ICEJAY INVESTMENTS LIMITED
versus
NU AERO (PVT) LTD
and
ABERFOYLE FARMING COMPANY (PVT) LTD

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE: 13 & 22 July 2020, 19 August 2020 & 5 August 2021

Opposed application - Review

Mr T. Zhuwarara, for the applicant
Mr H. Muromba, for the respondent

MUSITHU J:

BACKGROUND

The applicant seeks an order compelling the second respondent to sign all documents necessary to cause the transfer of certain 56 pieces of land constituting an aggregate 60 hectares, to the applicant. In the event of the second respondent failing to comply with such order within seven (7) days of it being granted, the applicant wants the Sheriff ordered to sign all documents necessary to achieve that transfer. Additionally, the applicant seeks costs of suit on the legal practitioner and client scale against both respondents. The respondents opposed the application.

The relief sought is founded on the following factual synopsis. On 9 November 2017, CHIGUMBA J granted an order under HC3342/17 in favour of the applicant against the respondents herein. The order reads as follows:

> "IT IS ORDERED THAT:
> 1. The defendants' defence be and is hereby struck out.
> 2. The defendants shall jointly and severally the one paying the other to be absolved, pay the plaintiff the sum of US$2 000 000.00 (two million United States Dollars) together with interest of 5% thereon calculated from the 13th of April 2017 to the date of payment.
> 3. The defendants shall pay plaintiff collection commission of US$50 157.00.
> 4. A certain piece of land situate in the District of Salisbury called the remaining extent of Kintyre Estate, measuring 208,7475 hectares including vested roadways held under

Certificate of Consolidated Title (Reg.9507/2002) dated 16 September 2002, be and is hereby declared specially executable.

5. The defendants shall pay costs of suit."

On 26 October 2018, the parties herein concluded what they termed a Settlement Agreement (the SA). The SA was intended to operationalize the order by CHIGUMBA J amongst other things. In terms of clause 1 of the SA, the second respondent, which stood as the surety for the first respondent's debt to the applicant, undertook to surrender title in and transfer the 56 pieces of land (collectively referred to as the property) to the applicant *"in full and final settlement of all the claims arising from CHIGUMBA J's court order under HC3342/17 dated 9 November 2017*".[1]

Clause 2.1.1 stated that on signature of the SA, the second respondent was required to sign such legal documents prepared by the conveyancer, as were necessary to effect the transfer of the property to a Special Purpose Vehicle (SPV) chosen by the applicant. Clause 3 of the SA required the second respondent to give the applicant vacant possession of the property upon the signature of the agreement. The SA contained a suspensive condition in clause 6. It is befitting that I recite that clause hereunder. It states as follows:

> "**SUSPENSIVE CONDITION**
> It is hereby agreed that the property shall be transferred to the Creditor's chosen SPV. The said SPV's company documents and title deeds to the property shall upon transfer be held in trust by *Coghlan, Welsh and Guest* for a period of 45 calendar days, calculated from the signature date of this agreement. Should the Debtor pay US$2 206 040 (being principal plus interest accrued up to the 26th of October 2018 and collection commission) on 26 October 2018 or US$ 2 206 040 plus any additional interest of 5% per annum accrued from the 26th of October 2018 up to the date of payment into *Coghlan, Welsh and Guest*'s Nedbank Bank Limited Nostro Account No 11990134482 or any other bank account nominated by the Creditor, *Coghlan Welsh and Guest* will surrender control of the said SPV to the Debtor. Should the Debtor fail to pay the US$ 2 206 040 plus interest applicable within the above noted 45 calendar days, Coghlan, Welsh and Guest shall release the said SPV's papers and title deeds to the Creditor who will thereafter be entitled to deal with the property as it deems fit".

Applicant's Case

The applicant averred that the debt was not paid despite the lapse of the 45 calendar days referred to in clause 6 of the SA. The second respondent was accordingly required to sign all documents necessary to effect transfer of the property to the applicant. The second respondent did not comply with several demands allegedly made by the applicant's legal practitioners in this regard. The second respondent's intransigence forced the applicant to

[1] See page 8 of the record.

approach this court for an order compelling the second respondent to comply with the terms of the SA.

First Respondent's Case

In its opposing affidavit deposed to by Cassidy Mugwagwa, the first respondent alleged that at the time the SA was concluded, the applicant was aware that the first respondent was expecting a loan of $6 000 000.00 from Homelink (Pvt) Ltd (Homelink). The loan was meant to kick start the first respondent's business operations, which would in turn enable it to start making payments to the applicant. The first respondent claimed that it only received $3 000 000.00 of that amount and was awaiting the disbursement of the remaining $3 000 000.00. It further claimed that the parties had mutually agreed that the 45 day period would be reckoned from the time it received the full $6 000 000.00. The balance of $3 000 000.00 was yet to be received. It had not therefore failed to comply with the SA.

The first respondent also argued that it was unclear when the 45 day period would commence since the SA was undated. The only rational interpretation one could come up with was that the 45 day period would commence after the first respondent received the loan balance of $3 000 000.00. First respondent therefore contended that the applicant's claim was premature. It had to be dismissed with costs.

Second Respondent's Case

The 2nd respondent came singing from a different hymn book altogether. It averred that the application was premature for different reasons. It gave the following reasons: the property ceded as security was still under development. The terms and conditions of the subdivision permit (the permit) issued by the responsible authority, the Ministry of Local Government, Public Works and National Housing (the Ministry), were yet to be complied with; Condition number 3 required the second respondent at its own cost to "form, and grade and maintain all the roads to the satisfaction of Zvimba Rural District Council."; Condition 5 required the applicant to "pay Zvimba Rural District Council, 10% of the value of each subdivision at the date of disposal as endowment. If endowment is not paid at the time of disposal, Zvimba Rural District Council will determine endowment based on obtaining market rates or values"; Condition 8 required the applicant to provide at its own cost adequate water to service the property to the satisfaction of the Council; Condition 10 provided that the Registrar of Deeds "shall not register transfer of properties until conditions 3, 5 and 8 have been complied with to the council's satisfaction."

According to the second respondent, the property was still to be developed in line with the specifications set out in the permit. The property could not be transferred until conditions 3, 5 and 8 of the permit were fulfilled. A certificate of compliance would only be issued once those conditions were fulfilled. The second respondent also averred that the agreement was irregular as it was undated. The date from which the 45 days were to be reckoned was therefore unclear. The second respondent further contended that the remedies available to the applicant in case of a breach were set out in paragraph 7 of the SA. The applicant was required to exhaust those remedies first before approaching this court for relief.

The Applicant's Reply

The applicant denied that the first respondent's financial arrangements with Homelink had a bearing on the SA. The payment plan under clause 6 of the SA agreement was not conditional on the availability of funds from Homelink. Clause 14 of the SA represented the "Whole Agreement", which meant that the agreement as signed constituted the memorandum of what the parties agreed upon.

The applicant also averred that the SA was signed by both parties on 25 October 2018. Clause 6, which was the suspensive condition of the SA set 26 October 2018 as the date from which the 45 day period would start to run. That date was agreed upon on the understanding that it was the day that followed the signing of the SA. The argument that the date from which the 45 day period was to commence was unknown was therefore baseless. The applicant also attached correspondence exchanged between the parties' legal practitioners showing that the issue of the Homelink loan never arose in their deliberations.

The applicant denied that its application was premature. It argued that the conditions set out in the subdivision permit had been satisfied. The SA was consummated on the basis of representations made by the second respondent that it would transfer the property to the applicant permanently in the event that the suspensive condition was not fulfilled. The applicant contended that the second respondent had in fact transferred a similar property to a third party. At one stage the second respondent sought the applicant's indulgence to release from mortgage encumbrance, a property that the second respondent had sold to the Cyba Malaba Family Trust, in order to facilitate transfer to the third party.

It was further contended that the transfer to the third party was pursuant to a court order in the case of *The Board of Trustees of the Cyba Malaba Family Trust* v *Aberfoyle Farming (Private) Limited & 6 Others* under HC 10362/13. For that reason, it was submitted that the

second respondent was being dishonest in asserting that the properties were not transferrable. At any rate, the first respondent's legal practitioners undertook to pay the applicant's transfer fees for the allocated stands upon presentation of invoices.[2] The applicant further submitted that although clause 7 of the SA permitted it to execute the court order under HC 3342/17, it did not restrict the applicant to that form of relief alone.

The Issues

In its heads of argument, the applicant identified three issues for determination, which are: the date from which the 45 calendar day period was to be reckoned; whether the property was transferrable to the applicant; and whether clause 7 of the SA restricted the applicant to a particular form of relief. The respondents identified the following issues for determination: that the SA violated section 39 of the Regional, Town and Country Planning Act[3] (the RTCP Act); non-compliance with suspensive conditions in the agreement; that relief could not be granted in synallagmatic contract where there was a breach by the party seeking relief; the substance of the agreement was a *pactum commisorium* prohibited by the law. The determination of the other issues will depend on the finding the court makes on the main issue, which I now turn to consider hereunder.

Whether the property is transferable.

Both parties related to this issue though they chose to couch it differently. It is implicitly concerned with the legality of the SA, since the relief sought is grounded in the SA. Mr *Zhuwarara* for the applicant argued that the issue about the legality of the SA was being raised for the first time in the respondents' heads of argument. It had not been pleaded before. I pause here to remark that Mr *Zhuwarara's* submission on this point is ill-considered. The issue of the transferability of the property was raised in paragraphs 4 and 5 of the second respondent's notice of opposition.[4] That objection impliedly called into question the legality of the transaction that gave birth to the obligation to transfer the property to the applicant. It was part of the nub of the second respondent's case.

Mr *Zhuwarara* further submitted that the subdivision permit was validly issued in terms of section 40 of the RTCP Act. In any case, the second respondent had already transferred some similar pieces of land to third parties. These pieces of land were transferred from the same land

[2] See letter of 7 November 2018 from the respondents' then legal practitioners to the applicant's legal practitioners on page 39 of the record.
[3] [*Chapter 29:12*]
[4]See pages 24 and 25 of the record

that the second respondent claimed was untransferable. One such piece of land was allegedly transferred pursuant to court order in the matter of *The Board of Trustees of the Cyba Malaba Family Trust* v *Aberfoyle Farming (Private) Limited & 6 Others* under HC 10362/13.

The court was referred to correspondence exchanged between the parties' legal practitioners in that matter. Mr *Zhuwarara* submitted that the correspondence showed that the conditions of the permit had been complied with. In one such letter dated 7 November 2018 to the applicant's legal practitioners, the respondents' then legal practitioners *Chinganga & Company* undertook *"to pay your transfer fees for the allocated stands upon presentation of the invoice to ourselves."*[5] Mr *Zhuwarara* applied to tender, with the consent of Mr *Muromba*, for the respondents, two copies of powers of attorney to pass transfer from the second respondent to a company called Newbell Investments (Private) Limited. The powers of attorney dated 7 August 2019 were signed by one *Tazviwana James Chivaviro* and nominated three conveyancers, in the alternative to attend to the transfer of the property.

The first power of attorney was in respect of Lot 30 Kintyre Estate measuring 13 075m^2, held under Certificate of Registered Title of 16 September 2002 (Reg No. 9507/2002), and sold for US$91 525.00. The other power of attorney was in respect of Lot 32 Kintyre Estate measuring 12 872m^2, held under Certificate of Registered Title of 16 September 2002 (Reg No. 9507/2002), and sold for US$90 104.00. The same *Tazviwana James Chivaviro* who signed the powers of attorney also signed the second respondent's opposing affidavit.

Mr *Zhuwarara* further urged the court to note that the powers of attorney in respect of Lots 30 and 32 were signed well after the applicant filed the present application in January 2019. The court was also urged to note that the subdivision permit attached to the second respondent's opposing affidavit included a list of the Lots in respect of which the permit was granted. Lots 30 and 32 were part of that list. The permit was issued on 27 October 2014. The applicant's contention was that since some of the Lots in the same permit were being transferred, nothing stood in the way of the transfer of the Lots that were surrendered to the applicant.

In its heads of argument, the applicant contended that the SA was entered into on the background of the undertaking made by the second respondent that it would transfer the property to the applicant if it failed to fulfil the suspensive condition in the SA. The second

[5] Letter on page 39 of the record.

respondent had already transferred similar properties to third parties. In one such case it actually sought the applicant's indulgence to release Lot 13 of Kintyre to the Cyba Malaba Family Trust because it could not effect transfer in light of a mortgage bond registered in favour of the applicant.

The applicant further averred that during the proceedings leading to the granting of the order by CHIGUMBA J and the SA, at no point did the second respondent assert that the conditions of the permit had not been fulfilled. This was because it was aware that those conditions had long been fulfilled. The second respondent was therefore acting in bad faith. The applicant further contended that in terms of clause 4 of the SA, risk and profit and liability in the property would only pass on to the applicant on the date of transfer of the property. The second respondent assumed risk that arose in connection with the property until the date of transfer. It could not use its own breach as a defence for non-performance.

Mr *Muromba* for the respondents argued that the SA was illegal. The law was not complied with and for that reason no transfer could take place. He further submitted that the communication between the respondents' erstwhile legal practitioners and the applicant's legal practitioners were based on an old permit which had nothing to do with the present matter. The conditions of the present permit remained unfulfilled and transfer could not take place without a compliance certificate having been issued by the relevant authority.

In their heads of argument, respondents averred that section 39[6] of the RTCP nullified agreements that were entered into in violation of a subdivision permit. The SA had to be interpreted in the context of condition 10 of the subdivision permit and section 39 of the RTCP. Condition 10 of the subdivision permit stated that:

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[6] Section 39 reads as follows:
"39 No subdivision or consolidation without permit
(1) Subject to subsection (2), no person shall—
(*a*) subdivide any property; or
(*b*) enter into any agreement—
(i) for the change of ownership of any portion of a property; or
(ii) for the lease of any portion of a property for a period of ten years or more or for the lifetime of the lessee; or
(iii) conferring on any person a right to occupy any portion of a property for a period of ten years or more or for his lifetime; or
(iv) for the renewal of the lease of, or right to occupy, any portion of a property where the aggregate period of such lease or right to occupy, including the period of the renewal, is ten years or more;
or
(*c*) consolidate two or more properties into one property;
except in accordance with a permit granted in terms of section *forty:*
Provided that an undivided share in any property, whether or not it is coupled with an exclusive right of occupation, shall not be regarded for the purposes of this subsection as a portion of that property.

> "The Registrar of Deeds shall not register transfer of properties until conditions 3, 5 and 8 have been complied with to the council's satisfaction"[7]

The respondents argued that no certificate of compliance was issued by the council to confirm that conditions 3, 5 and 8 of the permit were complied with. It was submitted that section 39 of the RTCP was couched in peremptory terms as evidenced by the use of the words *"no person shall"*, in subsection 1 of that section. Non-compliance with a mandatory provision yielded a nullity. The court was referred to the case of *Messenger of The Magistrate Court, Durban* v *Pillay*[8] in support of this position. The respondents further submitted that an agreement that sought to allow transfer of a property before the conditions of a permit were complied with was null and void at law. Reference was made further to the cases of *Metro Western Cape (Pty) v Ross*[9]*; Cleogoz Investments (Private) Limited* v *Patricia Mary Elizabeth Cox (Hougaard) & Ano*[10]*;* and *Hativagone & Ano* v *Cag Farms (Pvt) Ltd & Ors*[11].

The respondents further argued that it was not competent for the applicant to enforce the order under HC 3342/17 by transferring ownership of the property to itself since the process violated sections 39 and 40 of the RTCP Act. The court could not allow itself to be used to rubberstamp an illegality.

Developments post reservation of the judgment

Before considering the submissions by counsel on the preliminary point, I wish to highlight events that transpired following the reservation of judgment by the court. The court engaged counsel informally and enquired why the parties had failed to resolve what appeared on paper to be a simple issue. Both counsel admitted that not much effort had been invested towards achieving a settlement, and the parties were willing to pursue that route even though the court had heard arguments and reserved judgment. Counsels agreed to further engage, and provide feedback on progress made on or before 22 July 2020. I slowed up the preparation of the judgment pending the outcome of these deliberations, just in case the parties found each other.

On 22 July 2020, I received a letter from the applicant's legal practitioners, which read in part as follows:

> "RE: ICEJAY INVESTMENTS (PVT) LTD vs. NU AERO (PVT) LTD AND ABERFOYLE FARMING COMPANY (PVT) LTD HC 648/19

[7] See condition 10 on page 32 of the record.
[8] 1952 (3) SA 678 (A)
[9] 1986 (3) SA 181 (A)
[10] HH-250/17
[11] SC -42/15

> ……
> We regret to advise that the parties have not been able to settle this matter.
> We have also managed to obtain a copy of the Compliance Certificate in respect of the whole of Kintyre Estate. It is attached hereto. This is the same certificate that has been used to transfer the lots which appear at the back of the Certificate of consolidated title. The deductions were endorsed by the Registrar of deeds. We attach hereto as Annexure B. This is further proof that transfer is possible and has been done before.
> Kindly therefore place these before the Honourable Judge and advise if the judge requires the parties to appear on the 22nd of July 2020.
> ……"

When the parties appeared before me on 22 July 2020, it became clear that reaching a settlement was going to be a herculean task. The parties requested one last opportunity to further engage, and I gave them until 19 August 2020. Mr *Magaya* appearing for the applicant submitted that in the event of the parties failing to reach a settlement, then the applicant was going to apply to have the documents attached to the letter of 21 July 2020 admitted into the record as evidence.

On 19 August 2020, the parties returned poles apart. Mr *Zhuwarara* applied to have the documents attached to the letter of 21 July 2020 admitted as part of the applicant's evidence before the court. His argument was that the documents confirmed that the property was transferable, and were therefore relevant to the resolution of the dispute. Mr *Muromba* objected to the production of the documents at this stage arguing that their authenticity could not be verified now that the parties had argued the matter and judgment was reserved. I asked both counsel to file supplementary heads of argument to address the question of whether or not the court could admit further evidence after judgment was reserved.

The applicant's supplementary heads of argument were filed on 25 August 2020, while the respondents' supplementary heads of argument were filed on 1 September 2020. In its supplementary heads of argument, the applicant submitted that the court was imbued with powers to call for and receive additional information that would assist in the resolution of the dispute. Further, section 176 of the Constitution allowed the court to regulate its own processes. Counsel for the applicant cited several authorities in support of this position.[12] The applicant further submitted that a party could not be allowed to shield the court from the truth. The court had to allow the admission of those documents because they revealed the truth.

[12] *Mukambirwa & Ors v Gospel of God Church International 1932* 2014 (1) ZLR 207 (S); *Geffen v Strand Motors P/L* 1962 (3) SA SR; *Polini v Gray* (1879) 12 Ch.D. 438 (C.A.)

In their supplementary heads of argument, the respondents argued that it was highly inappropriate to seek the admission of additional documentary evidence after judgment was reserved. The applicant had not sought leave to file the additional evidence, and neither had it applied to have the case reopened. It was further submitted that no law permitted the admission of further documentary evidence after a case was argued. The respondents' counsel cited several authorities, whose import was that judicial officers must not rely on matters that were not placed before them in their determination of disputes.[13] It was further submitted that no reasons were given as to why the additional information was not attached to the founding affidavit or the answering affidavit, when that opportunity existed. The respondents contended that they would be prejudiced in the conduct of their defence as they had no other opportunity to deal with the new evidence.

It is common cause that in motion proceedings, evidence is proffered through affidavits which are usually accompanied by documents verifying the facts that are set out in the affidavits. In terms of Order 32 rule 235, further affidavits can only be filed with the leave of the court or a judge upon an application by a party seeking their admission.[14] The High Court rules do not provide for the admission of documentary evidence after the court has heard arguments and reserved judgment. While the court is imbued with powers to regulate its own processes in terms of section 176 of the Constitution, such powers should not be exercised in a manner that causes unnecessary prejudice to either party. In *Stuart* v *National Railways of Zimbabwe*[15] NDOU J held as follows:

> "It is trite law that the discretion to permit the adduction of further evidence must be exercised judicially, upon consideration of all relevant factors, and in essence it is a matter of fairness to both sides. Key factors for consideration are: (1) explanation for the failure to lead the available evidence timeously; (2) the danger of prejudice to the other party, and (3) sufficient materiality of the evidence – *Mkwananzi* v *van der Merwe & Anor* 1970 (1) SA 609 (A) at 616B; *Coetzee* v *Jansen* 1954 (3) SA 173 and *Blose* v *Ethekwini Municipality* (20053/14) [2015] ZASCA 87".

In the instant matter, the applicant's counsel applied to have the documents attached to the letter of 21 July 2020 admitted into the record as part of its evidence. It did not apply to

[13] *Nzara & Ors v Kashumba N.O. & Ors* SC 18/18; *South African Police Service v Solidarity obo Banard* 2014 (6) SA 123 (CC)
[14] *Associated Newspapers of Zimbabwe* v *Media Information Commission* 2006 (1) ZLR 128 (H); *Revesai V Windmill (Pvt) Limited* HH 163/16

[15] HB 122/18

reopen its case in order to allow the respondents to interrogate the veracity of this additional evidence. The applicant's counsel did not even explain why that additional evidence was not attached to the founding affidavit or its answering affidavit. In its opposing affidavit, the second respondent made it clear that it was contesting the transferability of the property on the basis that conditions 3, 8 and 10 of the permit were not fulfilled[16].

The court is persuaded by the respondents' argument that the applicant should not be allowed to tender evidence after judgment was reserved when such evidence could have been presented earlier. The concatenation of affidavits which must contain the parties' evidence is clearly set out in the rules of this court. It needs no further elaboration. Any departure therefrom must be on good cause. Litigants must not be allowed to smuggle further evidence through the backdoor, especially when the law accords them an opportunity to present that evidence earlier in the conventional way. The respondents will certainly be prejudiced in the conduct of their defence as they have no other avenue to address the court on the new evidence, unless the case is reopened. The application for the adduction of further evidence is accordingly declined and the letter of 21 July 2020 is expunged from the record. The court will confine itself to submissions made based on the record of proceedings as at the time judgment was reserved.

Analysis of the submissions and the law on the first preliminary point

I now turn to counsels' submissions on the preliminary point alluded to earlier on. The applicant wants the second respondent ordered to comply with its obligations under the SA. More importantly, the applicant wants the second respondent compelled to transfer the property to the applicant as per its undertaking under the SA. Attached to the second respondent's affidavit is a subdivision permit issued by the Principal Director of Physical Planning in the then Ministry of Local Government, Public Works and National Housing (the Ministry) on 27 October 2014. The permit was accompanied by a letter of the same date from the Ministry's Provincial Planning Officer to the second respondent. The letter reads as follows:

> "RE: PROPOSED CONSOLIDATION OF STAND 51 AND 52 KINTYRE ESTATE AND SIMULTANEOUS SUBDIVISION: SALISBURY DISTRICT
>
> The above matter refers.
>
> We are pleased to inform you that the Minister of Local Government, Public Works and National Housing by virtue of power granted to him under section 40(5) of the Regional, Town and Country Planning Act, Chapter 29:12 of 1996, has approved your application to consolidate and subdivide stand 51 and 52 detailed in the PERMIT.

[16] See paragraph 4(f) of the second respondent's opposing affidavit on page 25 of the record.

> Attached herewith find copy of PERMIT, Number MW/11/14 and accompanying subdivision diagram number MWD938 for your implementation and records.
> ……..”

The permit was granted in response to an application by the second respondent seeking the consolidation of stand 51 of Kintyre Estate measuring 160 hectares, and held under Certificate of Consolidation Title 9507/2002, with Stand 52 measuring 31.71 hectares held under Certificate of Consolidation Title 9507/2002. The consolidation was intended to create a piece of land known as Kintyre Estate A, measuring 191.71 hectares. This piece of land was to be further subdivided to create Lots of varying sizes denominated in hectares, spanning from Lot 1 to Lot 105. The applicant seeks the transfer of Lots 23 to 105. They are part of the Lots referred to in the aforementioned permit. As already noted, condition 10 of the permit forbade the Registrar of Deeds from transferring any of the Lots until conditions 3, 5 and 8 of the permit were fulfilled.[17]

The second respondent argued that the application to compel transfer was premature as conditions 3, 5 and 8 of the permit were not fulfilled. Compliance with those conditions was to be certified through a certificate of compliance issued by the Council. No such certificate was issued. On its part the applicant averred that the conditions of the permit were fulfilled, and this explained the disposal and transfer of similar Lots to third parties. The applicant also pointed to the undertakings made by the respondents’ erstwhile lawyers to pay transfer fees for the allocated stands upon presentation of an invoice. Nothing turns on this evidence. That undertaking does not help confirm that the conditions precedent set out in the permit were complied with at all. The same infirmity also afflicts the powers of attorney that were signed in respect of Lots 30 and 32. No further evidence was placed before the court to show that these properties were subsequently transferred following the signing of the powers of attorney. Those signed powers of attorney are therefore irrelevant.

The correspondence allegedly confirming the transfer of Lot 13 by the second respondent to the Cyba Malaba Family Trust, hardly provides conclusive proof that a certificate of compliance was issued for all the Lots. In their letter to *Messrs Kantor & Immerman* (presumably representing Cyba Malaba Family Trust), dated 27 March 2018, the second respondent’s then legal practitioners wrote:

[17] See footnote 6 above.

> "RE: THE BOARD OF TRUSTEES OF THE CYBA MALABA FAMILY TRUST vs ABERFOYLE FARMING (PVT) LTD & 6 OTHERS CASE NO: HC 10362/13
>
> We refer to this matter and your letter dated 26 March 2018.
>
> Kindly note that we have not received the Rates Clearance from Zvimba Rural District Council as they requested for the Endowment Certificate and the Certificate of Compliance of the Kintyre Plots. The letter was issued sometime in 2004 when *Messrs Dube Manikai & Hwacha* were handling all the transfers.
>
> We are currently looking for a copy of the Certificate of Compliance with the Deeds Office and the Surveyor General's office. Kindly bear with us in the meantime.
> ……" (Underlining for emphasis).

Messrs Kantor & Immerman responded through a letter of 2 April 2018. The letter reads in part as follows:

> "……..
> 1. We refer to the above matter and to your letter of 27th March 2018 to us.
> 2. Our client has produced a copy of the letter accepted by the Deeds Office as the Compliance Certificate dated 30th September 2002. The Deeds Office already has a copy in its records as signified by the Registrar's stamp thereon.
> 3. Please note from the attached documents that the Title Deeds for Lot 12 (next to Lot 13 which we are seeking transfer of) were issued on the basis of this letter from Zvimba Rural District Council.
> 4. We shall be grateful if you proceed to finalise the transfer and simultaneous lodging in liaison with Coghlan, Welsh & Guest…" (Underlining for emphasis).

What is clear from the communication is that there was no certificate of compliance even in respect of the proposed transfer of Lot 13 to the Cyba Malaba Family Trust. The parties sought to rely on a letter presumably issued by the Council in connection with the transfer of Lot 12. According to the letter from *Kantor & Immerman* referred to above, the letter from the Council was dated 30 September 2002. That letter was not placed before the court. The court is therefore oblivious to the circumstances under which that letter, which substituted the certificate of compliance, was allegedly issued by the Council.

The court further notes that if the letter from the Council was dated 30 September 2002, then it cannot be construed as certifying compliance with the conditions of a permit that was only issued in October 2014, some twelve years later. If the conditions of the permit in respect of all the Lots had been fulfilled, and a global certificate of compliance had been issued as insinuated by the applicant, then condition 10 of the permit would not have been insisted on by the issuing authority. That condition would not have been inserted in that permit. It would certainly have been waived. Be that as it may, no evidence was placed before the court to show

that a blanket certificate of compliance was issued for all the lots covered by the permit, as submitted on behalf of the applicant.

From a reading of the papers, it is not clear how the Council was required to certify compliance with conditions of the permit as envisaged under clause 10 of the permit. Reference was made to a certificate of compliance as well as a letter issued by the Council in 2002, none of which were tendered in court. Whatever form the certification took, nothing was placed before the court to confirm that conditions 3, 5 and 8 of the permit were complied with. One wonders why the Council's position was not sought on the matter before these proceedings were instituted. The Council's position would have certainly helped clarify the status of all these Lots. Section 39 of the RTCP Act proscribes any agreement that is entered into for the change of ownership of any portion of a property except in accordance with the conditions set out in a permit. In *Cleogoz Investments (Proivate Limited* v *Cox & Another*[18], CHAREWA J said:

> "The law with regard to contracts prohibited by statute may be summarised as follows:
> "As a general rule a contract or agreement which is expressly prohibited by statute is illegal and null and void even when, as here, no declaration of nullity has been added by the statute.""[19]

In the case of *Chioza* v *Siziba*[20] ZIYAMBI JA explained the position regarding section 39 of the RTCP Act as follows:

> "It is common cause that the agreement *in casu* was for the sale of an unsubdivided portion of a stand and that at the date of conclusion of the agreement, there was, in existence, no permit granted in terms of s 40 of the Act. Therefore, in terms of clear authority emanating from this Court, the agreement was illegal and unenforceable at law. See X-*Trend-A-Home (Pvt) Ltd v Hoselaw Investments (Pvt) Ltd* 2000(2) ZLR 348(SC) where McNALLY JA at 348F stated as follows:
>
> > ".. s 39 forbids an agreement for the change of ownership of any portion of property except in accordance with a permit granted under s 40 allowing for a subdivision. The agreement under consideration was clearly an agreement for change of ownership of the unsubdivided portion of a stand. It was irrelevant whether the change of ownership was to take place on signing or on an agreed date, or when a suspensive condition was fulfilled. The agreement itself was prohibited."
>
> It follows from the above that the grant of the remedy sought by the respondent in the court *a quo* would amount to an enforcement of the illegal contract. That was the substance of the concession made by counsel for the respondent"[21]

[18] HH 250/17 at pages 4-5
[19] See also *York Estates Ltd v Wareham* 1949 SR 197
[20] SC 4/15
[21] At pages 9-10.

The permit in *casu* was issued in terms of section 40 of the RTCP Act. It authorised the subdivision of Kintyre Estate A to create Lots 1 to 105. Condition 10 of the permit restricted the transfer of the Lots listed in the permit until conditions 3, 5 and 8 were fulfilled. If the Registrar of Deeds was prohibited from registering transfer of the Lots until those conditions were fulfilled, then it follows that this court cannot compel the second respondent to sign all documents necessary to effect transfer of the property to the applicant in the absence of proof that the Registrar of Deeds would approve such transfer. Put differently, this court needs to be satisfied that the conditions precedent to the transfer of the property as set out in the permit were complied with before it can grant an order compelling the second respondent to take all steps necessary to transfer the property to the applicant. This court cannot grant an order that is essentially a brutum fulmen.

Regrettably, no evidence was placed before the court to show that conditions 3, 5 and 8 of the permit were fulfilled to the Council's satisfaction. The SA is not beyond reproach. It is impugnable on the ground that it seeks to facilitate the transfer of a property in circumstances that violate the conditions of a permit, and by extension the very law in terms of which that permit was issued. The application must fall on that point. The argument by the applicant's counsel that risk, profit and liability would only pass on to the applicant on transfer also falls away in light of this finding on the validity of the SA.

CONCLUSION

The findings by the court on this preliminary point go to the root of the application and makes it unnecessary to traverse the remaining preliminary points as well as the merits of the dispute. Put differently, the determination of the remaining preliminary points and the merits of the matter was dependant on the finding of this court on the validity of the SA. The finding of invalidity thus makes it needless for the court to consider the remaining preliminary points and the merits.

COSTS

The general rule is that costs follow the event. The court finds no reason to depart from this general rule. The applicant was forewarned through the second respondent's opposing affidavit that the transfer of the property was incompetent for want of compliance with the conditions of the permit. It did not take steps to regularise or clarify that position through its answering affidavit. It sought to tender documents clarifying that position, albeit at a late stage

despite being forewarned in good time. An award of costs against the applicant is clearly justifiable under the circumstances.

DISPOSITION

Accordingly, it is ordered as follows:

1. The application is dismissed.
2. The applicant shall pay the first and second respondents' costs of suit.

Coghlan Welsh & Guest, legal practitioners for the applicant
Kantor & Immerman, legal practitioners for the first and second respondents