Urgent Chamber Application HC 2012/18

BULCHIMEX GmbH IMPORT-EXPORT
CHEMIKALIEN und PRODUKTE
TECHNOIMPEX SOFIA BULGARIA JSC
versus

BULCHIMEX GMBH IMPORT EXPORT
CHEMIKALIEN und PRODUKTE (PVT) LTD
and
SARAH HWINGWIRI
and
RAJENDRAKUMAR JOGI
and
REGISTRAR OF DEEDS (N.O)
and
THE SHERIFF OF ZIMBABWE (N.O)

Opposed Application HC 12074/16

BULCHIMEX GmbH IMPORT-EXPORT CHEMIKALIEN
und PRODUKTE
and
TECHNOIMPEX JSC
versus
BULCHIMEX GMBH IMPORT EXPORT
CHEMIKALIEN UND PRODUKTE (PVT) LTD
and
SARAH HWINGWIRI
and
THE REGISTRAR OF DEEDS (N.O)

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 22 February 2018, 7 March 2018 & 25 April 2018

Urgent Chamber/ Opposed Applications

Advocate T Mpofu, for the applicants
F. Nyamayaro, for the 1st and 2nd respondents
Advocate Sanhanga, for the third respondent - Urgent

MANGOTA J: The applicants are foreign legal entities. The first is a German Company. It is owned by a Bulgarian Corporation. The second is a Bulgarian entity. It is a subsidiary of the first.

Until 22 November, 2017 the first applicant was the owner of a certain piece of land which is situated in the district of Salisbury. The piece of land is called stand number 295, Northwood Township 2 of Sumbeni. It was held under deed of transfer number 5022/2008. It is commonly known as number 116 Twickenham Road, Mount Pleasant, Harare ["the Mount Pleasant Property."]

On 9 December, 2013 one Rajendrakumah Jogi [Jogi] purchased the property. He took title in the property on 22 November, 2017 following its sale to him. It is now registered under deed of transfer number 4766/17 which deed records the name of the purchaser as the new owner of the same.

The second applicant was, and still is, the owner of a certain piece of land which is situated in the district of Salisbury. It is called Lot 12 of Lot 15 Block C of Avondale. It is held under deed of transfer number 1657/89. It is commonly known as Bath Mansions Flats. It is at number 32, Bath Road, Avondale, Harare ["The Avondale Property"].

The abovementioned two properties lie at the centre of the main application, HC 12074/16 and the urgent chamber application, HC 2012/18.

The applicants filed the main application on 28 November, 2016. They successfully moved the court to interdict the first and second respondents from dealing in any way with the two properties and / or from coming within 100 metres of the same. The interim order which the applicants obtained in the mentioned regard is dated 2 December, 2016.

On 22 February, 2018 l heard the matter which related to the confirmation or discharge of the provisional order of 2 December, 2016. Having heard submissions from both parties, I reserved judgment. Before the ink which related to my hearing of the main application had dried up, the applicants filed the urgent chamber application, HC 2012/18. They did so on 5 March, 2018. They moved the court to restore to them possession of the Mount Pleasant Property and to interdict:

a) The first, second and third respondents from selling or, in any way, alienating or encumbering the Mount Pleasant Property;
b) The fourth respondent from facilitating or making further transfer of the Mount Pleasant Property which is held under deed of transfer number 4766/17 in favour of Rajendrakumah Jogi to anyone

c) All the respondents from facilitating or transferring title in the Avondale Property which is registered under deed of transfer number 1637/89 to anyone;
d) The fifth respondent from evicting occupants of the Avondale Property.

Because title in the Mount Pleasant Property had already changed hands from the first applicant to Mr Jogi when the application was filed, I disallowed paragraphs 1, 2 and 3 of the applicants draft order. I allowed paragraphs 6 and 9 of the draft order with some amendments. I directed that the word *Lease* which appeared in paragraph 6 should be deleted. I further directed that the phrase *or 116 Twickenham Drive, Mount Pleasant, Harare* which appeared in paragraph 9 should also be deleted. I, accordingly, allowed paragraphs 4, 5 and 6 as amended, 7, 8, 9 as amended and paragraph 11 to remain as the interim relief for the applicants. The interim order was issued with the consent of all the parties.

My reading of the record satisfied me that HC 2012/18 was urgent. The applicants stated that they were not aware that their Mount Pleasant Property had been sold and transferred to someone. They said they became aware of that fact on 1 March, 2018 when the deponent to their founding affidavit received a call from one Kudzai Kupambana, the caretaker of the property. He submitted that Mr Kupambana informed him that the Messenger of Court was carrying out eviction at the premises. He said he immediately notified the applicants' legal practitioners of the development. These and him, he said, visited the Mount Pleasant property. He averred that the legal practitioners and him later established that it was not the messenger of court but the deputy Sheriff who had carried out the eviction.

The supporting affidavit of Mr Kubambana was on all fours with that of the deponent of the founding affidavit especially on the portion which related to the latter's eviction.

The applicants filed the urgent chamber application a day after their discovery of what had occurred. They most certainly treated the matter with the urgency which it deserved.

The first, second and third respondents opposed the urgent chamber application. They, however and to their credit, consented to the interim relief which I granted to the applicants in its amended form. They did so in the interests of progress. They agreed with me that the situation had to be arrested. All the parties shared the view which the court had. The view was that the situation of the parties' case did not have to get out of hand whilst judgment in the main application, HC 12074/16, was being awaited.

Two characters stand out clearly in both applications. These are one, Borislav Boynov ("Borislav") and one Sarah Hwingwiri ("Sarah"). Borislav is the deponent to the founding and

the answering affidavits of the applicants. He is so for the main application as well as the urgent chamber application.

Sarah is the second respondent in both applications. She is the deponent to the affidavits of the first and the second respondents in both applications.

Sarah and one Ivan Pantchev ("Ivan"), a Bulgarian who is domiciled in Bulgaria, registered the first respondent in terms of the laws of Zimbabwe. They are both its directors.

Borislav's averments in the main application were that the applicants own the Mount Pleasant and the Avondale properties. He said they also used to own a certain piece of land which is situated in the district of Salisbury called Lot 9 of Lot 9 of Glen Lorne measuring 4047 square metres ["the Glen Lorne Property"]. This, he alleged, was sold by Sarah and Ivan for $150 000 and transferred into the name of the purchaser. The sale, he stated, was with the authority of the applicants. He submitted that Sarah and Ivan did not transmit the proceeds of the sale to the applicants. He successfully moved the court to grant to the applicants the provisional order which prohibited the first and the second respondents from dealing, in any way, with the remaining two properties as well as from coming within 100 metres of the same. He, in the final order, prayed that:

i. the first applicant be declared the owner of the Mount Pleasant property;
ii. the second applicant be declared the owner of the Avondale property – and
iii. the first and second respondents be declared to have no ownership rights or interests in either property.

The first and the second respondents opposed the application. The third did not. My assumption is that he chose to abide by the decision of the court.

The two respondents raised a number of preliminary matters in their opposition to HC 12074/16. They submitted that Borislav did not have the authority of the first applicant to depose to the founding affidavit on its behalf. Their second *in limine* matter was that the application was not urgent. The third was that an alternative remedy was available to the applicants. The fourth was that the applicants did not comply with the laws of Zimbabwe when they applied as they did. The fifth was that HC 12043/16 which the applicants filed remained pending. They, in the mentioned regard, anchored their opposition on the defence of *lis pendens*. The last was that the application contained material disputes of facts which could not be resolved on the papers. They stated, on the merits, that the applicants authorised Sarah to manage the two properties and / or to sell them on their behalf. They submitted that the

applicants were not the owners of the properties. They stated that the first respondent owned the Mount Pleasant property.

Annexures M_1 and M_2 which the applicants attached to their answering affidavits dispose of the respondents' first preliminary matter. The annexures show that the applicants conferred authority on Borislav to depose to their affidavits.

The issue of the urgency or otherwise of the application remains of no use to the respondents. That is so because the application was heard and determined on the basis of urgency.

In so far as the respondents' third *in limine* matter was concerned, the respondents made a statement which they did not substantiate. They did not mention the alternative remedy which they said was available to the applicants. These stated that they had no other remedy which was available to them. The *onus*, therefore, rested on the respondents to mention the remedy which the applicants could employ for a quick redress of their situation – i.e. a remedy which was outside the urgent chamber application which they had filed.

Given the circumstances of what was confronting the applicants at the time of the application, I remain satisfied that the only course which was available to them was to apply as they did. There was, therefore, no other remedy which was available to them.

The respondents' statement which was to the effect that the applicants did not comply with the laws of Zimbabwe was not only far-fetched. It was also, in my view, meaningless.

The respondents did not state the manner in which the applicants violated the laws of Zimbabwe. They simply stated that they violated the law without elaborating. They left that matter to conjecture.

The applicants stated, on the point in issue, that they owned immovable properties in Zimbabwe. They submitted, and correctly so, that they were not, because of the stated fact, required to provide security before instituting legal proceedings.

The applicants had, as at the time of the application, two properties in Zimbabwe. Nothing prevented them from approaching the court to protect their rights and interest in the same. No law prohibited them from applying as they did.

The issue of *lis pendens* which the respondents raised as their fifth *in limine* matter is without merit. The applicants stated, and the court confirmed, that they withdrew HC 12043/16. They did so on 14 February, 2017.

The applicants denied that there were material disputes of facts in the matter. They urged the court to adopt a robust approach and resolve the dispute, if any, on the papers which

were before it. They submitted that the first applicant and the first respondent were two separate legal entities. They stated that the annexures which the respondents used to support their case were forged documents. They insisted that the annexures which were purportedly deposed to outside Zimbabwe violated section 3 of the High Court [Authentication of Documents] Rules 1971. They contended that the documents / annexures were not notarised. They moved the court not to allow the respondents to use them as evidence which supports the latter's case.

Whether or not the application contains material disputes of fact will be determined in the course of this judgment. The probabilities are that it does not. That is so as the court will have to determine who between the applicants and the respondents owns the two properties. A robust approach to the matter as urged of the court by the applicants will, no doubt, enable the court to resolve the issue without hearing any oral evidence on that aspect of the case.

My first observation relates to the resolution which the respondents passed. The resolution confers authority on Sarah to depose to their opposing affidavits. It raises more questions than it provides answers to them. It appears at page 114 of the record. The respondents called it Annexure A.

A reading of the annexure with what Sarah stated in the first paragraph of the opposing affidavit shows the effort and the extent to which the respondents went to mislead the court. She stated:

> "I, the undersigned SARAH HWINGWIRI do hereby make oath and state as follows:
> 1. I am the second Respondent in this matter and I have been authorised to depose to this affidavit on behalf of the 1st Respondent by virtue of a company resolution attached hereto as Annexure A……" [emphasis added].

The annexure, it is evident, is not that of the first respondent who allegedly authorised Sarah to depose to the opposing affidavit. It is that of the first applicant. The question which arises is who, between the first applicant and the first respondent, authorised Sarah to depose to the opposing affidavit. The respondents left that critical issue not only unanswered but also unresolved.

I mention in passing that the first applicant could not have authorised Sarah to depose to the opposing affidavit. It could not do so when it sued the first respondent and her. It could not, in other words, approbate and reprobate and, at the same time, remain relevant to this application.

The first applicant and the first respondent have similar names. There is, however, a marked difference between the two legal entities. The difference lies in that the first respondent's name ends with the phrase (*Private) Limited*.

The second question which arises is whether it was by design or by accident for the respondents to have cited the name of the first applicant in their resolution. The probabilities are that it was more by design than it was by accident. The citation was deliberate. It aimed at confusing issues especially in the mind of unsuspecting readers of the resolution.

It is my considered view that Sarah must have realised the folly of the resolution of 29 November 2016 (i.e. Annexure A). It was for the mentioned reason, if for no other, that she refrained from repeating the same in all subsequent affidavits which she filed in opposition to any application which related to the two properties. She, for instance, stated in the opposing affidavit which she filed on 3 January 2017 as follows:

> "I, SARAH HWINGWIRI, duly sworn do hereby take oath and state as follows:
>
> 1. I am the second respondent and a director of the first respondent. I am therefore authorised to depose to this affidavit on my behalf and on behalf of the 1st Respondent."

She stated, in her opposing affidavit to the urgent chamber application, as follows:

> "I, the undersigned SARAH HWINGWIRI, duly sworn do hereby take oath and state as follows:
>
> 1. I am the second respondent in this matter. I also have authority to depose this affidavit on behalf of the 1st Respondent by virtue of being its director." [emphasis added].

Sarah did not mention the person who authorised her to depose to the first of the above mentioned two affidavits. She produced no resolution which conferred authority upon her to act for the first respondent. All she said was that she was authorised to depose to the affidavit on behalf of the first respondent.

Sarah stated, in so far as HC 2012/18 was concerned, that she had the authority to depose to the affidavit on behalf of the first respondent by virtue of being its director. The correct position of the matter is that she could not confer any authority upon herself. She could not even do so in her capacity of director of the first respondent.

It is a trite position of company law that a director cannot confer authority upon himself or herself to act for, and on behalf of, the company on the basis that he/she is a director of the same. If that was the case, then each director would, at his/her whim, drag his/her company to court as he/she pleases. Such an undesirable development would run against the concept of

good corporate governance which lies at the centre of any business enterprise as well as company law.

The respondents did not mince their words in their criticism of the applicants' case. They indicated that the application was fatally defective for want of a resolution which authorised Borislav to depose to the founding affidavit. They drew the court's attention to the importance of the resolution which they said was/is a *sine qua non* aspect of motion proceedings.

They spoke eloquently on the matter. They referred me to a number of case authorities which stressed the importance of the resolution in an application.

Among the cases which they cited in their heads and in support of the necessity for a resolution was that of *Madzivire & Ors* v *Zvaridza & Ors*, 2005 (2) 514 (S) 516 which stated as follows:

> "… a company, being a separate legal *persona* from its directors cannot be represented in a legal suit by a person who has not been authorised to do so. This is a well-established legal principle which the courts cannot ignore.--- The fact that the first appellant is the managing director of the fourth appellant does not clothe him with the authority to sue on behalf of the company in the absence of any resolution authorising him to do so. In *Burstein v Yale,* 1958 (1) SA 768, it was held that the general rule is that directors of a company can only act validly when assembled at a board meeting." [emphasis added]

The respondents also referred me to the case of *Dendeuka* v *Paper Place (Pvt) Ltd* HH 195/2011 in which BHUNU J (as he then was) made some incisive remarks on the need for a company resolution. The learned judge said:

> "The position in our law is --- that a company being a fictitious legal *persona* cannot act on its own. There is therefore need for a company resolution to legalize and validate any company acts
> ---"

The last case which the respondents were pleased to draw my attention to on the matter was that of *Tapson Madzivire and 3 Ors* v *Misheck Brian Zvarivadza and 2 Ors,* HH 2005 wherein MAKARAU J (as she then was) stated:

> "The fictional legal *persona* (i.e. a company) still enjoys full recognition by the courts. Thus for any acts done in the name of a company, a resolution duly passed by the board of directors of a company has to be produced to show that the fictional *persona* has authorised the act." [emphasis added]

The applicants complied with the principles which were enunciated in each of the above cited three cases. They produced two resolutions which conferred authority on Borislav to depose to their affidavits.

The respondents, on the other hand, produced no resolution. They, for a start, produced what purported to be the first respondent's resolution. This was, however, not such. They produced no resolution at all for the subsequent affidavits which they filed in opposition to the main, and the urgent chamber, applications.

It is accepted that Sarah is a director of the first respondent. She could not, however, confer authority upon herself to speak for, and on behalf of, the first respondent. She required a resolution for the purpose. She required the input of Ivan for any resolution which she would have produced to remain valid. Ivan's views were left out of the equation on the issue of the respondents' resolution.

The third question which arises from the above analysed matter is whether or not the respondents are properly before the court. They passed no resolution authorizing Sarah to speak for them. The first respondent is, by virtue of the stated fact, out of court.

It requires little, if any, debate to state that the resolution which the respondents produced was no resolution at all. It was fatally flawed. It was a nullity out of which nothing comes. I am pleased to refer the respondents to *Macfoy* v *United Africa Co Ltd* (1961) 5 ALL ER 1169 (PC) 1172 in the mentioned regard. The remarks of Lord Denning, which he made in the case are relevant to their situation. The learned Lord Justice said:

> "If an act is void, then it is a nullity. It is not only bad but incurably bad. --- It is automatically null and void without more ado --- You cannot put something on nothing and expect it to stay there. It will collapse."

Apart from the invalidity of the respondents' resolution, no evidence was produced to show that the first respondent's two directors – Ivan and Sarah – sat down in some room to pass any resolution. Ivan is a Bulgarian who is domiciled in Bulgaria. Sarah, as a Zimbabwean, stays in this country.

The applicants' unchallenged statement was that Ivan came to Zimbabwe at their instance. They said he left for Bulgaria and returned to Zimbabwe at the end of November 2013 to sell the Glen Lorne property. He, according to them, returned to Bulgaria after the sale. They submitted that he has not returned to Zimbabwe again.

The respondents did not challenge the above-mentioned averments of the applicants. They remained mute on the same.

By not challenging the applicants' assertions, the respondents admitted that Ivan did not come to Zimbabwe. He, in other words, did not return to Zimbabwe after he had sold the

Glen Lorne properly. He, in short, did not sit down with Sarah to pass a resolution authorising her to depose to the opposing affidavits.

The long and short of the above described matters is that the first respondent is not before the court. It is out of court. The opposing papers are, therefore, those of Sarah alone. The matter remains between the applicants and Sarah. It excludes the first respondent *in toto.*

Annexure C which the applicants attached to the application shows that the first applicant was, until 22 November 2017, the owner of the Mount Pleasant property. It purchased it 2008. It had it registered in its name.

Annexure D shows that the second applicant was, and still is, the owner of the Avondale property. It purchased it in 1989. It retained title in the same from the mentioned period of time to date.

Annexure E shows that the first applicant was the owner of the Glen Lorne property. It purchased it is 2008. Sarah and Ivan sold it to someone at the instance of the applicants. They sold it for $150 000.

Sarah's averments were that the first respondent was the owner of the Mount Pleasant property. She attached Annexure A to her opposing papers. The annexure, she said, constitutes proof of the fact that the applicants conferred upon her the authority to run the affairs of the two properties on their behalf.

The applicants denied having ever conferred any authority on Sarah to manage their two properties. They submitted that Borislav was, and remained, their point-man in Zimbabwe. They said he had their authority to look after their two properties.

Sarah's statement which was to the effect that the first respondent owned the Mount Pleasant property is devoid of merit. The first respondent did not ever own the Mount Pleasant property. That property's title was always with the first applicant. It was never with the first respondent as was alleged. It was transferred from the first applicant to Mr Jogi when the latter allegedly purchased the same.

The memorandum of agreement of sale which appears at p 156 of the urgent chamber application bears testimony to the above stated set of circumstances. It describes the first applicant, and not the first respondent, as the seller of the property. It describes Mr Jogi as the purchaser. The two are the parties to the alleged agreement of sale.

The first applicant could not have sold the Mount Pleasant property if it did not belong to it. It could not have sold it if it belonged to the first respondent as Sarah alleged. It could not

transferred title in the property to Mr Jogi if it did not have title in the same. It could not, in short, give what it did not have.

The first respondent, it is observed, did not ever own or possess the Mount Pleasant property. It did not ever have title in the Avondale property. Title in the same has always remained with the second applicant. The first respondent did not produce any evidence which supported the allegation that it was, or is, the owner of either of the two properties.

Sarah's claims were that the applicants authorised her to manage the affairs of their two properties which are in Zimbabwe. She produced four documents which she said conferred the requisite authority upon her. The documents comprise:

(a) Annexure A which is a letter which Ivan Pantchev and one Ivo Kamenov Georgiev signed. The capacity in which they singed it was not stated. It is dated 6 September 2016. Its heading reads:

RE: CONFIRMATION AS MANAGER OF THE BULCHIMEX GMBH IMPORT CHAMUKALIEN UND PRODUKTE'S PROPERTIES IN ZIMBABWE (emphasis added]

(b) Annexure A1 is a resolution of three legal entities. These are the first applicant, the first respondent and the second applicant. It is dated 12 December 2016. It was passed by Ivo Kamenov Georgiev and Ivan Kostadinov Pantchev. Its para 3 stated that the first applicant and the first respondent were one and the same entity. It authorised Sarah to *give effect to any of the companies' resolutions pertaining to the properties as the only director representing the interests of the organisation in Zimbabwe*.

(c) Annexure A2 is a resolution which Ivan Pantchev signed. It is dated 12 December 2016. It was passed by the first applicant and the first respondent. It authorised Sarah to "represent the company in the court cases including hiring legal practitioners in cases pertaining to the company's properties in Zimbabwe".

(d) Annexure A3 is an affidavit which Ivo Kamenov Georgiev deposed to on 12 December 2016. He did so as director of the first applicant. He confirmed Sarah as their *"lawful representative including management of all our properties in Zimbabwe*".

The applicants disassociated themselves from the above-mentioned four annexures. They said the annexures were a result of Sarah's resourcefulness. They described them as a fraud and a forgery by her. They submitted that she crafted them with a view to stealing from them their properties through the first respondent in which she is a director.

The applicants' Annexure M3 is a declaration by one Maria Ilieva Vladimirova who said she was the first applicant's manager and legal representative. She stated that she was appointed to her position on 28 August 2015. She averred that she had exercised her full rights to represent the first applicant before any third parties, to manage its day-to-day business affairs and to supervise its documentation as well as documentation and record keeping. She stated, in an emphatic manner, that the first applicant's board of directors had not adopted any resolution and had not taken any action for incorporation and registration of any daughter company into the first applicant or related parties to it in Zimbabwe. She denied that the first applicant gave any power of attorney or any letter of authorization to Sarah or to Ivan. She stated that the first respondent had no relationship at all with the first applicant. The first respondent, she said, was not even a subsidiary of the first applicant. She denied that the first applicant ever gave any authority to Ivan or Sarah to manage or sell any of its two properties.

Annexure O which the applicants attached to the application is a declaration by one Ivo Kamenov Georgiev. He said he was, until 27 August 2015, manager and legal representative of the first applicant. He stated that he was in that position from 2006 – 27 August 2015. He declared that Sarah's Annexures A, A1, A2 and A3 were untrue and unauthentic. He said the signature which appeared as his in any of the annexures was not his own. He said:

> "1.1 I am referred to as the authoriser who has allegedly confirmed the powers of Sarah Hwingwiri as a manager of the company's property in Zimbabwe. As indicated therein, the letter was produced on 6 September 2016. It is inconsistent with the fact (obviously due to the ignorance and a lack of information of its author) that on 28 August 2015 I was released as a manager and a legal representative of the company…
>
> 1.2 The second document is a translation of minutes (a Board resolution) into English language dated 12 December 2016 bearing the letterhead of Timeset Ltd a Bulgarian translation agency, which purportedly made that translation into English language. The original minutes, subject to the translation again is missing and not appended thereto ---. Furthermore, a joint meeting of three legal entities of different nationalities resolving together on matters concerning their private business affairs and properties, in one and the same document, is an absolute distortion of their actual corporate rules as well as legally unacceptable from the stand point of the corporate laws governing the Germany company said above, the Bulgarian Company Technoimpex JSC (wrongly stated to be incorporated in Germany and a Zimbabwean Company Bulchimex GMBH Import-Export Chemikalien and Produkte (Pvt) Ltd. It is important to be noted that the name of the said Zimbabwean company closely resembles the name of the German Company, but as a matter in fact it has nothing to do with the German Company (as well as the Bulgarian Company) it has no place in such a joint meeting with them because it is neither a subsidiary of nor a related party to the German Company (or the Bulgarian Company Technoimpex). It is also important to be mentioned that in this translation of the minutes I am referred to as a director of the said three companies, but in fact I have never been a director/manager of the Bulgarian and the Zimbabwean companies. Ivan Kostadinov Pantchev has never been a director /manager of the German company. In addition, as indicated therein, the

> minutes were produced on 12 December, 2016. It is inconsistent with the fact that on 28 August 2015, I was released as a manager and a legal representative of the company …..In conclusion, the document is false." (emphasis added).

Mr Georgiev discounted annexures A2 and A3 which Sarah purported to rely upon with clear and uncontroverted evidence.

The applicants' Annexure S was a declaration by one Dimitar Ivannov Tourlakov. He is the owner, manager and legal representative of TIMSET Ltd. He denied having ever received, let alone translated, Sarah's annexures from any language into the English language. He said the four annexures did not exist in his company's records. He stated that he did not sign or issue those. His conclusion was that the four annexures were untrue and unauthentic. He pointed out seven inconsistencies which he said they contained.

I cited *in extensor* the declaration of Ivo Kamenov Georgiev. I did so as he was alleged to have authorised Sarah to handle the affairs of the applicants' two properties. He and Ivan had their names repeatedly mentioned in the annexures. His conclusion with which the court agrees was that the annexures upon which Sarah relied were not authentic at all.

Sarah did not challenge, or even comment upon the declarations of Maria Ilieva Vladimirova, Ivo Kamenov Georgiev and/or Dimitar Ivannov Tourlakov. The declarations contained information which seriously damaged her case. They called for a response which Sarah did not ever make.

The law is very clear on such a matter as has been stated in the foregoing paragraph. It states, as trite, that what has not been denied in affidavits is taken as having been admitted (see *Fawcett Security Operations* v *Director of Customs & Excise,* 1993 (2) ZLR 121 (SC), *DD Transport* v *Abbot,* 1988 (2) ZLR 92; *In Remo Investment Brokers (Pvt) Ltd* v *Securities Commission of Zimbabwe,* SC 13/15).

Mr Georgiev stated that he was no longer working for the applicants when the annexures of Sarah came into existence. He denied that he authored Annexures A, A1 and/or A3. He stated, and I agree, that the annexures were a forgery. He could not have produced any of the annexures when he had ceased to work for the applicants.

That the annexures were a forgery is evident from their contents. Annexure 1, for instance, does not mention the name of the place where it was passed, if it was. It does not mention the names of the directors who attended the meeting on behalf of the first applicant, the first respondent and/or the second applicant.

A meeting of such serious magnitude with such far reaching consequences requires real, as opposed to fictitious, evidence that it was held and that the participants took a clear and unequivocal decision to merge the first applicant with the first respondent. It could not be plucked from thin air as Sarah would have the court believe.

Sarah did not explain the position of Mr Georgiev in the alleged meeting where the resolution was purportedly passed. He was not a director of the first, or the second, applicant. He was a manager and legal representative of one of the applicants. He had ceased to be such when the resolution was allegedly passed. How he was able to communicate to her the contents of the resolution in December 2016 when he had vacated his office on 27 August 2015 stretches the mind of anyone, that of the court included.

Sarah stated in her opposing papers that she was in constant communication with Ivan. She said she communicates with him through emails. She did not explain why she did not call upon him to substantiate the contents of her Annexure 2.

Sarah's Annexure 2 describes Ivan as a director of the first applicant. It reads, in part, as follows:

> "Today, 12 December 2016, the undersigned Ivan Kostadinov Pantchev, ….. in his capacity as Director of BULCHIMEX GMBH IMPORT CHEMIKALIEN UND PRODUKTE, a company duly established……." (emphasis added).

Paragraph 2 of Sarah's Annexure 3 changes the position of Ivan from that of a director to that of a manager. The annexure which was allegedly deposed to by Mr Georgiev reads, in the relevant part, as follows:

> "2. I confirm that through our manager Ivan Kostadinov Pantchev …. Sarah Hwingwiri …. to be our lawful representative including management of all our properties in Zimbabwe" (emphasis added).

It requires little, if any, effort to realise that the papers which Sarah purports to rely upon are not authentic. They are, if anything, a product of her own fertile mind. She authored them herself. Her aim and object were, as the applicants stated, to reach out to their properties in an unlawful manner, take charge of the same and deal with them as she pleased.

The documents which she referred to as annexures appeared to have been prepared in a hurried manner. They, in the process, failed to capture some salient features of, for instance, the correct name of the first applicant. Its name, in its correct form, reads: BULCHIMEX GmbH IMPORT-EXPORT CHEMIKALEN und PRODUKTE. The same name as Sarah wrote in her annexures reads as follows:

(i) Annexure A1: BULCHIMEX GMBH IMPORT CHEMIKALIEN UND PRODUCKTE. The following variations are noted.

(a) GmbH is written as GMBH

(b) Import-Export is written as Import only. The word Export is left out

(c) und is written as UND – and

(d) Chemikalen is written as Chemikalien.

(ii) In Annexure A1 – Sarah repeated the same errors,

(iii) In Annexure A2 – Sarah repeated the same errors,

(iv) In Annexure A3 she repeated the same errors.

A reading of the above shows that her intention was to show that her Zimbabwean company along which she fashioned the name of the first applicant was the same as the latter. She failed dismally to achieve her intended end-in-view in the mentioned regard. The two entities, it has already been observed, are separate and distinct from each other. They are not, and can never be, the same.

The word Chemikalien which appears in the abovementioned annexures of Sarah also appears in the memorandum of agreement of sale which is at p 156 of the urgent chamber application. The question which arises is whether it is the first applicant which sold its Mount Pleasant property to Mr Jogi.

Given Sarah's fraudulent conduct as has been observed in the foregoing paragraphs, the probabilities are that this in yet again one of her unwholesome scheme. She admitted, during the hearing of the urgent chamber application, that the mobile number which appears in the portion of the agreement which relates to the seller was her own. The number was quoted in many of the fraudulent documents which she produced as her annexures. I am satisfied, therefore, that the mobile number belongs to her. It was cited as part of the seller's contact address and phone number. That Sarah's annexures were a forgery and a fraud by her is evident from the agreement of sale of the Mount Pleasant property. The agreement was signed on 9 December, 2013.

The agreement is either real or unreal. If it is real, as Sarah would have the court believe, the applicants would not have mandated her to manage the affairs of both properties in December, 2016. They could not have done so when, to her knowledge and that of the applicants, Mr Jogi had, as of 9 December 2013, acquired personal rights in the Mount Pleasant property. The applicants would have realised that they could only confer such authority on Sarah with the consent of Mr Jogi.

It is disquieting in the extreme to observe that Sarah who knew that the Mount Pleasant property had been *"sold"* to Mr Jogi purported to have acquired the authority of the applicants to manage the same. The fact that she refrained from advising the court of the alleged sale of the property when the application was being heard shows the cunning mind with which she decided to handle the present matter. Nothing prevented her from disclosing that the applicants sold the Mount Pleasant property in December 2013, if they did.

Sarah spent a lot of time, energy and effort crafting her lies. She introduced them into the application which she strenuously opposed. She made every effort to create what she termed material disputes of fact. It was unfortunate for her, however, that what she had crated and made part of her case failed to stick.

The applicants described the circumstances through which Sarah came to work with Ivan. They said they decided to sell one of their three properties and they wondered if they would be able to have the proceeds of the sale remitted to them. It was their testimony that Ivan whom they described as a Bulgarian free agent convinced them that they would be able to receive the proceeds of the sale of the property. He was scheduled to come to Zimbabwe on holiday, according to them. They said they mandated him, on a trial basis, to sell their Glen Lorne property. He came to Zimbabwe in June, 2012 according to them. He met Sarah who said she could sell the Glen Lorne property for, and on behalf of, the applicants and secure the exchange control authority to remit the funds to Bulgaria. They said she was, at the time, working for Mercers Property Brokers which is an estate agency. She sold the Glen Lorne property for $150 000 but did not forward the proceeds of the sale to the applicants.

Sarah's contact with Ivan and her work with him opened her mind to a golden chance in a person's life-time. It must have been at that time, more than at any other, that she became aware of Mr Georgiev as one of the applicants' workers. She must, therefore have, crafted all the documents which she used in her fraudulent scheme using the names of Ivan whom she already knew and Mr Georgiev whom she got to know, say, through Ivan's correspondence with him. She knew of no other Bulgarian name apart from the two's names.

The applicants were, therefore, not far off the mark when they stated that the documents/annexures were a fraud which emanated from Sarah's forgery. The annexures are nothing but that. The fact that Timeset, which is a Bulgarian translation agency, did not translate those confirms the view which I hold of the matter.

Sarah registered the first respondent on 14 September, 2016. She made an effort to have its name resemble that of the first applicant. She hoped that people who read the name of the

first respondent would confuse it with that of the first applicant. Her plan, unfortunately for her, failed to hold.

Given Sarah's scheming mind, it is doubtful if Ivan is a director of the first respondent. The probabilities are that he is not. If he was, he would simply have deposed to an affidavit confirming his status in the same. His deafening silence in the midst of this hot battle for some other persons' properties remains a cause for very serious concern.

The applicants' averments were that they authorised Ivan to sell their Glen Lorne property. They, however, produced no evidence which supported that his authority was limited to selling only that property. He allegedly sold the Mount Pleasant property. It remains unknown, at this stage, if his authority extended to selling that property as well. If it did, then the sale which he conducted in respect of the same is unassailable. If he did not have their authority to sell and he sold it, the matter remains for argument before another court and on some other day.

The supplementary heads which Sarah filed on 13 February, 2018 sought to make a distinction between an interdict and a declaratory order. She stated that the two were founded on different causes of action. She moved the court to dismiss the applicants' final order which, according to her, related to a declaratory order.

What Sarah misses, however, is that the whole of the application centres on two remedies. These were an interdict and a declaratur. The interdict aimed at arresting the situation to allow the parties a chance to prove who the real owners of the two properties was or were.

The applicants did not mince their words. They said Sarah was not the owner. They stated that she schemed to steal from them their properties. They urged the court to make a finding that they were the owners of the properties as well as to declare them such.

Sarah, on her part, did not dwell so much on the interdict. She made every effort to show that the company which she had registered owned the properties. She said she had the authority of the applicants, through the first respondent, to manage as well as sell the properties.

I have made a finding that the first applicant was, until 22 November 2017, the owner of the Mount Pleasant property. Whether it remains the owner of the same does, in a large measure, depend on the success or otherwise of the applications it filed under HC 2974/17 and HC 11246/17 and subsequent developments on the same. I have also made a finding that the second applicant is the owner of the Avondale property.

Sarah's fraudulent conduct is a nullity. It could not transfer ownership of each of the two properties to herself or to anyone else. It is trite that nothing comes out of an illegal conduct. Nothing, in short, comes out of fraud.

I have considered all the circumstances of this case. I am satisfied that the applicants proved their case on a balance of probabilities. I, accordingly, grant the final order in their favour subject to the amendment which must be effected in paragraph (1) of the draft order. The paragraph is amended to read:

> "Until 22 November 2017, the first applicant, Bulchimex GmbH Import-Export Chemikalen und Produkte registered in Germany was the legitimate owner of stand 295, Northwood Township 2 of Sumbeni commonly known as House No 116 Twickenham Road, Mount Pleasant, Harare."

Mutumbwa, Mugabe and Partners applicant legal practitioners
Farai Nyamayaro Law Chambers 1st and 2nd respondents' legal practitioners
Chigwanda Legal Practitioners 3rd respondents' legal practitioners [urgent chamber application]