by first to third respondents. The fact that the respondents claimed to have fortuitously stumbled upon the application was neither here nor there since they had already filed their opposing papers. One could not respond, and thereafter complain about non-service. The essence of requiring service was to afford all interest parties the chance of being heard in keeping with the tenets of natural justice. There was no prejudice to the affected respondents. They were already before the court.

Rule 231 states as follows:

> "***231. Filing and Service***
> (1) A copy of a court application and of every affidavit by which it is supported shall be served upon every respondent.
> (2) Except as otherwise provided in this Order, no affidavit which has not been served with a court application shall be used in support of the application unless it is otherwise ordered by the court or a judge.
> (3) A court application and supporting documents shall be filed with the registrar before or as soon as practicable after the application has been served on every respondent.
> (4) As soon as possible after service of a court application and the supporting documents, the applicant shall file with the registrar proof of such service in accordance with rule 41."

The rule does not state what must happen in the event that an application is not served, but somehow the affected respondents get to file opposing papers having stumbled upon the court application like what happened in *casu*. The purpose of serving pleadings on interested parties is to alert such party of the existence of a case against them and inform them of their right to respond should they be so minded. It is intended to avoid prejudice to an interested party who may find himself saddled with a judgment or order of court, being a product of a litigation process that they were not aware of. The first to third respondents proceeded to file opposing affidavits and heads

of argument once they became aware of the existence of the application. I agree with Mr *Ndlovu* that in determining whether the failure to serve the application makes the application irregular, the court must also consider the question of prejudice to the respondents. None was alleged. Ultimately it was the applicant that initiated the application. The respondents became aware of its existence and opposed it. For the court to refuse to entertain the application for want of proper service under the circumstances would be too drastic a consequence. The court determines that the objection is without merit and it is dismissed.

Irregularly Filed Answering Affidavits

Mr *Mpofu* submitted that the filing of affidavits must follow a sequence. He further submitted that where a respondent has filed a notice of opposition and an opposing affidavit, and within one month the applicant has neither filed an answering affidavit nor set the matter down for hearing, the respondent may set the matter down for a hearing or apply for the dismissal of the matter for want of prosecution. In *casu*, no answering affidavit was filed and the first to third respondents proceeded to file heads of argument on 4 December 2019. The answering affidavit was only filed on 6 March 2020. Counsel submitted that once heads of argument were filed then the applicant could not file an answering affidavit. The applicant had not even sought condonation.

Mr *Mpofu* also submitted that the applicant's heads of argument were also filed out of time and yet no condonation was sought. Counsel further submitted that in terms of r 238 (3), if a respondent filed heads of argument first, then the applicant was required to file heads of argument within ten days or not later than five days to the date of set down. The same penalty that would befall the respondent in the event of non-compliance would also befall the applicant. Once a party was barred, then they could not file any further process before the bar is uplifted. When the applicant's heads of argument were filed on 18 March 2020, the registrar ought to have disregarded them as the applicant was barred.

In his reply, Mr *Ndlovu* submitted that there was nothing irregular about the manner in which the answering affidavits were issued, filed and served on the respondents. He further submitted that r 236 directed how a respondent should react to a failure by the applicant to file an answering affidavit. As regards the alleged late filing of the heads of argument, he argued that a bar only arose as against a respondent and not an applicant. The matter was therefore properly set down.

I will first of all determine whether the answering affidavits that were filed after heads of argument were already filed are properly before the court. The first to third respondents' notices of opposition were all filed on 2 October 2019. The answering affidavit was filed on 6 March 2020. The opposing affidavit for the fifth and sixth respondents was filed on 20 August 2019, while the one for the seventh respondent was filed on 22 August 2019. A global answering affidavit was filed in respect of the fifth, sixth and seventh respondents on 6 December 2019. On 6 December 2019, the applicant's legal practitioners wrote to the first to third respondents' legal practitioners as follows:

> "RE: UNITIME INVESTMENTS (PVT) LTD v ASSETFIN & OTHERS – HC6560/19
> …….
> We were surprised to receive heads of argument especially after our letter of 19 November 2019 wherein we had indicated that one of the parties had not yet been served. We had earlier indicated that we wanted to file a consolidated answering affidavit to all notices of opposition. Seeing as you have filed your heads we will proceed to answer to the 5th, 6th and 7th respondents. Our client indicates that they are close to establishing the whereabouts of the 4th respondent so that he can be served with the application."

Rule 234 regulates the filing of answering affidavits. It states as follows:

> "***234. Answering affidavit***
> (1) Subject to subrules (3) and (4) of rule 236, where the respondent has filed a notice of opposition and an opposing affidavit, the applicant may file an answering affidavit with the registrar, which may be accompanied by supporting affidavits.
> Provided that no answering affidavit may be filed less than ten days before the hearing of the application.
> (2) As soon as possible after filing an answering affidavit in terms of subrule (1), the applicant shall serve a copy of it upon the respondent and, as soon as possible thereafter, shall file with the registrar proof of such service in accordance with rule 41."

Rule 236 (3) states that where a respondent has filed opposing papers, and within one month thereafter, the applicant has neither filed an answering affidavit no set the matter down for hearing, then the respondent has courses of action open to it. The respondent may, on notice to the applicant, set the matter down for hearing or make a chamber application for the dismissal of the matter for want of prosecution. What can be inferred from the construction of r 236 is that if the respondent decides not to exercises one of the two options available, then there is no barrier to the filing of an answering affidavit for as long as it is done ten days before the hearing. The notice of set down on the opposed roll was issued and filed on 18 October 2020. The matter was then argued on 26 October 2021. There is nothing in the rules that suggests that the filing of an answering

affidavit after the respondent has filed opposing papers renders the answering affidavit irregular. I find no merit in this objection and I accordingly dismiss it.

The next point relates to the alleged late filing of heads of argument. The first to third respondents' heads of argument were filed on 4 December 2019. Heads of argument for the fifth, sixth and seventh respondents were filed on 18 December 2019. The applicant only filed its heads of argument on 18 March 2020. In terms of r 238, heads of argument of argument must be filed before a matter is set down for hearing, if at the hearing the applicant is going to be represented by a legal practitioner. The filing of heads of argument by an applicant is made mandatory by r 238(1a) which provides that an application shall not be set down for hearing unless heads of argument have been filed by the applicant's legal practitioners. There is no specification of the time within which such heads of argument must be filed. What matters is that heads of argument must be filed before the matter is set down for hearing.

Rule 238(2a) requires that heads of argument on behalf of a respondent be filed not more than ten days after the filing and delivery of heads of argument on behalf of the applicant. In terms of r 238(2b), where the respondent fails to file heads of argument in terms of r 238(2a), then that respondent shall be barred. The rules penalize a respondent for the non-filing of heads timeously. Rule 238 (3) which was cited by Mr *Mpofu* states as follows:

> "(3) In relation to any application, exception or application to strike out which has been set down for hearing by a respondent, any reference—
> (*a*) in subrule (1) to the applicant or excipient, shall be construed as a reference to the respondent;
> (*b*) in subrule (2), (2a) or (2b) to a respondent, shall be construed as a reference to the applicant or excipients." (underlining for emphasis)

It is on that basis of that rule that Mr *Mpofu* argued that the same penalty that befalls a respondent in the event of the late filing of heads of argument must befall an applicant. My interpretation of that rule is that the same fate as would befall a respondent for the late filing of heads of argument, would only befall an applicant where the respondent is responsible for setting the matter down. That was not the case herein. The matter was set down for hearing by the applicant. For that reason, I find the rule inapplicable.

The wording on the old rules was replicated in the new High Court Rules, 2021. From a careful reading of the rules, it follows that there is no provision for the barring of an applicant for the late filing of heads of argument unless the respondent proceeds to set the matter down. In such a case, the applicant is expected to comply with the same time frames that a respondent has to

contend with. It follows that where an applicant has not filed heads of argument following the filing of an answering affidavit, then a respondent must proceed to set the matter down for hearing or file a chamber application for the dismissal of the application for want of prosecution in terms of r 236(4). For the foregoing reasons, I find the point *in limine* devoid of merit and hereby dismiss it.

Prescription

In their heads of argument, the first, second and third respondents submitted that the applicant's claim had hopelessly prescribed. They averred that the supporting affidavit of Parehwa attached to the second respondent's opposing affidavit made it clear that the circumstances surrounding the property that gave rise to the applicant's complaint were known to it for a period in excess of 12 years. That averment was not rebutted and therefore it had to be taken to have been admitted. In his oral submissions, Mr *Mpofu* submitted that prescription had been properly raised in the pleadings in terms of s 20(2) of the Prescription Act.

In reply, Mr *Ndlovu* submitted that the point was devoid of any merit. He argued that in terms of s 20 of the Prescription Act, the defence of prescription must be properly pleaded. The supporting affidavit of Parehwa had merely mentioned prescription in passing. Mr *Ndlovu* further submitted that the respondents were required to sufficiently plead prescription in such a way that it was clear at what point proceedings ought to have been instituted. Counsel further submitted that the question of prescription did not arise if one had regard to the nature of the relief sought by the applicant. The application was one for a *declaratur* as opposed to payment of a debt. A claim for a *declaratur* did not constitute a debt within the contemplation of s 2 of the Prescription Act. Counsel also argued that the applicant's claim was one that involved the assertion of ownership, which was a function of the *rei vindicatio*. A *rei vindicatio* did not prescribe.

Section 20 of the Prescription Act provides as follows:

> "**20 Prescription to be raised in pleadings**
> (1) No court shall of its own motion take notice of prescription.
> (2) A party to litigation who invokes prescription shall do so in the relevant documents filed of record in the proceedings:
> Provided that a court may allow prescription to be raised at any stage of the proceedings."

Prescription is one of the major legal defences recognised at law that effectively forestalls a civil claim by a litigant once it is proved that such a claim expired by expiration of time. It's clear from the wording of s 20 above that such a defence must be pleaded and can be raised at any

stage of the proceedings. Ordinarily prescription is raised as a preliminary point that bars civil actions on a claim after the expiry of a certain period of time. The reason why it must be specifically pleaded is to allow the party against whom it is being raised to respond. It can completely destroy an action. The issue of prescription was raised in the second respondent's opposing affidavit as follows:

> "The purported discovery of the title deed is feigned. It is all a pretence. For reasons stated above Applicant always knew that it was holding a fake second title deed for the property in question. The pretence is also a convenient attempt to avoid prescription."

The issue was also raised in Parehwa's supporting affidavit as follows:

> "….. I share 2nd Respondent's view that a recent discovery is alleged simply to avoid the fact that whatever issue Applicant may have wanted to raise has prescribed. These are transactions that happened some sixteen years ago."

The essence of requiring particularity in pleading the defence of prescription is because time is always of the essence in determining whether or not a claim has all but prescribed. The papers must clearly spell out the basis upon which the defence is anchored and when the cause of action arose. It for that reason that evidence is relevant in determining whether or not a claim has indeed prescribed.[6] The two paragraphs quoted above do not provide the kind of particularity and precision required in pleading prescription. What further complicates the whole issue is that in its response to the averments of prescription, the applicant denies any knowledge of the transfer of the property to multiple persons.[7] It denied any knowledge of any prior competing claims to the property. On that basis, the court determines that the question of prescription was not only not sufficiently pleaded, but it is unresolvable on the papers without the benefit of oral evidence. The preliminary point is accordingly dismissed.

Material disputes of fact

Mr *Mpofu* submitted that the matter was saddled with serious disputes of fact which made it impossible for the court to make an informed decision on a balance of probabilities. There were a lot of gray areas that necessitated the adduction of oral evidence. Counsel cited the following crucial areas: there was no proof that the applicant purchased the property; the first to third respondents averred that the transfer of the property was fraudulently procured; the averments by

[6] (1) See *Jennifer Nan Brooker vs Richard Mudhanda and the Registrar of Deeds* SC 5/18
[7] Paragraph 15 of the applicant's answering affidavit on p 123 of the record.

Parehwa in his supporting affidavit cast serious doubt on the applicant's version of events; The second respondent disputed the board resolution that led to the sale of the property.

In their heads of argument, the fifth to seventh respondents echoed similar sentiments with respect to the materiality of the disputed facts that afflicted the application. For instance, the applicant stated that it took transfer of the property on 9 September 2003. In its own papers, it asserted that it discovered that the third respondent had taken title to the property on 23 September 2002. The fifth and sixth respondents assumed ownership of the property pursuant to their agreement of sale with the fourth respondent. The circumstances under which the applicant and the third respondent assumed title in the property therefore needed to be properly ventilated through oral evidence.

In his reply, Mr *Ndlovu* denied that there existed material disputes of fact as would impede upon a resolution of the matter on the papers. He submitted that it was common cause that the first respondent sold the property to the applicant. It was also common cause that title deeds were issued in favour of the applicant following the sale. Mr *Ndlovu* further submitted that at any rate, the law urged the courts to adopt a robust approach and endeavor to deal with the alleged disputes on the papers.

The standard for establishing whether or not disputes of fact exist was set out MAKARAU JP (as she then was) in *Supa Plant Investments (Pvt) Ltd* v *Chidavaenzi*[8]*:*

> "A material dispute of facts arises when material facts alleged by the applicant are disputed and traversed by the respondent in such a manner as to leave the court with no ready answer to the dispute between the parties in the absence of further evidence."

To this end, it follows that the mere allegation of a possible dispute of fact is not conclusive of its existence. The papers must expose the existence of a *bona fide* dispute of fact which is incapable of resolution on the papers without recourse to oral evidence.[9] The election as to whether to proceed by way of motion proceedings or by way of action must be made at the very outset when a litigant decides to institute proceedings. That election is no doubt informed by the nature of the dispute and the type of evidence required to persuade the court to make a finding in that litigant's favour. There are certain classes of disputes in which it is generally impossible to achieve a resolution without recourse to some *viva voce* evidence. Disputes involving multiple sales and

[8] 2009 (2) ZLR 132 (H) at 136F-G:
[9] See *Muzanenhamo v Officer in Charge, CID Law and Order and 7 Ors* CCZ 3/13

ownership of the same property immediately come to mind. Invariably such disputes involve the office of the eighth respondent, but rarely does that office respond to queries pertaining to registration of documents in motion proceedings. Yet it is the very office that must provide a clue as to how the same property ended up having two title deeds. This exactly what happened *in casu*. The same property has two sets of title deeds but different owners. Yet the registration occurred in the same office.

In the opening remarks of its heads of argument, the applicant makes very interesting observations which in a way help explain the somewhat unusual circumstances the court has to deal with. The applicant says:

> "This is a strange case. It is strange because a single piece of immovable property was transferred to two different entities, thus creating two competing titles for the property. It is made stranger by the fact that both transfers were done by the same conveyancer. That conveyancer did not bother to explain himself despite filing an opposition to it. Stranger still is the fact that the First Respondent which is the proponent of the two transfers proceeded to cause even more irregular transfers to be made. Sanity should be restored by the Court…."

The preparer of the heads of argument was very correct in his analysis. However the statement betrays serious shortcomings in the procedure that was adopted on behalf of the applicant. It is very strange that the conveyancer who was responsible for the transfers to the applicant as well as to the fifth and sixth respondents completely disowns the applicant. Yet it is the same conveyancer who facilitated the registration of the two competing title deeds. As correctly pointed out in the applicant's heads of argument, the seventh respondent does not explain what transpired. In its founding affidavit, the applicant claims that it became aware of the existence of the two competing title deeds in 2018, when it approached the eighth respondent's offices. It was informed that its title deed could not be replaced because there were two title deeds over the same property. It attached a query sheet generated by the eighth respondent. No explanation was given by the eighth respondent.

According to the applicant, its own investigations revealed that the property was once registered in the third respondent's name. The eighth respondent was also involved in the transfer. The property then changed hands from the third respondent to the fourth respondent, who in turn transferred it to the fifth and sixth respondents.

What compounds the obscurity involving all these transactions is that the second respondent claims that the purported sale agreement between the applicant and the first respondent

is fraudulent. The person who purportedly represented the applicant was not even involved with the applicant when the agreement of sale was signed. The second respondent also claims that the person who allegedly represented the first respondent had no authority to represent that party. She was on a frolic of her own. Yet that person was the second respondent's co-director. The resolution that allegedly blessed the sale was dismissed as fraudulent. The second respondent claimed that his signature was forged. The second respondent further denies that the applicant paid any purchase price for the property. The proof of payment of the purchase price was not tendered.

The court ultimately determines that the parties herein hold conflicting positions which are irreconcilable on the papers in several critical respects. This is not the kind of case where the court can take a robust approach and attempt to resolve the dispute in the face of those apparent conflicts. Going by the narration of events in the applicant's founding affidavit, it ought to have been obvious to that party that instituting proceedings by way of the application procedure was a very risky adventure. The existence of disputes of facts was quite apparent right from the very outset in the absence of an explanation by the eighth respondent. In *Room Hire Co (Pty) Ltd* v *Jeppe Street Mansions (Pty) Ltd*[10], MARRAY AJP properly articulated the position of the law in such instances as follows:

> "It is obvious that a claimant who elects to proceed by motion runs the risk that a dispute of fact may be shown to exist. In that event (as indicated *infra*), the court has a discretion as to the future course of the proceedings. If it does not consider the case such that the dispute of fact can properly be determined by calling *viva voce* evidence under r 9, the parties may be sent to trial in the ordinary way, either on the affidavits as constituting pleadings, or with a direction that pleadings are to be filed. Or **the application may even be dismissed with costs, particularly when the applicant should have realised when launching his application that a serious dispute of fact was bound to develop. It is certainly not proper that an applicant should commence proceedings by motion with knowledge of the probability of a protracted enquiry into disputed facts not capable of any ascertainment, but in the hope of inducing the court to apply r 9 to what is essentially the subject of an ordinary trial action".** (My emphasis).

For the foregoing reasons, the court determines that there is merit in the preliminary objection. The disputes of fact strike at the heart of the applicant's claim. It is only through *viva voce* evidence that the court is able to determine if the applicant's claim has not prescribed. It also through *viva voce* that the court can also determine if at all there is a cause of action and whether the deponent to the applicant's founding affidavit was not deposing to falsehoods. There is a lot of

[10] 1949 (3) SA 1155 T at 1162

unraveling that needs to be done through oral testimony. The strange occurrences that were correctly observed in the applicant's heads of argument can only be resolved conclusively through oral testimony.

COSTS

The general principle is that costs follow the event. The court was urged to dismiss the application with costs on the punitive scale. Having considered the totality of circumstances of the case, I find no basis to grant an order of costs on the punitive scale. I must also mention that the seventh respondent was rather coy in its response. It was involved in all the transactions that gave rise to this dispute. Its position is central to the ultimate resolution of this dispute. Yet its opposing affidavit did not give away much. Instead it constantly made reference to corporate and contractual disputes between the applicant and the first and second respondents, without explaining what those disputes were. It also went on to represent the fisfth and sixth respondents, yet it was involved in the transfers of title to those parties as well as the applicant. Even though it was successful in its defence, the court finds it befitting to deny it costs.

DISPOSITION

Resultantly it is ordered that:

1. The application be and it is hereby dismissed.
2. The applicant shall pay the first to third and the fifth and sixth respondents' costs of suit.

Nyamayaro, Makanza & Bakasa, applicant's legal practitioners
Gill, Godlonton & Gerrans, first, second & third respondent's legal practitioners
Charamba & Partners,fouth respondent's legal practitioners
Gutu & Chikowero, fifth, sixth & seventh respondent's legal practitioners