CHIKOSHOMANA (PRIVATE) LIMITED
versus
LUZERN ENTERPRISES (PRIVATE) LIMITED T/A
LUZERN ENTERPRISES MOTOR SPARES
and
LATER GLORY TRADING (PRIVATE) LIMITED
and
MAWORICK INVESTMENTS (PRIVATE) LIMITED
and
TOYOTECH AUTOPARTS (PRIVATE) LIMITED
and
SHEPTECH INVESTMENTS (PRIVATE) LIMITED
and
TOM TRANLUX (PRIVATE) LIMITED
and
TRAVOLYN MOTORS (PRIVATE) LIMITED
and
JEMIA WHEELS MOTORS
and
GLOBAL TYRES
and
RIGHT WAY AUTO SPARES
and
FRANCIS R FERNANDES & SONS (PVT) LTD
and
LOURDES BIBIANA FERNANDES

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE, 3 June 2021 & 6 July 2022

Opposed Application

T. Mapuranga, for the applicant
T. Zhuwarara, for the respondents

MUSITHU J:

INTRODUCTION

The applicant is a company incorporated according to the laws of Zimbabwe. It owns a piece of land situate in the District of Salisbury being Lot 6A The Range measuring 588 square metres held under Deed of Transfer 1586/19. That piece of land is commonly known as Number

80 Kaguvi Street ("the property"). The property is currently being occupied by the 1st to the 10th respondents. The applicant purchased the property from the 12th respondent, who on her part had taken title from the 11th respondent pursuant to an extant order of this court granted in HC3986/16.

The applicant claims that the 1st to 10th respondents are in possession of the property without its consent. On 24 November 2020, the applicant as the plaintiff, caused summons to be issued and filed in HC6921/20 for the eviction of the aforementioned respondents from the said property. The respondents entered appearance to defend and duly filed their plea through their legal practitioners of record. The applicant believes that it has an unanswerable claim, and for that reason, the respondents merely entered the appearance to defend for purposes of delaying the finalisation of the matter as their purported defence was not *bona fide*. Consequently, the applicant approached this court for summary judgment and the relief claimed reads as follows:

> "1. Summary judgment be and is hereby entered in favour of the Applicant for the eviction of the Respondents and all those claiming occupation through them from the premises at Number 80 Kaguvi Street, Harare being Lot 6A The Range, situate in the District of Salisbury, measuring 588 square metres;
> 2. The Sheriff or his lawful deputy be and are hereby authorised and directed to take such steps as are necessary to evict the Respondents and all persons holding occupation through the Respondents from the premises described in (1) above in the event that the Respondents or any others do not do so forthwith upon service of them of the court order;
> 3. The Respondents shall pay the costs of this application."

The application was opposed by the 1st-11th respondents herein.

FACTUAL BACKGROUND

On 12 October 2020, the applicant and 12th respondent entered into an agreement of sale in terms of which the applicant purchased the said property from the 12th respondent. The 12th respondent had obtained title of the property from the 11th respondent through an order of this court in HC 3986/16. In that matter, the 12th respondent was the plaintiff, while 11th respondent was the 1st defendant. The Registrar of Deeds was the 2nd defendant, while the Sheriff of the High Court was the 3rd defendant. The order was granted in default by MUREMBA J on 29 June 2016.[1]

[1] The order by MUREMBA J reads as follows:
"IT IS ORDERED THAT:

a) The 1st defendant, through its representatives, shall sign all papers necessary and do all acts necessary to effect the transfer of an immovable property known as Lot 6A The Range situate in the District of Salisbury, measuring 588 square metres and held under Certificate of Consolidated Title Number 4464/58 in favour of the 1st defendant from the 1st defendant to the plaintiff.

The property was transferred to the applicant on 21 March 2019. The applicant contends that in terms of its agreement of sale with the 12th respondent, it was to get vacant possession upon payment of the full purchase price and transfer of title. The applicant was thereafter at large to evict any occupiers, as they did not have any prior agreement with the 12th respondent to claim a right of occupation. By copy of a letter dated 12 April 2019 from its legal practitioners of record, the applicant invited the occupants to regularise their statuses, failing which the applicant would proceed to institute a claim for their eviction. The letter addressed to all tenants at the property reads as follows:

> "RE: OCCUPATION OF COMMERCIAL BUILDING BELONGING TO CHIKOSHOMANA (PRIVATE) LIMITED
>
> We refer to the above subject and advise that we act and appear on behalf of Chikoshomana (Private) Limited, please note our interest.
>
> Our instructions are to advise you that our client acquired legal ownership of the property that you occupy hence we are instructed as follows;
>
> 1. That you come forward to us with details relating to the basis of your current occupation of the premises.
> 2. That the exercise mentioned in (1) above be done within five days from the date of this letter.
> 3. That you proceed to stop paying rentals to any other party other than our client in light of the fact that it is now the new owner hence it is entitled to all the fruits that flow from the premises.
>
> Be guided in the event that you fail or neglect to come forward to us for us to regularise the issues relating to your occupation of our client's property within five days from the date of this letter then our client shall be left with no choice but to proceed to institute eviction proceedings against you."

The respondents did not heed the request and continued with their occupation unperturbed. One Vereno Joseph Fernandes, who purportedly acted on behalf of the 11th respondent applied for the rescission of the order granted in HC 2986/16 under HC3642/19. The application was struck off the roll with costs by MANGOTA J on 18 March 2020. According to the applicant, an application for condonation was filed purportedly on behalf of the 11th respondent in HC 2565/20. While this application was pending, yet another application

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b) The 3rd defendant shall sign all the papers necessary and do all acts necessary to effect the transfer of Lot 6A The Range measuring 588 square metres and held under Certificate of Consolidated Title Number 4464/58 registered in favour of the 1st defendant to the plaintiff in the event that the 1st defendant does not comply with the order of the court in (a) above within one week from the date of granting of the same.
c) The costs of effecting the above-mentioned transfer shall be borne by the 1st defendant.
d) The 1st defendant shall pay costs of suit on a legal practitioner and client."

was filed on behalf of the 11th respondent, on 17 December 2020 this time under HC 7535/20. The application under HC 2565/20 was withdrawn on 16 March 2021.

Meanwhile on 24 November 2020, the applicant caused eviction summons and declaration to be issued against the respondents. These were duly served on the respondents on 7 December 2020. The 1st to 11th respondents entered appearance to defend as well as their plea to the summons and declaration. In their plea, the respondents averred that the applicant's ownership rights were being contested in HC 7535/20. They further averred that the applicant obtained title from a sale that was under dispute. Until that dispute was resolved, the plaintiff could not enforce any rights in the property.

The respondents further claimed that the circumstances under which 12th respondent acquired title were the subject of a dispute. The 12th respondent acquired title after obtaining a default judgment against the 11th respondent. The 12th respondent's claim was based on an alleged donation made to her by a deceased person in 1999. There was no proof of the alleged donation, and in any case, her claim to title had long prescribed. Default judgment was obtained because summons had been served on persons that were unknown to the 11th respondent.

The summons were allegedly served on Tapiwa who accepted service on behalf of Terrence, the caretaker for 11th respondent. Investigations had revealed that the alleged Tapiwa was an employee of one Nigel Peters who was acting on behalf of the 12th respondent. The 12th respondent had therefore instituted summons and served them on the person who was allegedly acting on her behalf.

This dispute was pending before the court, and the 12th defendant had quickly sold the property in order to cover her tracks. For that reason, all rights obtained under the agreement between the applicant and 12th respondent could not be enforced until the court determined the circumstances under which the applicant obtained title. The 1st to 10th respondents were merely tenants caught up in an ownership dispute that had nothing to do with them. They had not violated their leases, and any termination of the lease agreements had to be done in terms of the law. The applicant could not seek the eviction of tenants who had valid lease agreements by way of a vindicatory action.

APPLICANT'S CASE

The respondents' reaction prompted the applicant to launch the present application. It claims that the respondents have no *bona fide* defence to the claim for eviction. The applicant

had proved that it was the owner of the property, which was in the possession of 1st-10th respondents against the applicant's will. The said respondents did not dispute that they were in possession of the property. The defences tendered were not legally sound, and the plaintiff averred so for the following reasons. The respondents were not challenging the applicant's title in HC 7535/20, which was not even instituted by the 1st-10th respondents. That matter had nothing to do with the applicant's title.

In any case, the applicant averred that a potential challenge to an order did not constitute a defence to a claim for eviction by the owner of the property; the 1st-10th respondents were not vested with any rights enforceable against the applicant. The applicant did not have any lease agreements with them, and neither was applicant a part to any lease. The 1st-10th respondents were not even in occupation on the authority of the 12th respondent from who applicant acquired title.

The applicant further averred that it could not legally terminate a lease that it was not party to. On its part, the 11th respondent could not purport to be defending the eviction claim since it was not in occupation of the premises. At any rate, the order under HC 3986/16 remained valid and enforceable until it was set aside. What was pending under HC 7535/20 was not even an application for rescission. It was a mere application for condonation to file an application for rescission out of time.

RESPONDENT'S CASE

The opposing affidavit was deposed to by VERENO JOSEPH FERNANDES in his capacity as director of the 11th respondent. The 4th, 5th, 6th, 7th, 8th, 9th and 10th respondents all filed supporting affidavits associating themselves with the averments made in the 11th respondent's opposing affidavit. The 11th respondent averred that the applicant's ownership of the property was being challenged in HC7535/20. The 11th respondents repeated the averments made in its plea. It denied that the property was ever donated to the 12th respondent. There was nothing in writing to confirm the donation except her word of mouth. The default order was therefore procured fraudulently. The 12th respondent used devious means to obtain title to the property.

The 11th respondent insisted that the 1st-10th respondents were tenants of the 11th respondent. They had valid lease agreements made in terms of the Rent Regulations and the common law. The letter demanding regularisation of the statuses of the 1st-10th respondents did not satisfy the legal requirements for terminating leases.

The 11th respondent stated that the application in HC 2565/20 was an application to file a resolution, following MANGOTA J'S decision to strike out the application under HC 3642/19 for want of a resolution. The application in HC 2565/20 was withdrawn after DUBE J pointed out that the proper procedure was for the applicant therein to approach the court for condonation of late filing of the application for rescission of judgment. That matter is yet to be decided on the merits.

THE SUBMISSIONS

At the commencement of oral submissions, Mr *Mapuranga* for the applicant abandoned the answering affidavit which had been filed without the leave of court. That affidavit was accordingly expunged from the record. Mr *Mapuranga* submitted that the 2nd and 3rd respondents did not file any affidavits. They were therefore not properly before the court. Counsel further submitted that while the 11th respondent's supporting affidavit was deposed to on 9 April 2021, all the other supporting affidavits were deposed to on 8 April 2021, save for the 7th respondent's affidavit. Those supporting affidavits signed before 9 April 2021 were therefore invalid, as they referred to an affidavit that was not yet in existence.

In response, Mr *Zhuwarara* for the respondents submitted that the plea filed of record pertained to all the 11th respondents. If any of the respondents succeeded, then it affected all the respondents. As regards the supporting affidavits signed before the main affidavit was signed, counsel submitted that the deponents had not departed from the averments made in their plea. He urged the court not to be bogged down with technical objections at the expense of substance. In so arguing he referred to the court to the cases of *Trans-African Insurance Co Ltd* v *Maluleka*[2] and *Standard Bank of SA Ltd* v *Roestof*[3].

In his brief reply, Mr *Mapuranga* submitted that the respondents were served with the court application on 24 March 2021. The *dies induciae* expired on 9 April 2021. Still there were no affidavits from the 2nd and 3rd respondents. Judgment should be granted against the two respondents.

I will deal with these two issues at the outset. The first issue pertains to the 2nd and 3rd respondents' failure to file opposing papers to the application. The certificate of service of the court application for summary judgment shows that it was served on *"**D. Kashambwa**, a*

[2] 1956 (2) SA 273 (A) at 278F-G
[3] 2004 (2) SA 492 (W), where the court held that, "technical correctness as a pre-requisite is unjustified" and if the papers are not correct due to some obvious or manifest error causing no prejudice to the defendant and if there is a substantial compliance with the rules it is difficult to justify an approach which refused summary judgment…"

receptionist and responsible person in the employ of ***Messrs Coghlan, Welsh & Guest*** *at number 2 Central Avenue, Cecil House, Harare, the 1st and 4th to 11th Respondents' Legal practitioners of record on the 24th of March 2021at 08:20hrs.*"[4] The certificate shows that the service of the court application on the said legal practitioners was in respect of the mentioned respondents. The same position is also confirmed by the notice of set down of the application. It also shows that the Messrs Coghlan, Welsh & Guest are the 1st and 4th-11th respondents' legal practitioners. The notice of opposition suggests that Messrs Coghlan, Welsh & Guest were in fact representing the 1st-11th respondents. In the record is a notice of renunciation of agency filed on 9 April 2021 by Coghlan, Welsh & Guest on behalf of the 3rd respondent. It would appear that the said law firm was all along representing the 3rd respondent, but decided to renounce agency on the very day the *dies induciae* expired as submitted by Mr *Mapuranga*.

The notice of set down was issued and filed on 22 April 2021, long after the renunciation of agency filed in respect of the 3rd defendant. Again, as was the case with the certificate of service of the court application, the notice of set down does not show that Coghlan, Welsh & Guest were also the lawyers of record for the 2nd and 3rd respondents. It is unclear whether the 2nd and 3rd respondents were actually served with the application for summary judgment since the applicant's certificate of service of the application does not even refer to the two. Mr *Zhuwarara* was not in a position to explain the fate of these two litigants. I therefore decline to grant judgment against the 2nd and 3rd respondents as prayed for by Mr *Mapuranga*, on the basis that there is no evidence before the court to show that they were indeed served with the application for summary judgment.

The second issue pertains to the supporting affidavits that were signed before the opposing affidavit, which the deponents sought to associate themselves with. Mr *Zhuwarara* did not dispute that the aforementioned affidavits, save for the 7th respondent's supporting affidavit, were all signed a day before the main opposing affidavit. The issue is whether the court should ignore that anomaly and proceed on the basis that the said affidavits are properly before the court. Mr *Zhuwarara* urged the court to avoid being embrangled in technicalities and instead consider the substance of the matter. In *Trans-African Insurance Co Ltd* v *Maluleka*[5], the court said:

> "No doubt parties and their legal advisors should not be encouraged to become slack in the observance of the Rules, which are an important element in the machinery for the administration

[4] See p38 of the record.
[5] 1956 (2) SA 273 (A) at 278F-G

> of justice. But on the other hand technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits." (Underlining for emphasis).

It is correct that courts must not be overly fastidious about formalism at the expense of substance. In those cases where it can properly exercise its discretion in favour of a litigant, the court must be ready to condone an irregularity provided that this can be done without injustice or prejudice to the other litigant.[6]The parties must be allowed to come to grips with the real dispute between them. However, courts must always be wary of disingenuous litigants who will always invent ways of misleading the court to get their way out of an undesirable situation. For that reason, it is not all irregularities that the court will immediately condone, regardless of their overall effect on the matter. Cases that come to mind are those where it is apparent that a litigant is clearly being untruthful or is seeking to mislead the court.

In the present matter, the opposing affidavit does not acknowledge or refer to the supporting affidavits. No explanation was given as to why the supporting affidavits were signed earlier than the opposing affidavits, yet the deponents sought to associate themselves with an affidavit that was not in existence at the time they were making their depositions under oath. In all the affidavits that were signed on 8 April 2021, the deponents claimed to have *"read the application for summary judgment and the opposing affidavit of the 11th respondent…."*, yet going by the said dates, there was no opposing affidavit by the 11th respondent on 8 April 2021. The said respondents were clearly being untruthful in their depositions.

The court would have been persuaded to condone the anomaly if, for instance, those supporting affidavits made reference to a draft and an unsigned opposing affidavit which was in place as at 8 April 2021. The impression that the affidavits create is that there existed an opposing affidavit at the time they signed the supporting affidavits, when in actual fact the opposing affidavit only came into existence a day letter. The deponents were associating themselves with a non-existent affidavit. That misrepresentation, in my view, borders on dishonesty, and it cannot be condoned. I do not believe that this is the kind of irregularity the court should consider condoning in the exercise of its discretion.

For the foregoing reasons, the court finds that the 4th, 5th, 6th and 8th to 10th respondents are not properly before the court as their supporting affidavits were deposed to before the founding affidavit was in existence. The said supporting affidavits are accordingly expunged

[6] See *Prudential Assurance Co Ltd v Crombie* 1957 (4) SA 699 (C) at 702 C-E.

from the record. Any further reference to respondents collectively herein shall mean the 1st, 7th and 11th respondents.

Concerning the merits, Mr *Mapuranga* submitted that the applicant's claim was incontestable. The respondents had not alleged any right to occupy the property, which was enforceable against the applicant. The rights emanating from the alleged lease agreements were exercisable against the 11th respondent. The averment that hire came before sale was not invocable in the present matter because the said respondents were all tenants of the 11th respondent who did not possess any rights in the property. In applications for summary judgment, one had allege a defence which had the possibility of success at a trial.

Assuming the matter were to proceed to trial, the 11th respondent's only defence would be that there was a pending application for condonation for late filing of an application for rescission of judgment. Still, that defence did not impeach the applicant's title to the property. The only way to impeach the applicant's title would have been for the 11th respondent to make a counterclaim to the plaintiff's claim. Alternatively, the 11th respondent could have instituted its own action to challenge the applicant's title. At this stage, the 11th respondent would have been seeking a consolidation of the matters instead of hiding under an application for condonation.

Mr *Mapuranga* further submitted that the 11th respondent ought to have applied for stay of execution and stay of proceedings pending the determination of the application for condonation as well as the intended application for rescission of judgment. Without these, there was nothing that would resemble a *bona fide* defence at the trial. The court could not be asked to grant the respondents the stay of execution which they never sought. Mr *Mapuranga* further submitted that the 11th respondent hoped that the court would exercise its discretion in the application for condonation and the application for rescission of judgment in its favour. Counsel submitted that nobody had a right to condonation and rescission of judgment. No one could pre-empt how the court was going to exercise its discretion.

Mr *Mapuranga* further submitted that the defence proffered by the respondents was bad at law. The net effect of the respondents' defence was that the court was being invited to weigh equities of occupation by the respondents yet none of them had the right of occupation. There were no equities involved in an application for the *rei vindicatio*. Counsel referred to the case

of *Alspite Investments (Pvt) Ltd v Westerhoff* [7]. That decision was cited with approval in the Supreme Court case of *Nzara & 3 Ors v Kashumba & 3 Ors*[8]. Mr *Mapuranga* further submitted that the judgment sought to be upset by the 11th respondent was a 2016 judgment, and yet the respondents had remained in occupation since that time without tendering any proof to show that they were indeed tenants of the 11th respondent. If the 11th respondent was serious about upsetting that judgment, then it ought to have achieved that long back.

In reply Mr *Zhuwarara* submitted that the court had to consider whether the respondents' plea revealed a cognisable defence to the claim. He further submitted that the plea did not assert a bare denial. The 11th respondent averred that the applicant was not the true owner of the property. The applicant had obtained fruits of fraud. He had received defective title. He was therefore not the owner of the property. Counsel submitted that contesting ownership was one of the four defences available against a claim for eviction. He referred to the case of *January v Maferefu*[9] to support this submission.

Mr *Zhuwarara* further submitted in defence to a claim for *rei vindicatio*, one did not need to file a counter-claim. One simply had to aver facts that disentitled the party seeking *rei vindicatio* from getting that relief. In the present case, nothing legal could flow from a fraud. Further reference was made to the case of *Katirawu* v *Katirawu & Ors*[10]. The plea alleged that the 12th respondent had stolen the 11th respondent's property. A thief could not pass any title. The application for rescission of judgment was going to unravel all that.

As regards the question of tenancy, Mr *Zhuwarara* submitted that the principle of law that hire goes before sale was trite. In their plea, the respondents averred that they held valid leases. The applicant had to respect those leases. In fact, it was the 12th respondent's

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[7] 2009 (2) ZLR 226 (H) where at p 237, the court 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…."

[8] SC 18/18
[9] SC 14/20
[10] HH 58/07

communication with the tenants that alerted the 11th respondent to the fact that its property had been stolen.[11] The court was urged to dismiss the application.

In his brief reply, Mr *Mapuranga* argued that the allegations of fraud did not make the respondents' position any better. The court had found as much in the case of *January* v *Maferefu* that the respondents' counsel alluded to. In any event, that judgment was concerned with a cession. Mr *Mapuranga* submitted that the question of ownership was *res judicata* in the present matter. The default judgment rendered the question of ownership *functus*. The 11th respondent could not challenge ownership without having the default judgment set aside first. Counsel further submitted that the respondents could not hide behind the hire goes before sale principle without making a positive averment that they were now tenants of the applicant and were paying rentals to the applicant. The respondents simply had no *bona fide* defence to the claim.

THE ANALYSIS

The case of *Charisma (Pvt) Ltd v Stutchbury and Anor*[12] sets out the legal position in an application of this nature. The court said:

> "The special procedure for summary judgment was conceived so that a *malafide* defendant might summarily be denied the right to be heard under onerous conditions of the fundamental principle on *audi alteram partem*. So extraordinary an evasion of basic tenet of natural justice would not be resorted to likely and it is only when all the proposed defences to plaintiff's claim are clearly inarguable both in fact and in law that this drastic relief will be afforded to the plaintiff".

The summary judgment procedure was conceived as a swift route that allows a plaintiff with a clearly unassailable claim to obtain relief expeditiously against an intransigent defendant. According to authors *Herbstein & Van Winsen:*[13]

> "…..the remedy provided by this rule is of an 'extraordinary and drastic nature' which is 'very stringent' in that it closes the door to the defendant, and that the grant of the remedy is based on the supposition that the plaintiff's case is unimpeachable and that the defendant's defence is bogus or bad at law."

The summary judgment relief is not just there for the taking. The applicant must demonstrate that the respondent's defence in the main claim is not *bona fide* or it is bad at law.

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[11] Letter from Mangeyi Law Chambers on p62 of the record. The letter dated 17 April 2019 was addressed to all the occupants of No. 80 Kaguvi Street, and was written on behalf of the 12th respondent. The letter requested the tenants to furnish the lawyers with information pertaining to their tenancy. The 11th respondent's legal practitioners responded to the letter through their letter of 24 April 2019, in which they insisted that their client was the owner of the property.

[12] 1973 (1)RLR 277 at page 279

[13] *The Civil Practice of the High Courts of South Africa*, 5th Edition, Vol 2 at p 517

In *Savanhu* v *Hwange Colliery Company*, ZIYAMBI JA explained the *rei vindicatio* claim as follows:

> "The *actio rei vindicatio* is an action brought by an owner of property to recover it from any person who retains possession of it without his consent. It derives from the principle that an owner cannot be deprived of his property without his consent. As it was put in *Chetty v Naidoo*[14]:
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> > "It is inherent in the nature of ownership that possession of the *res* should normally be with the owner, and it follows that no other person may withhold it from the owner unless he is vested with some right enforceable against the owner (e.g., a right of retention or a contractual right).
> >
> > The owner, in instituting a *rei vindicatio*, need, therefore, do no more than allege and prove that he is the owner and that the defendant is holding the *res* - the onus being on the defendant to allege and establish any right to continue to hold against the owner… (cf. *Jeena v Minister of Lands*, 1955 (2) SA 380 (AD) at pp 382E, 383)…"."

The law jealously guards the rights of an owner and sanctions what has been described as a "ruthless vindication of the owners' rights".[15] The requirements of the common law action of the *rei vindicatio* are twofold. The plaintiff must prove ownership of the property and that the defendant was in possession of the thing when the action was instituted.[16] One may also add that such possession was continuing against the plaintiff's will, otherwise there would be no need to pursue that remedy.

The respondents seek to impeach the plaintiff's ownership on the basis that the 12th respondent fraudulently took title from the 11th respondent. As already noted, the 12th respondent's claim to title is based on an order of this court which is extant. It is still to be set aside. The 11th respondent has applied for condonation for the late filing of an application for rescission of judgment. That application is pending before this court. The judgment, on the basis of which the applicant acquired title, and passed on that title to the applicant has not yet been rescinded. At this stage, the applicant is the registered owner of the property. The registration of title in terms of the Deeds Registration Act[17] is not a mere formality. It accords title holder real rights which are enforceable against anyone in the world who seeks to violate those rights.[18] It follows that the applicant's title remains unimpeachable until such time this court declares that it is defective.

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[14] 1974 3 SA 13 (A)
[15] Per MAKARAU JP (as she then was) in *Alspite Investments (Pvt) Ltd v Westerhoff* 2009 (2) ZLR 236
[16] See *January v Maferefu* (supra) at p6
[17] [*Chapter 20:05*]
[18] See *Takafuma v Takafuma* 1994 (2) ZLR 103 SC at p105 and also *Machiri (Executrix for LOUISA GOPALS Estate) v Amdvet Inv. (Pvt) Ltd & Ano* HH 505/15

Mr *Zhuwarara* submitted that *January* v *Murefu* is authority for the proposition that contesting ownership is one of the four main defences to a claim for eviction based on the *rei vindicatio*. The court alluded to the four defences that are available to claim for the *rei vindicatio*. One such defence is that the applicant is not the owner of the property in question. From a reading of the judgment, the court instead reasoned that the respondent must show that the applicant is not the owner of the property in question.[19] The applicant's title cannot be defeated by mere averments of fraud which are still to be proved in a court of law. The applicant remains the owner of the property until the registration of the property in its name is set aside by an order of court.

Further, as correctly submitted by the applicant's counsel, the respondents could have done themselves a huge favour by making a counterclaim to the *rei vindicatio* claim or alternatively seeking an order suspending the *rei vindicatio* proceedings pending the determination of the application for condonation for late filing of the application for rescission and the rescission application itself. That was not done. That is the Achilles heel of the respondents' case herein. There are no pending proceedings challenging the applicant's title whose merits the court would possibly consider in determining the propriety of the present application. That simply means there is nothing at law to stop the applicant from asserting its rights as the owner of the property herein.

The second leg of the respondents' argument was that they held valid lease agreements with the 11th respondent. They relied on the *huur gaat voor koop* common law principle, which essentially means that hire goes before sale. A purchaser who takes title of a property that was the subject of a valid lease agreement assumes all the rights and obligations of the previous owner of the property in respect of that lease agreement. See *Genna-Wae Properties (Pty) Ltd* v *MedioTromics (Natal) (Pty)*[20].

For one to rely on that defence, they must as a matter of law, prove the existence of a valid lease that existed before the property changed hands pursuant to transfer of title. They

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[19] See p7 of the judgment.

[20] 1995 (2) SA 927 (AD).

> "I hold that in terms of our law the alternation of leased property consisting of land or buildings, in pursuance of a contract of sale does not bring the lease to an end. The purchaser (now owner) is substituted *ex lege* for the original lesser and the latter falls out of the picture. On being so substituted the new owner acquires by operation of law all the rights of the original lesser under the lease. At the same time the new owner is obliged to recognise the lessee and to permit him to continue to occupy the leased premises in terms of the lease provided that he (the lessee) continues to pay the rent and otherwise to observe the obligations under the lease. The lessee in turn is also bound by the lease and provided the new owner recognises his rights, does not have any option, a right of election, to resile from the contract". The decision was cited with approval by DUBE J in the case of W&D Consultants (Pvt) Ltd v Doran HH 551/15 at p9.

must also show that they were observing their obligations under their lease with the former owner. No such lease agreements between the alleged tenants and the 11th respondent were placed before the court. The plea refers to valid lease agreements, but does not state whether these were written or oral. The same goes for the opposing affidavit and the supporting affidavits. They do not relate to the terms and conditions of the lease, the duration of the lease, the rentals that they were paying and other ancillary matters that would point to the existence of a valid and extant lease agreement.

What compounds the respondents' case is that the 11th respondent, with whom they claim to hold valid leases is not even the applicant's predecessor in title. There is the 12th respondent whose title was not revoked. The alleged lease holders do not even mention her title at all, and how they dealt with the leases from the time they were informed that she had taken title of the property. The defence pertaining to the existence of the lease is so unintelligible as to leave the court in no doubt that there are no triable issues that warrant the exercise of the court's discretion to refuse summary judgment. As was correctly stated in *Kingstones Ltd* v *D. Ineson (Pvt) Ltd*[21]*:*

> "In summary judgment proceedings, not every defence raised by a defendant will succeed in defeating a plaintiff's claim. What the defendant must do is to raise a *bona fide* defence, or a plausible case, with sufficient clarity and completeness to enable the court to determine whether the affidavit discloses a *bona fide* defence.
>
> The defendant must allege facts, which if established, would enable him to succeed. If the defence is averred in a manner which appears in all circumstances needlessly bald, vague or sketchy that will constitute material for the court to consider in relation to the requirement of *bona fides*.
>
> The defendant must take the court into his confidence and provide sufficient information to enable the court to assess his defence. He must not content himself with vague generalities and conclusory allegations not substantiated by solid facts….."

In view of the foregoing, the court finds that the respondents do not possess a *bona fide* defence to the applicant's claim on the merits. It is the court's view that this is a proper case for granting summary judgment.

COSTS

The general rule is that costs follow the event. I see no reason for departing from this general rule. The court will therefore grant an order of costs as prayed for by the applicant.

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[21] 2006 (1) ZLR 451 (S)

DISPOSITION

Resultantly it is ordered that:

1. Summary judgment be and is hereby granted in favour of the applicant for the eviction of the 1st and 4th to 11th respondents and all those claiming occupation through them from the premises at Number 80 Kaguvi Street, Harare being Lot 6A The Range, situate in the District of Salisbury, measuring 588 square metres.
2. The Sheriff or his lawful deputy be and are hereby authorised and directed to take such steps as are necessary to evict the 1st and 4th to 11th respondents and all persons holding occupation through them from the premises described in paragraph (1) above in the event that the said respondents and all those claiming occupation through them do not do so forthwith upon service of them of this court order.
3. The 1st and 4th to 11th respondents shall pay the costs of suit.

Lawman Chimuriwo Attorneys, legal practitioners for the applicant
Coghlan, Welsh & Guest, first, fourth and eleventh legal practitioners