MILTON GARDENS ASSOCIATION
versus
CHAMPION CONSTRUCTORS (Pvt) Ltd
and
TECLA MVEMBE
and
THE SURVEYOR GENERAL
and
THE REGISTRAR OF DEEDS HARARE
and
THE DIRECTOR OF URBAN PLANNING SERVICES

HIGH COURT OF ZIMBABWE
MTSHIYA J
HARARE, 19 December 2013 and 22 January 2014

OPPOSED MATTER

Advocate Uriri, for the applicant
Advocate Mpofu, for the 1st respondent
Advocate Mahere, for the 2nd respondent

MTSHIYA J: On 6 November 2000, the second respondent, who is the current owner of the property in dispute, entered into an agreement of sale of the property known as Newark of Hilton of subdivision A of Waterfalls measuring 25,0532 hectares (the property) with a company known as Max Management (Pvt) Ltd (Max) and the estimated purchase price was ZW$6.5 million (six million five hundred Zimbabwean Dollars).

The agreement stated that subject to the granting of a permit by the City of Harare for the subdivision of the property "the purchaser would acquire 76 stands leaving approximately twenty or more stands to the seller." Through a letter from the City of Harare dated 27 October 2000 but date stamped by the City of Harare on 22 November 2000, the second respondent was granted permission to subdivide the property.

Given the fact that the agreement of sale was entered into on 6 November 2000, I shall assume that the official permit was only released on 22 November 2000 as per the official date stamp on the letter granting permission to subdivide the property. Part of the letter, with the usual City of Harare conditions, read as follows:-

"I refer to your application dated 7th May 1998 which has been numbered SD/670 in the Register held in this Department and have to advise that in terms of Section 40(5) of the Regional, Town and Country Planning Act, (Chapter 29:12) a permit is HEREBY GRANTED authorising the subdivision of Newark of Hilton of Subdivision A of Waterfall in the manner indicated on Plan No. SD/670/98 subject to the following conditions…"

Max took occupation of part of the property and started developing and selling some of the stands (76 stands) to interested individuals. However, problems arose between the individual "purchasers" of stands and Max. The applicant details the problems as follows:

"12. Sadly, the individual stand holders faced numerous challenges amongst other things, Max Management did not timeously pass transfer as provided for in respective sale agreements, purportedly cancelled some agreements of sale without just cause see **Annexure 'J'** and even going to the extent of effecting double sales, this was also perpetuated by delays in servicing of the stands as per the site plans and layouts attached hereto. Generally, the development of the property was marred with gross maladministration which resulted in numerous legal suits between individuals and Max Management. By way of illustration, I attach hereto copies of Summons in HC 5056.06. A Chamber page in HC 7755/06, urgent chamber application page together with a draft provisional order in HC 445/05 as Annexure 'K', 'L' and 'M' respectively.

13. Furthermore, individual stand holders concerned, in an effort to ensure expeditious resolution of these legal suits amongst others and even to save costs created and mandated first Applicant with the management of the property, to regulate the rights and objections of stand holders and most importantly, to legally represent or defend members' interests when necessary. The Association which is made up of about thirty – seven (37) members, after countless legal battles managed to a greater extent to resolve the impasse surrounding the property by reaching consensus with Max Management, who by then were, the land developers of the property. I attach hereto marked as **Annexure 'N' and 'O'** a provisional order together with a Consent Order in Case No. HC 7312/06.

14. Sadly once more, a dispute arose relating to the implementation of the consent order in particular modalities relating to payment of certain amounts which would enable Max Management to ceed its rights, interests and title in the property to the Applicant. However, after protracted negotiations, and in a positive development, Max Management waived its claim from Applicant of any fees due to it and consequently ceded its rights, title and interest to the Applicant. Max Management thereby discharged its obligation in so far as the property is concerned in favour of Applicant in terms of an agreement of assignment attached hereto as **Annexure 'P'**. Effectively, it is Applicant who now has the overall responsibility not only of developing its members stands but the whole property including the portion which 2nd Respondent is to benefit by virtue of her agreement with Max Management."

The applicant contends that it derives its rights over the property from the cession referred to in para 14 above.

It is common cause that, notwithstanding the agreement of sale between Max and the second respondent, the property was never transferred to Max or to the individuals it purported to sell the property to. This led to some forty (40) individuals issuing summons (HC 5065/06) against Max, the second respondent and the Registrar of Deeds seeking the following relief:

> "(a) an Order that the First Defendant shall within (30) thirty days of the granting of this order complete the servicing of all stands sold to the Plaintiffs which are on Newark of Milton of Sub "A" of Waterfalls situate in the district of Salisbury;
>
> (b) an Order that the First Defendant shall upon completion of the servicing of stands in terms of paragraph (a) above, and in any event, within forty days from the date of this order, sign all documents necessary to transfer ownership of the stands to the Plaintiffs'
>
> (c) in the event that the First Defendant fails to comply with paragraph (a) hereof the Plaintiffs shall be entitled, at their own expense, to complete the servicing of the stands and pay to the Second Defendant any amounts of money due to her by the First Defendant in terms of the agreement of sale of Newark of Milton of Sub "A" of Waterfalls;
>
> (d) the Second Defendant shall accept payment from the Plaintiffs of all monies due to her by First Defendant in terms of the agreement referred to in paragraph (c) hereof;
>
> (e) the Plaintiffs shall be entitled to recover from the First Defendant all expenses incurred in completing or in connection with the completion of the servicing of their stands, together with any monies paid by them to the Second Defendant;
>
> (f) if the First and Second Defendants fail to pass transfer of the stands to the Plaintiffs after they have been serviced, the Sheriff or his Deputy shall sign all papers necessary to transfer the stands to the Plaintiffs;"

The record shows that the summons in Case No. HC 5065/06 was prepared on 17 August 2006. The date of filing is not clear. However, the matter was withdrawn on 11 March 2008. Prior to the withdrawal of Case No. HC 5065/06, the applicant had obtained a Provisional Order in case HC 7312/06 against Max, Sandriver Properties (Pvt) Ltd, the second respondent and the Registrar of Deeds. There is no indication as to whether or not the 40 applicants in HC 5065/06 were involved in HC 7312/06.

The terms of the Provisional Order granted on 11 December 2006, were:

"1. Final Order Sought:

1.1 The First and Second Respondents be and hereby interdicted from ceding or encumbering or advertising for sale; or selling or disposing of in any way, First Respondent's right, title and interest in the immovable property called Newark of Hilton of Subdivision A of Waterfalls measuring 25,0532 hectares pending the determination of HC matter number 5065/06.

1.2 That the Fourth Respondent be and is hereby interdicted from registering the cession or transfer of the said property, or to register any mortgage bond or any other form of encumbrance on the said property to a third party, other than Applicant's members pending the determination of HC matter number 5065/06.

1.3 That any agreements of sale relating to the property described in paragraph 1 hereof entered into by First Respondent, or Second Respondent on behalf of First Respondent, and any third party in respect of stands which First Respondent had sold to any of Applicant's members, be and are hereby cancelled and declared to be null and void.

1.4 That the First Respondent shall pay costs of this Application.

INTERIM ORDER

That pending the determination of this matter on the return day:-

2.1 The First Respondent and Second Respondents be and are hereby interdicted from ceding or encumbering; or advertising for sale, or selling or disposing of in any way, the First Respondent's right, title and interest in the immovable property called Netwark of Hilton Subdivision A of Waterfalls measuring 25,0532 hectares.

2.2 That the Fourth Respondent be and is hereby interdicted from registering the cession or transfer of the said property, or to register any mortgage bond or any other form of encumbrance on the said property to a third party, other than Applicants members pending determination."

As can be seen, from paras 1.1 and 1.2 of the final order sought, the relief was based on the determination of a matter (HC 5065/06) that was later withdrawn on 11 March 2008. Clearly the withdrawal of HC 5065/06 took away the effect of the provisional order.

The record also shows that on 11 March 2008, following the withdrawal of HC 5065/06, a consent order was granted by this court.

The parties to the consent order were:-

a) the applicant herein

b) Max

c) Sandriver Properties (Private) Ltd

d) the second respondent herein; and

e) the fourth respondent herein.

The consent order provided as follows:-

"IT IS ORDERED BY CONSENT THAT:

1. The 1st Respondent shall, on payment of the sum of $3 7000 000.00 ($3,7 billion) being the total value of 10 stands or, alternatively, release to *(sic)* Stands from the Applicant's membership within the development known as Newark of Hilton to the 1st Respondent for the 1st Respondent's benefit, the 1st Respondent, shall, upon receipt of either of the above cede its rights, interests an title to the Stands to the Applicant's members Stands only, within the development to the Applicant. *(sic)*

2. Payment, for the cessions as shown above shall be made by the Applicant to the 1st Respondent's Legal Practitioners Kantor & Immerman, as follows

   a) 5% of the said sum of $3,7 billion within 7 days of signature of this Consent Order by the parties or their Legal Practitioners.
   b) 20% of the said sum of $3,7 billion within three (3) weeks (21 days) of the date of signature of this Consent Order by the parties or their Legal Practitioners.
   c) The balance in 6 equal monthly instalments from the date of payment of the 20% asset *(sic)* out above inclusive of interest at the rate set out below. Payment shall be in cash, bank transfer or bank guaranteed cheque which shall be cleared prior to the release of cessions by the 1st Respondent, who at its discretion may accept a combination of Stands and cash as payment to the sum valued as set out above. The Applicant hereby agrees that should any part of the above payment not be received by the 1st Respondent within the agreed period, the Applicant, shall nominate a Stand or Stands as the case may be to be forwarded to the 1st Respondent within seven (7) days of posting written notice by the 1st Respondent of breach for the purpose of recovering any sums unpaid, by the Applicant or its members.

3. The Applicant hereby undertakes to service at the Applicant's cost together with funds the Applicant will collect from non members Stand as shown in Clause 9 hereto, the development as a whole that is 76 Stands as laid out in Sub Division Permit SD670 and agrees to be bound by the terms and conditions therein, the Applicant indemnifies the 1st Respondent and its directors, against any and all claims that may arise during or after the servicing phase of the development from either its membership or persons outside its membership. The 1st Respondent confirms that it has approximately sufficient piping only for phase 1 that at its cost it shall place on site.

4. 1st Respondent agrees that any overlap sales that may interfere with Applicant's members cession or interest shall be removed by the 1st Respondent to other non-member Stands and accepts that the cessions once signed shall take precedent over any other indulgences on that member's Stand.

5. Applicant agrees to indemnify and hold harmless 1st Respondent and its directors in respect of any claim of whatsoever nature present or future including claims in Case Numbers CRB 3938/07 and HC 5065/06 which Applicant agrees to withdraw simultaneously with the signing of this Order.

6. 1st Respondent shall ensure the transfer of the Applicant's members' Stands upon completion of the servicing the condition of which are laid out in SD 670.

7. It is specifically agreed that:

1. Bushu C	(stand No. 925)
2. Magasa C (Chipudhla)	(stand No. 937)
3. Chari M	(stand No. 916)
4. Chidyamukuni	(stand No. 971)
5. Chipudhla C	(stand No. 941)
6. Chitengu P	(stand No. 953)
7. Dodzo A	(stand No. 908)
8. Furayi	(stand No. 919)
9. Ganyani D	(stand No. 948)
10. Kadziringe S	(stand No. 947)
11. Kandengwa F	(stand No. 949)
12. Katunga C	(stand No. 912)
13. Kawa G	(stand No. 951)
14. Mangwiro E	(stand No. 918)
15. Mataga C	(stand No. 986)
16. Matsuro N	(stand No. 960)
17. Maundanhema N	(stand No. 936)
18. Mazonde R	(stand No. 904)
19. Mkwendi R	(stand No. 907)
20. Mkwendi T	(stand No. 921)
21. Mubonderi	(stand No. 906)
22. Mudadada C	(stand No. 926)
23. Mukwidzi R	(stand No. 929)
24. Munetsi C	(stand No. 928)
25. Mupanguri S	(stand No. 902)
26. Mushore A	(stand No. 914)
27. Mushunje	(stand No. 952)
28. Musiiwa H	(stand No. 961)
29. Mutare P	(stand No. 899)
30. N'angu F	(stand No. 935)
31. Ngwnya G	(stand No. 934)
32. Nyabuka N	(stand No. 959)
33. Nyamadzawo H	(stand No. 983)
34. Rufu E	(stand No. 925)
35. Sibanda B	(stand No. 924)
36. Tawengwa T	(stand No. 936)
37. Mapipi	(stand No. 922)

are entitled to benefit from this Order.

8. 1st Respondent shall surrender to Applicant all the required documents for the Applicant to conclude the servicing of the Stands including all site diagrams, surveys and plans obtained by the 1st Respondent to the date of signature hereof.
9. The 1st Respondent agrees to direct both its existing clients and clients it is yet to contract with, monies to a trust account in favour of the Applicant for servicing fees of the development that being the water reticulation system, storm water drainage reticulation and road reticulation any other sums not directly for the aforementioned are deemed herein to be due the 1st Respondent's account meaning proceeds from the sale of the 10 Stands (if applicable) any sale of non ceded or non members Stands any interest or late fees or any other amount due that is not directly related to the above-mentioned services.

10. Interest on the value of the Stands shall accrue at the rate at 52,5% per month from the date of payment of the 20% in terms of paragraph 2(b) above.

11. Each party shall bear its own costs."

On 15 April 2010 Max and the applicant entered into an agreement of assignment which

provided as follows:-

"**WHEREAS** by virtue of a Consent Order dated 11th March 2008 entered into by the Assignor and the Assignee (hereinafter referred to as the Consent Order), the Assignor agreed to cede its rights title and interests in certain stands to the Assignee within the development known as Newark Hilton of Subdivision "A" Waterfalls, Harare measuring 25,0532 hectares (hereinafter referred to as the property) namely stand numbers,

925 (Bushu C)
941 (Chipundla C)
916 (Chari M)
971 (Chidyamukuni)
953 (Chitengu P)
908 (Dodzo A)
919 (Furayi)
948 (Ganyani D)
947 (Kadziringe S)
949 (Kandengwa F)
912 (Katunga C)
951 (Kawa G)
918 (Mangwiro E)
960 (Matsuro N)
936 (Maundanhema N)
904 (Mazonde R)
907 (Mkwendi R)
921 (Mkwendi T)
906 (Mubonderi)

926 (Mudadada C)
929 (Mukwidzi R)
928 (Munetsi C)
902 (Mupanguri S)
914 (Mushore A)
952 (Mushunje)
961 (Musiiwa H)
899 (Mutare P)
935 (N'angu F)
934 (Ngwnya G)
959 (Nyabuka N)
983 (Nyamadzawo H)
925 (Rufu E)
924 (Sibanda B)
936 (Tawengwa T)
922 (Mapipi),

FURTHER, The Assignor agreed to cede its rights, title and interests in certain stands within the remainder of the property as described in the schedule attached hereto.

AND WHEREAS, The Assignor has waived any and all obligations, rights and interests on the stands and/or property including any fees or balances outstanding that may be due to it, present or in the future.

AND WHEREAS, the Assignor now wishes to cede its rights and delegate its obligations from the Consent Order and within the property and whereas the Assignee is willing and able to take the cession and to accept delegation of the Assignor's obligations.

NOW THEREFORE THE PARTIES AGREE AS FOLLOWS:

1. The Assignee acknowledges that it has fully acquainted itself with the stands being ceded and the nature and extent of the Assignor's obligations under both the Consent Oder and within the property itself, including all documents to which the stands or the property maybe subject to.

2. The Assignor hereby cedes and the Assignee accepts full unreserved/unrestricted cession of the Assignor's rights title and interest and obligations in the individual stands and in the property as a whole entity.

3. The Assignor hereby delegates and the Assignee agrees to take over without restriction all of the Assignor's obligations arising from the Consent Order and within the property itself including the individual stands and all risk and profit which includes but is not limited to the following;

   3.1 All monies collected/due in connection with the property or individual stands either by rental or sale agreement or other requirement.

3.2 All monies payable including but not restricted to engineers, plan approval, connection fees, transfer fees, insurances, City of Harare Fees, clients fees, rates and taxes etc.

3.3 All works, planning and payment and arrangement thereof.

3.4 All materials, procurement, fitting and payment thereof.

3.5 All communication with the clients for any purpose, including payment, notice demand, cancellation etc.

3.6 All legal matters of any type arising from or in connection with the property itself or its individual stands or its stands holders.

4. The Assignee agrees to indemnify and hold harmless the Assignor and its directors in respect of any claim of whatsoever nature present or future arising therefrom.

5. The Directors of Max Management as of the date of signing of this document forfeit/giver/surrender/waive any and all rights and interest in the property known as Newark Hilton of Subdivision "A" Waterfalls, Harare measuring 25,0532 hectares."

As can be seen, both the Consent Order and the assignment place no obligations(s) on the second respondent who is the rightful owner of the property.

On 19 September 2007 the second respondent, as owner, sold the property to the first respondent herein for three hundred and fifty million Zimbabwean Dollars (ZW$350 000 000-00).

On 14 September 2011, after the second respondent had failed/refused to transfer the property to the first respondent, this court, upon application in Case No. HC 7398/11, granted the following order in favour of the first respondent, (i.e. Champion Constructors (Pvt) Ltd):-

"IT IS ORDERED THAT:

1. 1st Respondent, Teela Mvembe be and is hereby ordered to sign all transfer papers and give effect to transfer of certain piece of land situate in the District of Salisbury called Newark of Hilton of Subdivision A of Waterfall held under deed of transfer No. 4573/2000 to the Applicant within ten (10) days of the date of service of this order on her.

2. Should 1st Respondent fail to sign the papers within the said period then the Deputy Sheriff Harare be and is hereby authorised to sign all papers on behalf of 1st Respondent to give effect to the transfer.

3. An order be and is hereby granted directing the 2nd Respondent to cancel any subdivision plan registered with him by 1st Respondent in respect of the property referred in paragraph 1 above of this order and recognise only the original boundaries of the property as provided for in deed of transfer No. 4573/2000 to the registered subdivision.

4. 1st Respondent to pay costs of suit."

On 19 October 2011, following the above court order, the first respondent wrote the following letter to the third respondent:

"Dear Sir/Madam

REF: CANCELLATION OF SUBDIVISION PLAN FOR NEWARK OF HILTON OF SUBDIVISION OF WATERFALLS

On behalf of Champion Constructors (Pvt) Ltd, I write in respect of a High Court order which was served on you by the Deputy Sheriff on the 18th of October 2011.

Kindly please cancel the respective general plan number CG 2836.

Also please be informed that we do not have any copy of the said subdivision plan in our custody and advise that should we find any we will surrender them to your good offices.

I hope the above will assist you and I await your cancellation document at your earliest convenience.

Yours faithfully

E. CHIDAVAENZI (Miss)
CHAMPION CONSTRUCTORS (PVT) LTD"

On 20 October 2011, the third respondent responded to the above letter in the following terms:-

"**Attention: Miss Chidavaenzi**

RE: APPLICATION FOR CANCELLATION OF GENERAL PLAN CG2836 OF STANDS 894-987 MIDLANDS TOWNSHIP OF NEWARK OF HILTON OF SUBDIVISION OF WATERFALL.

DISTRICT: SALISBURY

Reference is made to your application dated 19/10/2011.

You are hereby advised in terms of section 47 of the Land Survey Act [Chapter 20:12] that the general plan CG2836 of Stands 894-987 Midlands Township of the Whole of Newark of Hilton of Subdivision A of Waterfall situate in the district of Salisbury has been **Cancelled** as requested.

I acknowledged receipt of my office fees and all other relevant documents.

Yours faithfully

S. Charama
for Surveyor-General"

It is on the basis of the foregoing developments that, on 28 October 2011, the applicant filed an urgent application wherein it, among other averments, stated that:-

"19. As a result of the aforegoing, Applicant has been left without no option but to approach the Honourable Court for relief by way of an interdict, prohibiting 2nd Respondent from passing transfer of title and 4th Respondent from effecting such transfer to 1st Respondent and also prohibiting 5th Respondent from giving effect towards 3rd Respondent's directive, by deleting individual standholders names from its registrar, books and/or administrative records.

20. I submit that, I am advised, Applicant and in particular, individual standholders of Newark of Hilton of subdivision A of Waterfall have a clear right of title over the property in particular, each individual stand separately purchased, on both facts and law. Regard being heard to the background of this matter, the consent order granted by Mavungira J on 11th March 2008 and the agreement of assignment thereto. In addition, there is reasonable apprehension of injury in the instance. Clearly 1st Respondent in its founding Affidavit in HC 7398/11 admits that the general plan or subdivision of the property as it stands today has no bearing on its interest towards the property. Put simply, 1st Respondent clearly indicates that it does not wish to proceed with the development and serving of the property for residential purposes and has other intentions. The stand holders are in no doubt bound to lose their property to which some now regard as their place of habitation having occupied same soon after fulfilling the terms of their respective agreements and consequently losing their investments in the face of a possible demolition of the structures erected thereat notwithstanding the different levels of construction."

The urgent application resulted in the granting of a Provisional Order in HC No. 10716/11. The terms of the said provisional order, granted on 18 November 2011, were:-

"**FINAL ORDER SOUGHT**

That you show cause to this Honourable Court why a final order should not be made in the following terms that:-

1. The Order granted in default by Justice Mutema on 14 September 2011, compelling 2nd Respondent to pass transfer to 1st Respondent and subsequently cancelling the general plan CG2836 in relation to a certain piece of immovable property namely: Newwark of Hilton of Subdivision A of Waterfalls situate in the District of Salisbury measuring 25,0532 hectares, should not be set aside or rescinded.

2. The agreement of sale entered into and by the 1st and 2nd Respondent on or about 19 September 2011 in relation to a certain piece of immovable property referred in 1 above, should not be declared null and void and subsequently cancelled.

3. The decision made by the 3rd Respondent of 20 October 2011 cancelling the general plan CG2836 should be declared null and void and accordingly set aside.

4. 4th Respondent be and is hereby prohibited from passing transfer and/or accepting, approving and/or authorising any documents or papers passing transfer to any other person other than Applicant without the approval or authority of the Applicant.

5. 1st Respondent should not be ordered to pay costs of suit.

INTERIM RELIEF SOUGHT

Pending the determination of this case the following interim relief is made:

1. 2nd Respondent or the Deputy Sheriff or his lawful deputy as the case might be, be and is hereby interdicted from signing such documents and/or papers passing transfer to 1st Respondent of certain immovable property namely Newwark of Hilton of Subdivision A of Waterfalls situate in the District of Salisbury measuring 25,0532 hectares.

2. Consequently, 4th Respondent be and is hereby interdicted from accepting, approving such documents and/or papers as may be presented to him to effect such transfer of the aforesaid property into 1st Respondent's name.

3. The 3rd Respondent is interdicted from implementing a new plan in place of Plan CG2836.

4. The 5th Respondent is interdicted from implementing any plan brought into effect by the 3rd Respondent in place of Plan CG2836."

It is the above order that the applicant seeks to confirm. The application for confirmation is opposed.

Notwithstanding the fact that there was never any application for the rescission of this court's order of 14 September 2011, Advocate *Uriri* for the applicant, submitted that the

applicant should have been cited in HC 7398/11 because it had an interest in the matter and the applicant therein was aware of such interest. He argued that the court was not given full disclosure. He also argued that the cancellation of the General Plan was not in accordance with the law.

Advocate *Mpofu,* for the first respondent, submitted that the applicant should have adhered to the court's rules that govern rescission of default judgments. That submission was, in my view, correct. This court has clear rules relating to rescission of default judgments and those rules should be followed.

He said it was common cause that the agreement between Max and second respondent had been cancelled and hence the sale to the first respondent. Furthermore, there could be no assignment without the consent of the second respondent i.e the owner of the property. That being the case, he said, the applicant had no right to enforce.

Advocate *Mahere* for the second respondent, correctly submitted that the provisional order does not place any obligation on the second respondent and that there was no relationship between the second respondent and the applicant's members.

I must state or acknowledge that detailed submissions were made herein and I am grateful for same.

I believe that notwithstanding the great detail *in casu*, the matter can easily be disposed of by taking note that to date the second respondent remains the owner of the property. It was not disputed that owing to non-payment of the purchase price, the agreement between the second respondent and Max was cancelled. Transfer of the property was never made to Max and accordingly Max could not transfer or assign any rights to anyone in respect of the property. The purported assignment was therefore a non-event. To that end, I agree with the second respondent's submission that:

> "In order for any transfer to the applicant's purported members to have been possible. Max Management (Pvt) Ltd ought to have acquired the property from the 2nd respondent, which it did not. As highlighted in Silbergerg and Schoeman's, The Law of Property, 5th Edition (LexisNexis – Butterworths) at page 73:
>
> > 'The seller of a thing which does not belong to him or her must first acquire it for him or herself then transfer it to the buyer … in other words, "nobody gives something he does not have" (nemodat qui non habet). This rule is based on the old Roman Law maxim "non-one can transfer more rights to another than he himself has (nemo plus iuristransferrepotest quam ipse habet). This may be described as the "golden rule" of the law of property."

It should further be noted that the consent order of 11 March 2008 was the final position prior to this court's order of 14 September 2011. The consent order took note of what had transpired up to that date. That order, in my view, cancelled all previous arrangements, except that it failed to recognise that Max had no rights to assign to anyone. It was only the second respondent who could assign rights. However, notwithstanding the fact that the parties knew that the second respondent held title to the property, no responsibility/obligation was placed on her. Without the participation of the second respondent the said consent order could not be implemented. The same applied to the purported agreement of assignment of 15 April 2010 concluded between Max and the applicant. In the absence of title and clear rights, Max had nothing to cede. That point should have been revealed to the court before the consent order was granted. The applicant acknowledges that Max, a developer of the property, had no title.

Given the collapse of the agreement between Max and the second respondent, I find nothing in these papers that could militate against the second respondent selling her property to the first respondent. The applicant's members have no relationship whatsoever with the second respondent. They are at liberty to claim their moneys from Max. I did not see any challenge to the second respondent's letter of 1 May 2007 wherein she addressed Max in the following terms:-

> "The above refers. Further reference is given to my previous letter to you dated 7 April 2007 demanding a payment of Three Trillion Four Hundred and Twenty Billion Zimbabwe Dollars (ZW$3 420 000 000 000.00) in respect of the sale of stand 60A Newark of Hilton of Subdivision A of Waterfall.
>
> I hereby write to notify you that you have remained in breach of your agreement with me over several years. This breach flows from your failure to pay your overdue purchase price which has accumulated to Three Trillion Four Hundred and Twenty Billion Zimbabwe Dollars (ZW$3 420 000 000 000.00) as at the date of writing this letter. This payment is supposed to cover the outstanding capital purchase price together with the accumulated interests, as per the agreement of sale we signed on the 6th November 2000. The purpose of my letter is to highlight the breach to you and to give you notice in terms of the agreement to cure such breach. I accordingly hereby call upon you to pay me the outstanding Three Trillion Four Hundred and Twenty Billion Zimbabwe Dollars (ZW3 420 000 000 000.00) within thirty (30) calendar days from the date of this letter. Should you fail to do so, then I shall invoke the provision of Clauses 5.1; 5.3 and 7 of the agreement of sale in the following ways:-
>
> a) Cancel the agreement without further notice;
> b) Retake possession of the stand;
> c) Re-offer it for sale;

d) Retain all payments you made on account of the purchase price as *rouwkoop* (pre-estimated damages); and
e) Sue you for any damages whatsoever as may have been incurred by me.

It is thus in your best interest to take this NOTICE seriously."

Max never sought enforcement of any rights against the second respondent leading to the cancellation of the agreement referred to above. Consequently if the applicant cannot assert any rights against the second respondent, the matter ends there. The cancellation of the General Plan cannot be a matter for the applicant who has no enforceable rights on the property.

I also do not find any basis for the argument that the first respondent should have joined the applicant in HC 7398/11. The first respondent knew the owner of the property that it was purchasing and it was that owner it had to deal with. There was, as already shown, nothing to stop the second respondent from selling the property to the first respondent.

Furthermore, the cancellation of the general plan was, in my view, a matter between the title holder and the town planners.

In view of the foregoing and as long as this court's order of 14 September 2011 remains extant, I find myself being disabled to confirm the court's provisional order of 18 November 2011.

I therefore order as follows:-

1. This court's provisional order of 18 November 2011 be and is hereby discharged; and
2. The applicant shall pay costs of suit.

Messrs Artherstone& Cook, applicant's legal practitioners
Messrs Munangati& Associates, first respondent's legal practitioners
Messrs J. Mambara& Partners, second respondent's legal practitioners