

C.GAUCHE (PRIVATE) LIMITED

Versus

REGISTRAR OF DEEDS

And

MINISTER OF LANDS, AGRICULTURE, WATER  
CLIMATE & RURAL RESETTLEMENT

And

ZEPHANIAH MATIWAZA

And

COLIN IAN VENEABLES

HIGH COURT OF ZIMBABWE

ZISENGWE J

MASVINGO 02 MARCH, & 28 JUNE, 2023

## **OPPOSED APPLICATION**

*D Abraham, for Applicant*

*No appearance for 1<sup>st</sup> Respondent & 4<sup>th</sup> Respondent*

*P. Kunaka, for 2<sup>nd</sup> Respondent*

*M Ndlovu, for 3<sup>rd</sup> Respondent*

ZISENGWE J. This matter has had a long and chequered history. In its various forms and guises, it has been in and out of this and other courts quite a few times. The dispute revolves around the ownership of a piece of land known as Subdivision 3 of Subdivision A of *Imbesu Kraal* (*‘the property’*). The applicant seeks to have the deed of transfer in favour of the 3<sup>rd</sup> respondent in respect of the property be cancelled in terms of s8 of the Deeds Registries Act, [Chapter 20:05] and that its ownership reverts to the 4<sup>th</sup> respondent. He insists that he is the legitimate owner of the property for the reasons that I will set out later.

The applicant is a duly registered company whose Managing Director is one Dumisani Sibanda. It is common cause that the 4<sup>th</sup> respondent, i.e., Colin Ian Venables is the immediate past owner of the property but that the property is currently registered in the name of the 3<sup>rd</sup> respondent. The latter obtained transfer thereof from 4<sup>th</sup> Respondent on the 30<sup>th</sup> of January 2019 following an agreement of sale between the two dated 4 December 2015.

The transfer of the property was not without incident as it was preceded by several court battles waged between the three protagonists namely the applicant, the 3<sup>rd</sup> respondent and the 4<sup>th</sup> respondent. Shortly, a synopsis of those cases will be given suffice it however to say that the applicant ultimately failed to have the agreement between the 3<sup>rd</sup> and 4<sup>th</sup> respondents declared null and void.

The Draft Order attached to this application reads as follows:

***It is declared [that]:***

- 1. The title deed number 71/19 registered in the name of Zephaniah Matiwaza be and is hereby cancelled.*
- 2. 1<sup>st</sup> and 2<sup>nd</sup> Respondent take all necessary steps to pass transfer of subdivision 3 of Subdivision A of Imbesu Kraal, measuring 103, 3939 hectares to 4<sup>th</sup> Respondent.*
- 3. 3<sup>rd</sup> Respondent to bear costs of suit only he opposes this application.*

The application is premised on the allegation that the sale of the property by the 4<sup>th</sup> respondent to the 3<sup>rd</sup> respondent constituted a nullity for want of compliance with a condition precedent thereto, namely the obtainment by the seller of a certificate of no present interest (by the State) in the property as required by section 5 of the Land Acquisition Act Disposal of Rural Land Regulations, 1999 (SI 287 of 1999). This, according to the applicant rendered the subsequent registration of the property in 3<sup>rd</sup> respondent equally null and void. According to the applicant the certificate of no present interest used in this transaction was one it (i.e. applicant) obtained several years earlier which the parties to that sale fraudulently produced to facilitate an irregular transfer of the property.

In the founding affidavit deposed to by its Managing Director, the applicant chronicled some of the events which according to it are the important milestones which culminated in the present application. It shall not be necessary to regurgitate that history in *extensu* suffice it for current purposes to point out that the applicant avers that it is the one which procured the certificate of no present interest in question and further that it purchased the property from the 4<sup>th</sup>

respondent in December 2009. According to the applicant this was after two failed attempts towards the purchase of the property, the first attempt being one by 3<sup>rd</sup> respondent in September 2009 and the second attempt being one by the applicant and the 3<sup>rd</sup> respondent jointly through the vehicle of a partnership in December 2009.

The gravamen of applicant's contention is therefore that it is the legitimate owner of the property having purchased it from the 4<sup>th</sup> applicant on 4 December 2015 for the sum of US\$45 000 which sale met all terms and conditions attending thereto not least the obtainment of a certificate of no present interest as required by section 5 of the Land Acquisition Act Disposal of Rural Land Regulations, 1999 (SI 287 of 1999).

The applicant therefore avers that the transfer of the property from 4<sup>th</sup> respondent to 3<sup>rd</sup> respondent cannot be allowed to stand and should be declared null and void on two main grounds, namely that it was predicated on a certificate of no present interest stolen from him as far back as 2009. Secondly that it was based on a fraudulently obtained default judgment in case No HC 647/16. It also avers that the 3<sup>rd</sup> respondent did not pay the purchase price for the property.

The applicant further refers to the various twists and turns in the legal battles between him and the 3<sup>rd</sup> respondent. Although the applicant came worse off in virtually all the cases reference thereto was undoubtedly meant to portray the latter as a duplicitous individual who tenaciously clings to a property that he obtained fraudulently. For reasons that will soon become apparent it shall not be necessary to refer to all the allegations made against the 3<sup>rd</sup> respondent and his lawyers in the applicant's founding and answering affidavits.

What follows is a summary of the history of the litigation between the parties in connection with the property. In March 2016, the 3<sup>rd</sup> respondent (then as plaintiff) sued out summons out of this Court sitting at Bulawayo under case number 647/16 compelling the 4<sup>th</sup> respondent to co-operate with the transfer of the property to him by signing all the requisite papers to effect such transfer. In the event of his failure to do so the 3<sup>rd</sup> respondent prayed that the Sheriff of Zimbabwe be empowered to sign the papers in his stead.

Having initially failed to effect service on the 4<sup>th</sup> respondent through the usual means, the 3<sup>rd</sup> respondent obtained an order for substituted service. When service of summons was effected by such means and no appearance to defend (or any other response) was filed by the 4<sup>th</sup>

respondent the 3<sup>rd</sup> respondent successfully obtained default judgment against the 4<sup>th</sup> respondent on terms earlier stated.

What then followed were several attempts by both the applicant and the 4<sup>th</sup> respondent to have that default judgment rescinded. Firstly, under HC1113/18 the 4<sup>th</sup> respondent brought an application for its rescission. The 3<sup>rd</sup> respondent reacted by filing a notice of opposition and successfully sought an order requiring the 4<sup>th</sup> respondent to pay into court the sum of US\$15000 as security for costs. That application soon fell by the wayside after the Registrar deemed it to have lapsed on account of the 4<sup>th</sup> Respondent's failure to pay the said security for costs.

This was followed by the applicant suing out summons under HC 12/20 seeking relief which was virtually identical to that which he seeks in *casu*. The prayer in this summons reads:

1. *It is declared that the agreement of sale entered into between the plaintiff and 4<sup>th</sup> defendant on the 4<sup>th</sup> of December 2015 over subdivision 3 of Subdivision A of Imbesu Kraal is lawful, binding and enforceable*
2. *It is declared that the agreement of sale entered into between the 1<sup>st</sup> and 4<sup>th</sup> Defendant on the 3<sup>rd</sup> of August 2009 was terminated automatically on the 30<sup>th</sup> of August 2019 by reason of failure to meet the conditions precedent to the sale.*
3. *Consequently, it is ordered that the judgment of this court in HC647/16 was obtained by fraud and misrepresentation and be and is hereby rescinded and set aside.*
4. *Deed of Transfer 71/19 on favour of the 1<sup>st</sup> Respondent (sic) over subdivision 3 of subdivision A of Imbesu Kraal be and is hereby cancelled and set aside.*
5. *Costs to be borne by the 1<sup>st</sup> Defendant on an attorney-client scale.*

That matter suffered a still-birth at Pre-trial Conference stage when the applicant withdrew the matter.

An attempt at the same relief was revived under HC1302/20 *albeit* by way of application when applicant sought the rescission of the judgment HC 647/16. However, the 3<sup>rd</sup> respondent successfully applied for its dismissal. The order for the dismissal of that application was granted by MAKONESE J under case HC 870/20

Under HC486/20 the 3<sup>rd</sup> respondent obtained a judgment for the eviction of the applicant from the property

Finally, the provisional order which applicant had earlier obtained under HC2113/20 for the stay of execution was discharged.

In this present matter the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Respondents did not file any opposing papers but the 3<sup>rd</sup> respondent did. In opposing this application, the 3<sup>rd</sup> respondent apart from disputing the material averments made by the applicant in support of the application raised the following preliminary points.

1. *That the applicant lacks locus standi to institute the present proceedings given that its thrust is to restore ownership of the property to 4<sup>th</sup> respondent yet the later has not sought such an order. In other words that Applicant cannot purport to seek an order for the benefit of the 4<sup>th</sup> respondent.*
2. *That the matter is res judicata given that matter has been adjudicated upon by this court and a final decision in favour of 3<sup>rd</sup> respondent entered. The corollary being that this court is now functions officio- if and that the application accounts to no more than an above of the court process.*
3. *That in any event that this matter is fraught with material disputes of fact which are incapable of resolution on the papers which disputes applicant was aware of at the time of the institution of the application and that accordingly the matter ought to be dismissed.*
4. *That the applicant has approached the courts with dirty hands having defied an extant court order evicting him from the property.*

Undeterred, however, the Applicant filed an answering affidavit digging in. He insisted not only on the propriety of this application-but also that the 3<sup>rd</sup> respondent obtained registration of the property through fraudulent means. It challenged the 3<sup>rd</sup> respondent to produce the original certificate of no present interest and the receipt showing purchase price of the property. He maintained that the certificate of no present interest used to effect transfer was the one he stole from it. It was its contention therefore that the title deed issued by the registrar of deeds in favour of the 3<sup>rd</sup> applicant was void *ab initio*. It further insisted that the default judgments obtained by the 3<sup>rd</sup> respondent under HC 12/20 and HC1302/20 were obtained in an opaque and deceitful manner. In particular it averred that the 3<sup>rd</sup> respondent reneged on a mutual agreement to have the parties meet and agree on issues for determination before referring the matter back to the court to be heard on the merits. It therefore relies on s8 of the Deeds Registries Act, [Chapter 20:05] which provides for the cancellation of deeds obtained illegally as irregularly.

On the question of his alleged absence of *locus standi*, the applicant retorted in equal measure and averred that it was in fact the 3<sup>rd</sup> respondent who has all along lacked *locus standi*. The thrust of that last averment is however difficult to follow suffice or however to say that the applicant cannot on the one hand cite the 3<sup>rd</sup> respondent as a party to this suit and on the other hand claim that the latter lacks *locus standi* to participate in the same proceedings.

*A fortiori* however, the order sought being one to have the deed of transfer in 3<sup>rd</sup> respondents' name cancelled, it cannot by any stretch of the imagination be alleged that the latter lacks *locus standi*. He obviously has a direct and substantial interest in the outcome of the litigation, See *ZIMTA v Minister of Education and Culture* 1990 (2) ZLR 48 (HC), *United Watch & Diamond Co (Pty) Ltd & Others v Disa Hotels Ltd & Another* 1972 (4) SA 409 (C) & *Henri Viljoen (Pty) Ltd v Awerbuch Brothers* 195 3 (2) SA 151(0)

Be that as it may the applicant maintained in his answering affidavit that he is the *bona fide* owner of the property having purchased it from the 4<sup>th</sup> respondent.

It is the 3<sup>rd</sup> respondent's points *in limine* to which I now turn. Although the 3<sup>rd</sup> respondent raised four preliminary points referred to earlier, it is the 3<sup>rd</sup> respondent's contention that this court having previously adjudicated over essentially the same matter between the same parties and that the matter is therefore *res judicata* which in my view is potentially dispositive of the matter. Despite the 3<sup>rd</sup> respondent having somewhat blurred the lines between the court being *functus officio* and the matter being *res judicata*, there can be no denying that the latter is the real issue for determination. A judicial officer is said to be *functus officio* when his or her mandate expires in the sense that once he or she renders a decision regarding the issues submitted, such judicial lacks any power to re-examine that decision. The principle *Res judicata* on the other hand refers to the end of a case in the sense that once a matter that has been adjudicated by a competent court it cannot be pursued further by the same parties.

The defence of *res judicata* is predicated on the fundamental principle that there must be finality to litigation. Stemming from this is the rule that legal proceedings can be stayed it can be shown that the point at issue has already been adjudicated upon between the parties. In *Lifort v Vodge Investments (Pvt) Ltd & Ors*, SC 15/2017 the court referred with approval the case of *Chimponda & Anor v Muvami* 2007 (2) ZLR 326 where MAKARAU JP (as she then was) at page 329G to 330 C said:

*“The requirements for the plea of res judicata are settled. Our law recognizes that once a dispute between the same parties has been exhausted by a competent court it cannot be brought up for adjudication again as there is need for finality in litigation. To allow litigants to plough over the same ground hoping for a different result will have the effect of introducing uncertainty into court decisions and will bring the administration of justice into disrepute.*

*For the plea to be upheld, the matter must have been finally and definitively dealt with in the prior proceedings. In other words, the judgment raised in the plea as having determined the matter must have put to rest the dispute between the parties, by making a finding in law and / or in fact against one of the parties on the substantive issues before the court or on the competence of the parties to bring or to defend the proceedings. The cause of action as between the parties must have been extinguished by the judgment.*

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

In Herbstein & Van Winsen, *The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* fifth edition at p 609 the following is said:

*“A defendant may plead res judicata as a defence to a claim that raises an issue disposed of by a judgment in rem and also as a defence based upon a Judgment in personam delivered in a prior action between the same parties, concerning the same subject matter and founded upon the same cause of action.”*

A party who pleads that a point in issue is already *res judicata* because of an earlier judgment in personam must show:

- a) *That there has already been a prior judgment,*
- b) *In which the parties were the same; and*
- c) *The same point was in issue*

Each of these will be dealt with in turn.

- a) **Whether there is a prior judgment- if so which one**

In my view the relevant judgment which potentially renders the present matter *res judicata* is one in HC870/21 itself coming against the backdrop of the application launched by applicant in HC 1302/20. The latter was an application for the rescission of the judgment in HC 647/16.

The other judgments though related were either merely collateral or did not constitute “judgments” *per se*. For example, the claim in HC12/20 having been withdrawn at PTC stage would not a “prior judgment” for purposes of the defence of *res judicata*. In that case the matter was not decided on the merits as it was merely withdrawn at applicant’s instance.

Similarly, whether the eviction order under HC 486/20 would equally qualify as *res judicata* would depend on whether the court in that matter went as far as determining the basis of 3<sup>rd</sup> respondent’s ownership of the property or it merely based its decision on the fact that the property is registered in his (i.e. 3<sup>rd</sup> respondent’s) name- something I am not able to determine from the papers filed of record. I must hasten to point out however that if it was predicated on the former (i.e. upon basis of ownership) it would equally constitute *res judicata*, but if based on the latter than it would not.

#### **b) Whether the parties are the same**

It is interesting to note that the order in HC 870/21 pitted the 3<sup>rd</sup> respondent on the one hand and the applicant and Dumisani Sibanda (the applicant’s Managing Director) on the other.

Even if the applicant has introduced other players into the fray, this in my view does not detract from the fact that the matter is now *res judicata* as between applicant and 3<sup>rd</sup> respondent.

#### **c) Whether the same point is in issue**

Under this head the following is stated in Erasmus Superior Court practice op at D1-287:

*“The requirement has been differently stated in a number of the leading cases on the subject. Thus, it has been in issue and the same thing must have been demanded; that the action must have been based on the same ground and with respect to the same subject matter; that it must have concerned the same subject matter and must have been founded on the same cause of complaint.”*



It is settled that the subject matter claimed in the two relevant actions does not necessarily and in all circumstances have to be the same and a Court must have regard to the object of the *exceptio res judicata*- namely an endeavour to put a limit to needless litigation and in order to prevent the regurgitation of the same thing in dispute in diverse actions, with the concomitant undesirable potentiality of conflicting decisions being rendered, see *Bafokeng Tribe v Impala Platinum Ltd* 1999 (3) SA 517 (B). Although the application under HC 1302/21 was for the rescission of the judgment in HC 647/16, the net effect of the relief sought as in the present matter was to set aside the agreement of sale between the 3<sup>rd</sup> and 4<sup>th</sup> respondent and to have everything based on it declared invalid. The two matters are the same despite the fact that the present matter is characterised as an application under s8 of the Deeds Registries Act. As they say a rose by any other name is still a rose.

The applicant's complaints on how the 3<sup>rd</sup> respondent obtained default judgment against the 4<sup>th</sup> respondent were issues dealt within the application for rescission under HC 1113/18 which as earlier said ended in the dismissal of the same. More pertinently however the applicant's own attempt at the rescission of the default judgment under HC 647/16 failed through the decision in HC 870/21. This court cannot purport to review (albeit indirectly) that decision by MAKONESE J, which is what the applicant is effectively inviting me to do. The applicant is basically seeking to have a second bite of the cherry so to speak, after having failed to dislodge the default judgment granted in HC 647/16 which judgment effectively led to the registration of the deed of transfer in 3<sup>rd</sup> respondent's favour.

In the final analysis therefore, I find that the requirements to sustain the preliminary point of *res judicata* have been satisfied.

Before concluding, I briefly pause here to observe that even if the preliminary point on *res judicata* had failed, the one based on the existence of material disputes of fact would have still succeeded. In *Supa Plant Investments (Pvt) Ltd v Edgar Chidavaenzi* 2009 (2) ZLR 132 (H) MAKARAU JP (*as she then was*) defined a material dispute of fact in the following terms:

*“A material dispute of fact arises when such material facts put 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”.*

Material disputes of fact can also arise where the respondent admits the allegations contained in the applicant’s affidavit but alleges other facts which the applicant disputes. In this regard, the following was stated in *Savanhu v Marere & 2 Ors* SC22/99:

*“The appellant chose to proceed by way of a court application to claim the order of specific performance against the first respondent. As the proceedings were by way of a court application and there were disputes of fact the final relief could only have been granted if the facts stated by the first respondent together with the admitted facts in the appellant’s affidavit justified such an order. Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984(3) SA 623(A) at 634H-635B.”*

That this matter is replete with disputes of facts is common cause. As a matter of fact, the parties are hardly in agreement on anything at all. The 3<sup>rd</sup> respondent in his opposing affidavit traversed and denied virtually each and every one of the applicant’s factual averments. It is those disputes of facts that spawned endless stream of litigation between the parties. Just for illustration, divergence of factual averments on whether or not the default judgment in HC 647/16 was obtained fraudulently, whether the 3<sup>rd</sup> respondent paid the purchase price for the property and whether or not the applicant indeed purchased the property from the 4<sup>th</sup> respondent constituted glaring disputes of fact rendering the dispute incapable of resolution on the papers. Most importantly however, the applicant has always known that the 3<sup>rd</sup> respondent vehemently denies that he used a fake certificate of no present interest to facilitate the registration of the property.

From all the options at the court’s disposal when faced in application proceedings where there are material disputes of fact I find that this is one where a dismissal of the application is warranted.

Where a party approaches a court on motion when he or she is aware of the existence of material disputes of fact particularly in light of the prior history of litigation between them over the same subject matter, the court will be justified in dismissing the application on that basis; see

*Carole Patricia Williams & Anor v Malcom Sydney Williams & 2 Ors* HH 12-02; *Jakamoko investments (Pvt) Ltd v Brennan James Michael De Bruyn* HMA 67-22.

In *Carole Patricia Williams & Anor v Malcom Sydney Williams & 2 Ors* (*supra*) the court had occasion to deal with a situation which resembles the present. In that case the parties had earlier squared off in action proceedings in a matter involving the same subject matter, but the applicant had instituted application proceedings knowing fully well that disputes of fact were likely to arise. The court per GUVAVA J (as she then was) had this to say in dismissing the application:

*“In this case the applicants must have known that there were disputes of fact as they had initially issued out summons in case No HC 15403/98 relating to the same parties and on similar issues. The respondents' opposing affidavit has raised the same disputed issues as they had pleaded in the earlier case. This case was subsequently withdrawn by the plaintiffs (applicant in this case). Although the applicants sought to deal with them in the replying affidavit, these are issues which can only be properly dealt with by adducing evidence. In the case of *Masukusa v National Foods Ltd & Another* (*supra*) the court, in dealing with this very question, said at page 236F -G*

*“Now in the present case I have not the slightest doubt that the applicant should have realized that a serious dispute of fact was to develop as between himself and both respondents. Should I nevertheless, in the interest of saving costs and generally getting on with the matter, condone the wrong procedural approach? In my view it would be wrong to do so. There are a number of reasons. In the first place this is a very clear example of the wrong case of procedure. The conflicts of fact were glaring and obvious and were in fact referred to in the applicant's affidavit. In the second place the claim for damages was clearly illiquid and would patently need examination by way of evidence”.*

Similarly, I find that it was therefore reckless and improper for the applicant to institute this claim by way of application procedure fully aware of the existence of such glaring material

disputes of fact, particularly in light of the history of past litigation between the parties. Therefore, even if the applicant had surmounted the hurdle of the preliminary point based on the defence of *res judicata*, I would have nonetheless dismissed it on the basis of the preliminary point based on the adoption by the applicant of the wrong procedure.

Regarding costs I believe that there is justification in awarding costs on the punitive scale as sought by the 3<sup>rd</sup> respondent. The applicant has been relentless in pursuing a cause of action for which it has continuously lost in several cases in the past. Further, it must surely have dawned upon the applicant that it could not obtain the relief it seeks without first overcoming the hurdle of the order in HC 870/21 yet he soldiered on regardless.

Accordingly, the following order is hereby made:

**It is hereby ordered that:**

1. The point *in limine* based on the defence of *res judicata* raised by the 3<sup>rd</sup> respondent is hereby upheld and the application is accordingly dismissed.
2. The Applicant to meet the 3<sup>rd</sup> respondent's costs on the Attorney and client scale.

*Tanaka Law Chambers, Applicant's Legal Practitioners*  
*Mabundu Ndlovu Law Chambers, 3<sup>rd</sup> Respondent's Legal Practitioners*  
*Mathonzi Law Chambers, 4<sup>th</sup> Respondent's Legal Practitioners*