

DISTRIBUTABLE (16)

**(1) SHORAI MAVIS NZARA (2) AAROLA TAKUDZWA TENDAYI
IDEHEN (3) AMOSOGÉ RUDO IDEHEN (4) OSARETIN TANAKA
FEMI IDEHEN**

vs

**(1) CECILIA KASHUMBA N.O. (2) THE REGISTRAR OF DEEDS
(3) MASTER OF THE HIGH COURT (4) TAFIRENYIKA
KAMBARAMI**

**SUPREME COURT OF ZIMBABWE
BEFORE GARWE JA; GUVAVA JA; UCHENA JA
HARARE: JUNE 2, 2017 & MARCH 12, 2018**

T. Mpofo, for the appellants

L. Uriri, for the first respondent

T.L. Mapuranga, for the fourth respondent

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UCHENA JA: This is an appeal against part of the judgment of the High Court Harare.

The first appellant, Shorai Nzara, (Shorai) is the mother of the second to fourth appellants to whom she donated the property that forms the subject of this dispute. The first respondent Cecilia Kashumba N.O. was the wife of the late Dzingai Kashumba and is the executrix dative of his estate. Dzingai Kashumba (Dzingai) entered into an agreement of sale with Shorai Nzara the original owner of the property at the heart of this seventeen-year-old

dispute. The second respondent is the Registrar of Deeds who was cited in his official capacity as the official who registers title of immovable properties. The third respondent is the Master of the High Court, cited in his official capacity as the official who exercises oversight over deceased estates. The fourth respondent Tafirenyika Kambarami bought a sub-division of the land in question from Cecilia Kashumba in her capacity as the late Dzingai's estate's executrix dative.

The detailed facts of the case are as follows;

On 12 May 1999, the first appellant, Shorai entered into an agreement of sale with the now late Dzingai for the sale of two proposed stands - being stand number 552 and 553 Quinington Township of Subdivision "A" of Subdivision "F" of Quinington of Borrowdale Estate. At the time the parties entered into the agreement the two stands constituted one property for which a subdivision permit had been granted by the City of Harare.

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Shorai instituted application proceedings for the cancellation of the agreement of sale, under case number HC10065/00. She claimed that Dzingai had breached the agreement of sale, as he had not paid the full purchase price. The court (per BARTLETT J) accepted that Dzingai had not paid the full purchase price but held that the first appellant had not lawfully cancelled the agreement as she had not given Dzingai the mandatory 30 days' notice in terms of s 8 (2) (c) (ii) of the Contractual Penalties Act [*Chapter 8:04*]. In terms of s 8 (2) (c) (ii) a purchaser is entitled to a notice period of 30 days within which to pay the purchase price before the contract can be cancelled. BARTLETT J ordered Dzingai to pay the outstanding amount within 30 days failing which the contract could be lawfully cancelled. That judgment was handed down on 9 May 2001.

Shorai alleges that Dzingai thereafter attempted to pay the outstanding purchase price through her legal practitioners but over fifty days later on 5 July 2001. Apart from the payment having been made out of time, she claimed that he did not tender the outstanding balance in full. She contended that the amount paid was ZW\$166 403.25 less than was due and her legal practitioners therefore refused to accept the payment.

In view of the above mentioned breaches by the late Dzingai, Shorai again cancelled the agreement and made another application seeking confirmation of the subsequent cancellation. The first respondent argued that payment had been made by cheque to Shorai's legal practitioners who presented it to his bank for payment. She alleged that his account was debited to the value of that cheque, indicating acceptance of the payment. The first appellant disputed this alleging that the cheque through which the late payment was attempted, was returned to Dzingai's legal practitioners.

The dispute over the outstanding balance was referred to arbitration where an award was made confirming that the purchase price had not been settled and that there remained an outstanding balance. By letter dated 4 June 2002 the appellant's legal practitioners again advised Dzingai's legal practitioners that the contract had been cancelled. The first respondent conceded that this position was made clear to Dzingai but contended that the cheque he presented to Shorai's legal practitioners was presented to his bank and debited from his account. She did not however dispute that the amount held by the Arbitrator to have been outstanding had not been paid.

Shorai alleged that there was no response to her letter of 4 June 2002 till 10 July 2002 when Dzingai purported to pay the outstanding balance. On 12 July 2002 her legal practitioners wrote another letter to Dzingai's legal practitioners stressing that the contract had been cancelled and enclosing a cheque for ZW\$454 037.93, being the money the respondent had tendered in his attempt to pay part of the outstanding balance.

Shorai alleges that notwithstanding the cancellation of the contract Dzingai made an application in November 2002 for condonation of his non-compliance with the order of 9 May 2001 but did not pursue it. It was dismissed for want of prosecution in February 2003.

It was contended on behalf of the late Dzingai's estate that the application was not an application for condonation *per se*, but an application for reversal of the donation made by Shorai to her children who are the second to fourth appellants, which it is alleged was in clear violation of the order of the High Court granted by HLATSHWAYO J (as he then was) against the alienation of the property. That order was to remain in force "pending the finalization of the Arbitration proceedings" which were finalised on 28 February 2002. Shorai's donation to the second to fourth appellants was effected on 31 January 2003 long after the arbitration proceedings had been finalized. The transfer was registered in the Deeds Registry and reflected on the title deeds in the second, third and fourth appellants' names.

On 9 May 2003 Dzingai, through his legal practitioners, filed an application for condonation of his failure to comply with the judgment of BARTLETT J, which Shorai opposed. He subsequently withdrew it when he changed legal practitioners. The new legal practitioners

filed another application for condonation for non-compliance with the order of 9 May 2001 in which Dzingai argued that Shorai had no *locus standi* in the matter as she had donated her interest in the property to the second to fourth appellants.

In that application Dzingai argued that the full purchase price except the interest had been paid by August 2000. He therefore admitted that he had not paid the accrued interest. He maintained that the purported cancellation was a nullity at law. He disputed Shorai's right to cancel the agreement.

Dzingai argued that the matter only went for arbitration to clarify the issue of the outstanding interest. On 3 May 2006, while the dispute was still raging, the property was unlawfully transferred from the second to fourth appellants to Dzingai Kashumba.
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Dzingai died on 30 April 2007. Cecilia Kashumba, his surviving spouse was appointed executrix dative of his estate, substituting him as the first respondent. She entered into an agreement of sale with the fourth respondent, Tafirenyika Kambarami, for the sale of one of the contentious properties which the court *a quo* held to be unlawful.

Shorai contested this development as an act of fraud, theft and misrepresentation to the office of the Registrar of Deeds. She claimed that she was unaware of the change of ownership from her children to the late Dzingai.

In response to the unlawful transfers the appellants registered caveats against the properties. Shorai pursued her application in the High Court for the confirmation of the

subsequent cancellation of the agreement between her and Dzingai, which would in turn cancel deeds of transfer number 3030/06 and 3031/06 which Dzingai unlawfully obtained from Shorai at a time when the property had already been transferred to her children the second to fourth appellants. The transfer was therefore purportedly from the first appellant, who no longer had title, without the involvement of the second to the fourth appellants who now had title.

In her evidence to the court *a quo* Cecilia Kashumba alleged that, contrary to the repeated promises of a refund, the money debited from Dzingai's bank account was never returned. In heads of argument prepared on behalf of Shorai in the court *a quo* it was suggested that Dzingai took ownership of the property sometime in 2006, without her knowledge. The court *a quo* correctly found that the judgment of 9 May 2001 had not been complied with, when it was relied on to get transfer from the second to fourth appellants, who were not parties to that judgment, to Dzingai. Dzingai failed to pay the balance of the purchase price within the time ordered by BARTLETT J, leading to the cancellation of the agreement by the first appellant.

In spite of the caveats registered by Shorai and subsequently by the second to fourth appellants against the Title Deeds of stand 553, title was passed to Kambarami by Cecilia in her capacity as the executrix dative of Dzingai's estate.

These are the facts on which the court *a quo* made the following decisions.

1. That the transfer of the two stands to the late Dzingai was unlawful.
2. That the late Dzingai and his estate did not pay the full purchase price.

3. That the donation of the two stands by the first appellant to the second, third, and fourth appellants was lawful.
4. That the sale of stand 553 to the fourth respondent was unlawful.

After making these findings the court *a quo* surprisingly gave Cecilia Kashumba a grace period of thirty days within which to settle the outstanding debt. Dzingai's estate and Kambarami, the fourth respondent were allowed to remain in possession of the two properties during the grace period. The order further provided that if Cecilia Kashumba failed to pay by the deadline the property would be returned to the appellants and all monies paid to date would be forfeited by the deceased estate.

The appellants appealed to this court against the decision of the court *a quo*. The appeal is based on the following grounds of appeal.

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1. Having come to the conclusion that first and fourth respondents had obtained title irregularly and without lawful cause the court *a quo* erred in not finding that the requisites for an action *rei vindication* had been met.
2. Having come to the conclusion that first appellant had been entitled to donate the property to second to fourth appellants and had in fact done so, the court *a quo* erred in granting consequential relief which completely ignored the rights of the true owners of the property.
3. The court *a quo* erred in granting relief which had not been sought from it and which the parties had not addressed their argument to and so erred in adopting a course which is incapable of resolving the dispute between the parties.

4. The court *a quo* erred in coming to the conclusion that the agreement between first appellant and the late Dzingai Kashumba had not been validly cancelled and erred in ignoring an *ex nunc* cancellation of 4 June 2002.

This appeal raises two issues:

1. Whether or not a court can grant an order not sought by the parties.
2. Whether or not the law calls for the strict application of the *rei vindicatio*?

I will address each issue in turn.

1. Whether or not a court can grant an order not sought by the parties?

Mr *Mpofu*, for the appellants, citing authorities, which will be analysed below, submitted that the court *a quo* erred and misdirected itself when it granted relief which had not been sought by either party. Mr *Uriri* for the first respondent and Mr *Mapuranga* for the fourth respondent supported the court *a quo*'s decision without legally establishing the court *a quo*'s authority to grant orders not sought by the parties.

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The fact that the court *a quo* granted orders not sought by the parties can be demonstrated by comparing the orders sought by the parties and the orders granted by the court *a quo*.

In terms of their application and the subsequent notice of amendment the appellants who were the applicants in the court *a quo* sought the following relief:

1. "Deed of transfer No 3030/06 held in the name of Dzingai Kashumba be and is hereby cancelled and title in respect of the remainder of Subdivision 'A' of

- Subdivision 'F' of Quinington of Borrowdale Estate should revert back to the second, third, and fourth Applicants.
2. Deed of transfer No 773/2011 in the name of Tafirenyika Kambarami be and is hereby cancelled and title in respect of Stand 553 Quinington Township of Subdivision A of Subdivision F of Quinington of Borrowdale Estate reverts back to second, third, and fourth Applicants”.

Through her opposing affidavit Cecilia Kashumba merely sought the dismissal of the applicants’ application.

The fourth respondent in his opposing affidavit also merely sought that the applicants’ application be dismissed with costs.

In the determination of the application before it the court *a quo* made the following orders:

1. It is hereby declared as follows:

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- 1.1 “That the Deed of Sale between the first applicant and the Late Dzingai Kashumba (hereinafter referred to as “the deceased” on 11 and 12 May 1999 in respect of the property described as Stands 552 and 553 Quinington Township of Subdivision A of Subdivision F of Borrowdale Estate, measuring 3 999 square metres and 4002 square metres respectively (hereinafter referred to as “the original property”, was never cancelled.
- 1.2 That the balance of the purchase price due and owing by the deceased to the first applicant as at 9 May 2001, in respect of the Deed of Sale aforesaid was never paid.
- 1.3 That the transfer of 3 May 2006 in favour of the deceased of the two properties known as certain pieces of land situate in the District of Salisbury, respectively called Stands 552 and 553, Quinington Township of Subdivision A of Subdivision F of Quinington of Borrowdale Estate, respectively on Deeds of transfer Nos 3030/2006 and 3031/2006 (hereinafter referred to as “Stands 552 and 553 Quinington Township”) was unlawful and therefore invalid.
- 1.4 That the subsequent transfer of stand 553 Quinington Township on Deed of transfer No 773/2011 on 17 February 2011 in favour of Tafirenyika Kambarami, was unlawful and therefore invalid.

- 1.5 That the balance of the purchase price outstanding, due and owing by the deceased to the first applicant as at 9 May 2001 in respect of the sale and purchase of the original property was in the sum of ZW\$503 573-02, being the total of ZW\$337 178-77, reflected on the deceased's cheque subsequently rejected by the first applicant, and ZW\$166 394-25 subsequently found by the arbitrator to have been the shortfall on the cheque amount aforesaid.
2. Notwithstanding the declaration of invalidity of the transfers referred to in paragraph 1 above, but subject to paragraphs 3, 4, 5 and 6 below, if the 1st respondent pays, or causes to be paid, to the applicants, or one or other of them, the one receiving payment, the others to be bound, the equivalent of the balance of the purchase price referred to in paragraph 1.5 above in the functional currency current at the time of payment, together with interest thereon as envisaged herein, then the title deeds in respect to which the transfers aforesaid have been declared unlawful and invalid shall not be set aside, and the declarations of invalidity herein shall automatically lapse.
 3. Unless the equivalent amount of the balance of the purchase price referred to in paragraph 1.5 above is otherwise agreed to in writing within thirty (30) calendar days of the date of this order, or such other extended period not exceeding a further thirty (30) calendar days as they may agree to in writing, the parties shall engage the Commercial Arbitration Centre in Harare solely to determine the equivalent amount of that balance, in any of the functional currencies, and the decision of the arbitrator shall be final and binding.
 4. The first respondent shall pay the equivalent amount of the balance of the purchase price referred to above within thirty (30) days of the date the amount is ascertained either by agreement between the parties, or through determination by arbitration as contemplated by paragraph 3 above, together with interest thereon at the prescribed rate from the date of such agreement or determination, whatever the case might be, to the date of payment.
 5. In the event that the first respondent fails or neglects to pay as envisaged in this order, then the applicants, or one or other of them, shall *ipso facto*, **forthwith have the right to declare in writing, the immediate and automatic cancellation of the Deed of Sale aforesaid and, without prejudice to any other rights they might have at law**, shall be entitled to keep as rouwkoop all such monies as they might have received as purchase price for the original property.
 6. Subject to any rights to compensation for improvements that they have in the event that the title deeds mentioned herein have been cancelled as aforesaid, the first and fourth respondents, and all those claiming occupation through them, shall, within thirty (30) calendar days of the date of such cancellation, vacate, the respective properties occupied by them, failing which the Sheriff of Zimbabwe, or his lawful deputy or assistant deputies, or such of his agents as might be duly authorized by him, shall be empowered, authorized and directed to evict the aforesaid respondents and all those claiming occupation through them.
 7. Save and except for the fourth respondent whose costs of suit shall be borne by the first and second respondents, jointly and severally, the one paying the other to be absolved, each party shall bear its own costs". (emphasis added)

It is clear from the court *a quo*'s orders that some of the orders it granted had not been sought by either party. It is also clear that parties had not made submissions for or against those orders. They were granted *mero motu* by the court *a quo*. It did so without seeking the parties' views on those orders. There is no doubt that the court *a quo* exceeded its mandate which was to determine the issues placed before it by the parties through pleadings and proved by the evidence led.

The function of a court is to determine disputes placed before it by the parties. It cannot go on a frolic of its own. Where a point of law or a factual issue exercises the court's mind but has not been raised by the parties or addressed by them either in their pleadings in evidence or in submissions from the bar, the court is at liberty to put the question to the parties and ask them to make submissions on the matter.

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In *Welkom Municipality v Masureik and Herman T/A Lotus Corp* 1997 (3) SA 363 at 371 G-H Marais JA commenting on what the court should base its decision on said:

“I should add that whether or not South Africa did or did not fail to do so is a question of fact upon which there was no evidence before the court *a quo*, and for reasons too obvious to require enumeration, the learned Judge **was not entitled to enquire into this issue of fact after reserving judgment and without any reference to the parties, and then to decide it.** Compare *Kauesa v Minister of Home Affairs and Others* 1996 (4) SA 965 (NmS) at 973H – 974C.” (emphasis added)

In the Namibian case of *Kauesa v Minister of Home Affairs and Others* 1996 (4) 965 (NmS) DUMBUTSHENA AJA at pages 973H to 974C said:

“The above matters are not crucial to the determination of this appeal. They are however, important because a frequent departure from counsel's, more correctly the litigant's case,

may be wrongly interpreted by those who seek justice in our courts of law. **It is the litigants who must be heard and not a judicial officer.**

It would be wrong for judicial officers to rely for their decisions on matters not put before them by litigants either in evidence or in oral or written submissions. Now and again a Judge comes across a point not argued before him by counsel but which he thinks material to the resolution of the case. It is his duty in such a circumstance to inform counsel on both sides and invite them to submit arguments either for or against the Judge's point. It is undesirable for a court to deliver a judgment with a substantial portion containing issues never canvassed or relied on by counsel.

To produce a wide –ranging judgment dealing with matters not only extraneous and unnecessary to the decision but which have not been argued is an exercise full of potential pitfalls and the judgment of the court *a quo* has placed this court in a difficult position. Are we to consider every opinion expressed in the judgment, however unnecessary it was to the decision and say whether it accords with our own? Or can we leave such matters well alone until such time as they become necessary to decide and are fully argued? In our view, the latter course is the proper one to take and in doing so we emphasize that it must not be thought that this Court in any way approves or endorses the many obiter opinions expressed in the judgment of the court *a quo*.”

Before leaving this aspect of the appeal I consider it ^{Judgment No. SC 18/18} appropriate to refer to what ^{Civil Appeal No. 137/16} 12

was said by BHAGWATI J (as he then was) in *M. M. Pathak v Union* (1978) 3 SCR 334 in relation to the practice of the Supreme Court of India:

“It is the settled practice of this Court to decide no more than what is absolutely necessary for the decision of a case”. (emphasis added)

In *Groenewald NO and Anor v Swanepoel* 2002 (6) SA 724 at 726 I to 727 A, PICKERING J commenting on what a judicial officer should do if he wants to take into consideration issues not covered in pleadings, evidence and submissions of the parties said:

“It was therefore the duty of the learned Judge to have informed plaintiff's counsel of the relevant point, more especially where that point was, in her view, conclusive of the matter, and to have invited him to submit argument to her. Had she done so counsel would no doubt have been in a position to address her concerns and the necessity for this appeal may well have been obviated.

Secondly, **the remark made by the learned Judge concerning the alleged arrest of the defendants was not based on any averment made in either the pleadings or the evidence adduced before her at the hearing or in the course of argument by Mr Pretorius. It would appear that she must have gleaned this information from some outside source. It hardly needs stating that a judge may only have regard to the evidence placed before him or her during the course of the hearing and that a reliance on facts not averred in the pleadings or raised in court constitutes a serious misdirection.” (emphasis added)**

I respectfully agree with the views expressed in the authorities referred to above. The function of a court is to determine the dispute placed before it by the parties through their pleadings, evidence and submissions. The pleadings include the prayers of the parties through which they seek specified orders from the court.

This position has become settled in our law. Each party places before the court a prayer he or she wants the court to grant in its favour. The Rules of court require that such an order be specified in the prayer and the draft order. These requirements of procedural law seek to ensure that the court is merely determining issues placed before it by the parties and not going on a frolic of its own. The court must always be seen to be impartial and applying the law to facts presented to it by the parties in determining the parties' issues. It is only when the issues or the facts are not clear that the court can seek their clarification to enable it to correctly apply the law to those facts in determining the issues placed before it by the parties. The judgment of the court *a quo* unfortunately fell short of these guiding principles. In seeking to find middle ground, the court *a quo* granted orders which had not been sought by either party. It granted the first and fourth respondents a further grace period and a referral to arbitration. The first and fourth respondents had not sought such orders.

Such orders cannot be sustained at law. They seem to have been motivated by equity and sentiments of justice rather than the law and the facts, as demonstrated by the court *a quo*'s narration of the exploits of the legendary "judge jackal" in setting free a man who was about to be eaten by a leopard he had rescued from a trap. Where a court is of the view that an order not sought by the parties may meet the justice of the case, it must put that possible relief to the parties and allow them an opportunity to address it on such an order. In *Proton Bakery (Pvt) Ltd v Takaendesa* 2005 (1) ZLR 60 (S) at page 62E-F GWAUNZA JA said:

"The appellant argues, in the light of all this, that the action of the court *a quo* in reaching a material decision on its own, amounted to gross irregularity justifying interference by this court on the principles that have now become trite.

I am, for the reasons outlined below, persuaded by this argument ...

The misdirection on the part of the court *a quo* is left in no doubt. It is my view, so serious as to leave this Court with no option but to interfere with the determination of the lower court."

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The determination by the court *a quo*, of matters not placed before it, goes against a litigant's right to be heard and this view is supported in the fourth edition of *Judicial Review of Administrative Action* by J. M. Evans at pages 157-158 where it was highlighted that the principle that "no man is to be judged unheard" is an age-old view adopted from the ancient Greeks. This principle has been adopted in our system under the *audi alteram partem* Rule. Therefore, the fact that the respondents are not taking issue with the court's *mero motu* decision is, neither here nor there. This irregularity militates against the validity of parts of the judgment of the court *a quo*.

The "grace period" of thirty days granted to the first respondent by the court *a quo* has no founding at law and cannot be legally justified. The initial thirty days awarded by

BARTLETT J were in terms of the Contractual Penalties Act. The purchaser, having already been granted this thirty-day period in terms of the law, cannot be granted a further thirty-day period not provided for in terms of the law, to the prejudice of the seller on no legal basis. Judicial discretion should at all times remain guided by the dictates of the law.

A court is not entitled to determine a dispute placed before it, wholly based on its own discretion, which is not supported by the issues and facts of the case. It is required to apply the law to the facts and issues placed before it by the parties.

2. Whether or not the law calls for the strict application of the *rei vindicatio*?

Mr *Mpofu* for the appellants submitted that in view of the court *a quo*'s findings, the appellants' ownership of the property 'should have been vindicated by the court *a quo* regardless of the court *a quo*'s considerations of equity and justice, on the basis of the strict application of the *rei vindicatio*. Mr *Uriri* for the first respondent and Mr *Mapuranga* for the fourth respondent without laying a clear legal basis for their submissions supported the court *a quo*'s decision.

The court *a quo* came to the conclusion that the contract was never properly cancelled at the instance of Shorai Nzara. However, by the time Dzingai attempted to claim title based on the judgment of 9 May 2001 which had superannuated and the time within which payment should have been made had long passed. Therefore, the late Dzingai failed to perform his obligations in terms of the contract. He therefore could not lawfully claim title to the property. This means transfer to him was unlawful and the subsequent sale and transfer to

Kambarami was a nullity. R.H. Christie in his book “Business Law in Zimbabwe” states as follows:

“An owner whose property has been sold and delivered without his consent remains the owner, as the seller cannot pass ownership that was not his. The true owner can bring vindicatory action to recover his property from anyone including a *bona fide* buyer.”

These are precisely the circumstances the first respondent and fourth respondent found themselves in and as a result the appellants contend that the court *a quo*, having found that ownership never lawfully passed to the first respondent that should have been the end of the matter and the principles of the *rei vindicatio* ought to have been applied with full force and effect. The land should have been returned to its rightful owners.

The late Dzingai failed to pay and finalize the sale agreement in terms of the judgment of 9 May 2001. He could not therefore rely on a judgment he had not complied with to enforce the agreement of sale. He could not seek transfer of the property to himself without complying with the legal requirements of a contract of sale. He in fact admitted that, he did not pay the full purchase price after BARTLETT J’s judgment. That entitled the first appellant to an immediate cancellation of the agreement as she did on 4 June 2002. In its own order giving a further grace period as BARLETT J had previously done the court *a quo* had in para 5 of its order ordered that if payment was not made as per its order the appellants would be entitled to **“forthwith have the right to declare in writing, the immediate and automatic cancellation of the Deed of Sale aforesaid and, without prejudice to any other rights they might have at law”**.

This is an admission that a party who has been given notice through a court order as required by the Contractual Penalties Act, need not be given a further such notice in terms of the Contractual Penalties Act. The seller can cancel immediately as was submitted by Mr *Mpofu* for the appellants.

As the late Dzingai never lawfully owned and held title to the property, his estate could not alienate the said property. Cecilia his executrix dative could not sell property which did not belong to her late husband's estate. The purported sale was also tainted by Cecilia's misrepresentation in an affidavit that the property was not subject to any disputes. This lie was intended to mislead the purchaser into the agreement of sale, and facilitate its transfer.

The first respondent therefore sold the subdivision to the fourth respondent through deceit. That cannot justify transfer of the appellants' property to the fourth respondent.

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After title was transferred, and a subdivision was sold, developments were allegedly made to the land in dispute. It must be noted that the respondents' counsel only raised the issue of vast and substantial improvements on the property from the bar on appeal. The alleged improvements were vaguely referred to, but were not quantified. No evidence was led to establish their existence and their value.

Therefore, the claim for improvements, not having been properly raised or quantified, cannot be taken into consideration by this court. Nevertheless, even if these issues had been properly raised and quantified in the court *a quo*, the title of an owner is so respected that the *rei vindicatio* operates against a third party who innocently purchases the property even

where improvements or developments were made. The owner remains entitled to his property. This was made clear in the case of *Alspite Investments (Pvt) Ltd v Westerhoff* 2009 (2) ZLR 236 where MAKARAU JP, as she then was, said:

“There are no equities in the application of the *rei vindicatio*. Thus in applying the principle, the court may not accept and grant pleas of mercy or for extension of possession of the property by the defendant against an owner for the convenience or comfort of the possessor once it is accepted that the plaintiff is the owner of the property and does not consent to the defendant holding it. It is a rule or principle of law that admits no discretion on the part of the court. It is a legal principle heavily weighted in favour of property owners against the world at large and is used to ruthlessly protect ownership. The application of the principle conjures up in my mind the most uncomfortable image of a stern mother standing over two children fighting over a lollipop. If the child holding and licking the lollipop is not the rightful owner of the prized possession and the rightful owner cries to the mother for intervention, the mother must pluck the lollipop from the holder and restore it forthwith to the other child notwithstanding the age and size of the owner-child or the number of lollipops that the owner child may be clutching at the time. **It matters not that the possessor child may not have had a lollipop in a long time or is unlikely to have one in the foreseeable future. If the lollipop is not his or hers, he or she cannot have it.” [My emphasis]**

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This case therefore sanctions ruthless vindication of the owners’ rights. Ownership is a well-guarded title in property law. For this reason, after finding the second, third and fourth appellants to be the true owners, the court *a quo* was bound by law to vindicate their title to the land. One of the critical maxims of property law is *nemo plus iuris transfer e protest quam ipsa habet* – translated as meaning that an owner cannot, as a general rule, be deprived of his property against his will. Therefore, where an owner’s property is sold and delivered without his consent his right to ownership can be vindicated from any person. Silberberg and Schoeman in their Second Edition of “The Law of Property” at page 268 make it clear that the maxim stands firm even where the third party acquires the property in good faith, having paid a fair market value and acted in all innocence. Our law calls for ruthless vindication and protection of the right of

ownership. Counsel for the appellants cited the words of Holmes JA in the case of *Oakland Nominees Ltd v Gelria Mining & Investment Ltd* 1976 (1) SA 441 (A) at page 452 where he said:

“Our law jealously protects the right of ownership and the correlative right of the owner in regard to his property... if the law did not jealously guard and protect the right of ownership and the correlative right of the owner to his/her property, then ownership would be meaningless and the jungle law would prevail to the detriment of legality and good order.”

In view of the arguments put forward on behalf of the fourth respondent two things are clear. Firstly, that his right to title is directly and inextricably linked to whether or not the late Dzingai’s estate owned the property. As it did not, the case of *Mashave v Standard Bank of South Africa* 1998 (1) ZLR 436(S), is instructive. In that case Mc NALLY JA at page 438 C said:

“...Roman-Dutch law protects the right of an owner to vindicate his property, and as a matter of policy favours him as against an innocent purchaser. See for instance *Chetty v Naidoo* 1974 (3) SA 13 (A) at 20A-C. The innocent purchaser’s only defence is estoppel. Estoppel depends upon an allegation that a representation was made by the owner or claimant.”

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Therefore, having found that Dzingai was not entitled to transfer, the sale to the fourth respondent was rendered *void ab initio*.

The court *a quo* ordered that should Dzingai’s estate fail to pay the balance in terms of its order the payments Dzingai made to Shorai would be kept by her as *rouwkoop*. Cecilia Kashumba did not cross appeal against that order. In my view that order is fair and just as Dzingai and subsequently his estate occupied the property in dispute for 17 years during which he fraudulently transferred it to himself and his estate sold the subdivision to Kambarami. Section 9 (3) (c) and (d) of the Contractual Penalties Act allows the court to take such factors into consideration. It reads:

“(3) In assessing any relief that may be given in terms of this section, the court shall have regard to all the circumstances of the case and in particular to—

(a)----

(b)----

(c) **the nature of any breach of contract on the part of the purchaser and the circumstances in which it was committed; and**

(d) the extent to which the purchaser has complied with his obligations during the currency of the instalment sale of land concerned;

and **shall balance those amounts against the value of any use or occupation of the land concerned which was enjoyed by the purchaser**, together with any commission or costs which the seller has been required to pay in connection with the instalment sale of land concerned.” (emphasis added)

After balancing the manner in which Dzingai conducted himself during the time he enjoyed occupation while deliberately defrauding the appellants and avoiding paying the full purchase price, I am satisfied that the court *a quo*’s order that Shorai keep the payments he had made is fair and just.

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Accordingly, having considered argument from both parties, and the findings of the court *a quo* we order as follows:

1. The appeal succeeds with costs
2. The judgment of the court *a quo* be and is hereby set aside and substituted by the following:
 - (a) The transfers effected in favour of Tafirenyika Kambarami and Dzingai Kashumba under deed of transfer number 773/2011 for the former and Deed of Transfer numbers 3030/2006 and 3031/2006 for the latter having been found invalid, the Registrar of Deeds is ordered to cancel them.
 - (b) In terms of General Condition 6 of the Deed of Sale the first applicant is entitled to keep as *rouwkoop* payments she received from the late Dzingai.

- (c) First and fourth respondents be and are hereby ordered to vacate stands 552 and 553 Quinington Township of Subdivision A of Subdivision F of Quinington Borrowdale Estate within 30 days of this order, failing which the Sheriff of Zimbabwe, or his lawful deputy or assistant deputies, be and are hereby, authorized and directed to evict the aforesaid respondents and all those claiming occupation through them.
- (d) The donation made in favour of the second, third and fourth applicants having been found to have been validly and legally made is upheld. The Registrar of Deeds is ordered to reinstate title to the second, third and fourth applicants as the owners of stand 552 and 553 Quinington Township of Subdivision A of Subdivision F of Quinington Borrowdale Estate.

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GARWE JA: I agree

GUVAVA JA: I agree

P. Chiutsi Legal Practitioners, appellant's legal practitioners

Kantor & Immerman, 1st respondent's legal practitioners

Chihambakwe, Mutizwa & Partners, 4th respondent's legal practitioners