Judgment No. HB 134/04
Case No. HC 262/03

JOHN GARDNER MUNRO FERGUSON

Versus

THE TRUSTEES FOR THE TIME BEING OF CITY CLUB BULAWAYO

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 16 FEBRUARY AND 2 DECEMBER 2004

D M Campbell for the applicant
J Tshuma for the respondent

Judgment

NDOU J: The applicant is a medical practitioner carrying on his profession in partnership with others at Galen House, 93 Josiah Tongogara Street, Bulawayo ("the Galen House property"). The respondents are the trustees for the Time Being of the City Club Bulawayo, a gentlemen's recreational club having its club house premises at 95 Josiah Tongogara Street on the southern boundary of the Galen House property. The Galen House property was at one time the whole of stand 658 Bulawayo Township extending from Josiah Tongogara in the west to the sanitary lane to the east with its northern boundary along 9th Avenue and its southern boundary in common with the northern boundary of the City Club. In August 1970 the Galen House property was subdivided into two pieces, namely, a piece of land on the corner of 9th Avenue, and the sanitary lane known as lot I of stand 658 Bulawayo Township upon which was built Lancet House ("the Lancet House property") and the remainder of the Galen House property. The Lancet House property had its northern boundary on 9th Avenue and its eastern boundary on the sanitary lance, but did not share its southern boundary with the City Club property being separated therefrom by a strip of

the Galen House property preserving the access of that property to the sanitary lane on the east.

The applicant became the owner of the Lancet House property in May 1988. The applicant and some of his partners in the Galen House property have established a casualty unit in Lancet House for the treatment of emergency illness and accidents. Some time in 1997 the applicant entered into negotiations with the Chairman and Committee of the City Club with a view to acquiring for the benefit of the casualty unit that portion of the City Club property which abutted on the sanitary lane behind the Club house and situated immediately behind Lancet House. As a result of these negotiations some time in 1998 the parties concluded the agreement subject matter of these proceedings. The respondents were owners of two adjacent pieces of land described above which they were in the course of consolidating and which, it was agreed, would, upon consolidation, be subdivided into two portions one of which, "the subdivided property" was sold to the applicant. The purchase price of the subdivided property was paid in cash immediately to be held in trust by respondents as sellers pending the fulfilment of the legal requirements for subdivision. It was agreed that if the necessary municipal authority for the subdivision as envisioned in the diagram annexed to the agreement was not forthcoming, or if for any other reason the transfer could not be passed to applicant, the purchase price was to be refunded. The applicant was also granted a right of first refusal to purchase the whole property if at any time before or after transfer of the proposed subdivision should be wound up. The council authority for the subdivision was granted on 19 November 2001 and survey diagrams were prepared. Despite demand respondents refuse or neglect to transfer the subdivided property to applicant.

From the facts it is common cause that sale agreement sought to be relied by the applicant was not preceded by the application to the Municipality of Bulawayo on behalf of the City Club for the approval of the proposed subdivision of the disputed property.

The applicant seeks an order in the following terms:-

"1. That respondents, themselves or their duly authorised agent do, within fourteen days of service of this order upon them, sign and attest all documents, applications, powers of attorney and declaration required of them to secure separate title to the proposed stand 16681 Bulawayo Township a portion of stand 16447 Bulawayo Township and to transfer the same to applicant.
2. That should respondents default, the Deputy Sheriff of this honourable court is hereby directed to sign and attest all such documents in place of respondents.
3. That the costs of this application are to be paid by respondents."

The respondents' case is that even if there was an offer and acceptance which is denied the purported agreement has a nullity for want of compliance with section 39(1) as read with section 40 of the Regional Town and Country Planning Act [29:12] (The Act). The said provision reads in pertinent part:

"(1) Subject to subsection (2), no person shall-
(a) …
(b) enter into any agreement
(i) for the change of ownership of any portion of a property; or
(ii) …
(iii) …
(iv) …
(c) consolidate two or more properties into one property, except in accordance with a permit granted in terms of section forty."

As a general rule, a contract or agreement which is expressly prohibited by statute is illegal and null and void even when, as here, no declaration of nullity has been added by statute – *York Estates Ltd* v *Wareham* 1950(1) SA 125 (SR),

Neugarten & Ors v *Standard Bank of SA Ltd* 1989(1) SA 797 (A) at 808 and *SA Investments* v *Van Der Shyff NO & Ors* 1999(3) SA 340 (N) at 349-50. Whether, in particular, a statutory prohibition falls within this general rule depends upon the construction of the enactment concerned. In the instant case, the use of the word "shall" points to an intention on the part of the legislature that the illegality be visited with nullity. So far as the law in Zimbabwe is concerned, there is no longer any controversy as to the interpretation and meaning of section 39(1) of the Act. It has been considered and determined by the Supreme Court in *X-Trend-A-House* v *Hoselaw Investments (Pvt) Ltd* 2000(2) ZLR 348(S). At 355A McNALLY JA stated-

> "It seems to me to be clear that the legislature has simplified, not modified the previous wording … whether the change of ownership is to take place on signing, or later on an agreed date, or when a suspensive condition is fulfilled is unimportant. It is the agreement itself which is prohibited. The evil which the statute is designed to prevent is clear. Development planning is the function and duty of planning authorities, and it is undesirable that such authorities should have their hands forced by developers who say "but I have entered into conditional agreements, major developments have taken place. You cannot possibly now refuse to confirm my unofficial subdivisions or development". (emphasis added)

In light of the above position the applicant's case is premised on two grounds. First, the applicant's case is that this court should distinguish the facts of this case from that in the *X-Trend-A-House* case, *supra*. The facts of this case are not, with respect, materially different from those in the said judgment. There is simply no merit in the argument.

Second, as a "last resort" Mr *Campbell* submits that the decision in *X-Trend-A-House* case is bad in law. He, *inter alia*, submitted –

> "… However, in saying next "it is agreement itself which is prohibited" the learned judge [McNALLY JA] was unquestionably wrong … But in this too

> he is wrong because he has limited himself to a consideration of only the operative part of the section".

There were further criticisms levelled against the decision. This is harsh criticism of a judgment of the highest court in the land. Such criticism is usually made in academic circles but seldom in the course of a submission in a lower court. As far as this court is concerned the said judgment of the Supreme Court is a binding precedent. This court cannot depart from the position adopted by the Supreme Court in this regard without breaching the *stare decisis* principle – Joubert, *The Law of South Africa* Vol 5 at paragraph 481 and *Diana Farm (Pvt) Ltd* v *Madondo NO & Anor* 1998(2) ZLR 410(H) at 417H-418B. The object of the *stare decisis* principle is to avoid uncertainty and confusion, to protect vested rights and legitimate expectations as well as to uphold the dignity of the court. The effects of this rule is that a judgment of superior court is binding on an inferior court even if the latter considers it wrong, – it is binding until overruled by the Superior Court – *Standard Chartered Bank Zimbabwe Ltd* v *Matsika* 1996(1) ZLR 123 (S); *Ex parte Jones* 1929 CPD 134 at 137; *Ethnomusicology Trust* v *Deputy Chairman, Labour Relations* 1997(2) ZLR 199(H) at 213G-214B. These judgments attest to the authoritative nature of judicial precedents. Such precedents depend on the hierarchy of courts. In terms of the hierarchy this court is therefore bound by the Supreme Court judgment and there is no merit in questioning such a judgment – see also *Introduction to South African Law and Legal Theory*, Hosten, Edwards, Church & Bosman 2nd Ed at pages 386-88.

It is for the above reasons that I dismissed the application with costs.

Calderwood, Bryce Hendrie & Partners, applicant's legal practitioners
Webb, Law & Barry, respondents' legal practitioners