

MERJURY KANDURU  
versus  
CHARLES MASIMBA CHIHUMBIRI  
and  
REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE  
NDOU J  
HARARE 28 March and 12 April 2002

### **Urgent Application**

Mr *V. Matipano*, for the applicant

Mr *S. Makonyere*, for the 1<sup>st</sup> respondent

NDOU J: The first respondent (Charles Masimba Chihumbiri) owns Stand 20 Carrick Creagh Township 2 of Carrick Creagh of Section 4, Borrowdale Estate in Harare. It is common cause that the first respondent's intention is to subdivide this piece of land and sell the subdivisions to various purchasers. One such purchaser is the applicant.

On 8 September 1999, the applicant "purchased" a subdivision of a piece of land owned by the first respondent.

It was an implied term of the agreement that the first respondent was to subdivide the stand to enable him to transfer to the applicant the subdivision she purchased. The applicant paid the purchase price. At the time of this application the first respondent's application for a permit to subdivide the stand had not been granted by the City of Harare. Such a permit is granted in terms of section 40 of the Regional, Town and Country Planning Act [*Chapter 29:12*] (herein referred as "the Act"). In their submissions both legal practitioners seemed to ignore the provisions of section 39 of the Act. I, however, specifically invited further submissions on whether the "Agreement of Sale" forming subject matter of these

proceedings fell foul of the provisions of section 39 of the Act. This invitation only succeeded in producing perfunctory further submissions on the interpretation of section 39. With hindsight, the first respondent's counsel now submits that the agreement of sale is not valid as it was concluded in contravention of section 39. Mr *Matipano*, for the applicant, submits that the agreement "is valid intra-parties in that it was made with an implied condition that applicant will get transfer once a subdivision permit has been granted". This submission is consistent with decision in *NCR Zimbabwe (Pvt) Ltd v Gulliver Consol Ltd and Another* 1993 (1) ZLR 205 (H). This decision, as will later be apparent, has been overruled by the Supreme Court. He further submits that the first respondent did not dispute this in his opposing papers.

It is trite that section 39 forbids an agreement for the change of ownership of any portion of a property except in accordance with a permit granted under section 40 allowing for a subdivision. The agreement between the applicant and the first respondent was clearly an agreement for the change of ownership of the unsubdivided portion of a stand. It is irrelevant whether the change of ownership is to take place on signing, or on an agreed date, or when a suspensive condition is fulfilled. The agreement itself is prohibited by section 39 - see *X-Trend-A-Home (Pvt) Ltd v Hoselaw Investments (Pvt) Ltd* ZLR 2000 (2) 348 (S). In this case McNALLY JA (as he then was) dealt with the construction of section 39 extensively. McNALLY JA also overruled the decision in *NCR Zimbabwe (Pvt) Ltd v Gulliver Consol Ltd and Another* (*supra*). I think it is important to quote what McNALLY JA had to say in this regard on page 355:-

"The relevant words are: 'no person shall ... enter into any agreement for the change of ownership of any portion of a property ... except in accordance with a permit granted in terms of section forty.'

It seems to me to be clear that the legislature has simplified, but not modified, the previous wording. The statute no longer speaks of "a sale" or "an agreement of sale". It uses the much wider expression "agreement for the change of ownership". The agreement with which we are concerned is clearly an agreement for the change of ownership of the unsubdivided portion of a stand. What

else could it be for? 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 already entered into conditional agreements; major developments have taken place; large sums of money have been spent. You can't possibly now refuse to confirm my unofficial subdivision or development"."

There is now legal certainty on the interpretation of section 39.

The cause of action in this case is based on agreement for the change of ownership of the unsubdivided portion of a stand i.e. Stand 20 Carrick Creagh Township 2 of Section 4, Borrowdale Estate. There is no permit granted under section 40 to subdivide this piece of land. The transaction between the applicant and the first respondent fell foul of the provisions of section 39 of the Act. There is no valid and enforceable agreement between the parties.

In the circumstances I dismiss the application with costs.

*Matipano & Musimwa*, applicant's legal practitioners.

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*Robinson & Makonyere*, 1<sup>st</sup> respondent's legal practitioners.