

LINUS NYAMUSAMBA  
versus  
RUNYARARO DOUGLAS MSARAKUFA (1)  
and  
BEAUTY MSARAKUFA (2)  
and  
THE REGISTRAR OF DEEDS (3)

HIGH COURT OF ZIMBABWE  
**DEMBURE J**  
HARARE: 26 August 2024 & 9 September 2024

### **Opposed Application**

*T. Chikura* with *T. Chiminya*, for the applicant  
1<sup>st</sup> and 2<sup>nd</sup> respondents in person  
No appearance for the 3<sup>rd</sup> respondent

DEMBURE J: This is a court application for the registration of a caveat on the immovable property being certain piece of land situate in the district of Salisbury called stand 2126 Tynwald South Township of stand 1042 Tynwald Township measuring 220 square metres and held under Deed of Transfer number 257/2023. The first and second respondents are the registered owners of the said property. They are also husband and wife. This application was filed following what the applicant alleged was a fraudulent sale of state land being certain piece of land situate in the district of Makoni called Plot 35 St Faith by the first respondent.

### **THE FACTS**

On 27 September 2022 the applicant and the first respondent entered into an agreement of sale of certain piece of land situate in the district of Makoni called Plot 35 St Faith measuring 25,2477 hectares ("*Plot 35 St Faith*") for the purchase price of US\$50 000.00. While the agreement at pp.8 – 10 of the record was not signed by the first respondent, there is an acknowledgment of receipt he duly signed on the same date wherein he acknowledged receipt of the sum of US\$43 000.00 being "part payment of the purchase price for the Agreement of sale of Plot No. 35 St Faith, Makoni District". Of the said US\$43 000.00, US\$3 000 was to be withheld by the conveyancers, Sikala & Company Legal Practitioners for the purposes of cession and

transfer of title. Below the said acknowledgement of receipt is a handwritten record of what is termed “Addendum to contract” and the said document is signed by both the applicant and the first respondent. Given the signed acknowledgement and the said “addendum to contract” there can be no doubt that a contract of sale was concluded between the parties.

Following the conclusion of the sale on 27 September 2022, the first respondent wrote a letter to the applicant on 12 June 2023, demanding that he pay a top-up of the sum of “at least US\$20 000.00” as he alleged that the correct value of the property was US\$120 000.00. He further stated that the said top-up amount would bring the price to US\$70 000.00 and that if parties fail to agree he would consider the option of cancelling the agreement of sale of the property.

The applicant averred that he had realised that Plot 35 St Faith had been sold to him fraudulently since the first respondent could not pass on title as the land is owned by the state. While the first respondent contended that the transfer of title in the land is possible and that he has the authority to transfer, he placed nothing before this court showing his title to the said Plot 35 St Faith. It is common cause that the first and second respondents jointly own certain piece of land situate in the district of Salisbury called stand 2126 Tynwald South Township of stand 1042 Tynwald Township measuring 220 square metres held under Deed of Transfer number 257/2023 (“*the Tynwald property*”). The applicant seeks an order for the registration of a caveat on the said Tynwald property and the application was opposed by the first and second respondents.

### **ISSUE FOR DETERMINATION**

The issue that arises and which this court has to resolve is whether or not a caveat can be registered on the first and second respondent’s immovable property being stand 2126 Tynwald South Township of stand 1042 Tynwald Township measuring 220 square metres and held under Deed of Transfer number 257/2023.

### **APPLICANT’S CASE**

The applicant in his founding affidavit averred that he was advised by “a reliable source” that the first respondent used the purchase price which he had paid for Plot 35 St Faith to purchase the Tynwald property. When questioned at the hearing on whether there was evidence to prove this allegation, the applicant’s counsel submitted that since the allegation was not disputed by the respondents it should be taken to have been admitted. The applicant further stated that he intends to institute proceedings in this court against the first respondent concerning the fraudulent sale and

the only property of value the first respondent has is the Tynwald property. He was, therefore, afraid that the first respondent may alienate the Tynwald property to frustrate the execution of a court order which he may obtain. Counsels for the applicant, Ms *Chikura* and Ms *Chiminya* submitted that the applicant has satisfied all the requirements for registration of a caveat in terms of the law.

It was submitted that the fact that the first respondent used the funds paid by the applicant for the sale of Plot 35 St Faith to purchase the Tynwald property establishes his interest in the Tynwald property. Ms *Chiminya*, for the applicant, argued that the interest was direct and related to the property for which the registration of a caveat is sought. She further submitted that the respondents did not dispute the fact that they bought the Tynwald property with the said funds. The court, however, find this submission to be incorrect as there was no such an admission. The contents of para. 12 of the founding affidavit were denied by the first respondent in para. 18 of his opposing affidavit. The law, therefore, that what is not disputed in the opposing affidavit is taken to have been admitted does not apply in this case. Further, when I queried this submission Ms *Chiminya* then sought to rely on the contents of a letter dated 12 June 2023 attached to the application to state that the first respondent confirmed that he used the proceeds of the sale to purchase the Tynwald property. However, the said letter in particular para. 3 referred to by counsel does not confirm that the first respondent admitted to have used the proceeds of the sale to purchase the Tynwald property.

Ms *Chiminya* further submitted that the applicant intends to safeguard his interests in the event that the first respondent fails to reimburse the amount that was paid and as such he has substantial interest in the property. She argued that the interest existed at the present moment and is connected to the Tynwald property. The applicant intends to institute proceedings in this court in relation to the fraudulent sale and has good prospects of success. The Tynwald property is the only property upon which execution can be levied in the event that this court grants an order against him. When asked whether there is any pending litigation between the parties, the applicant's counsel started to refer to the summons matter filed at Rusape Magistrates Court in case number RSPCG 107/23. The applicant did not mention this matter in his founding affidavit. The matter was only brought to the attention of this court by the first respondent. The applicant's counsel made a belated attempt to submit that the said summons matter is the pending litigation required

to satisfy the requirements for the placement of a caveat. She urged the court to grant the application in terms of the draft order filed of record.

### **THE FIRST AND SECOND RESPONDENTS' POSITION**

The first respondent, including the second respondent who simply adopted the first respondent's submissions, submitted that the registration of a caveat was unnecessary. The first respondent argued that the transfer of Plot 35 St Faith is still possible and can be effected. He further stated that the applicant had a summons issued against him in case number RSPCG 107/23 at Rusape Magistrates Court seeking transfer of the property but abandoned the claim. He further stated that he is ready to assist the applicant to effect transfer of title of the land which he said is transferrable as it is different from other farms. When they first negotiated with the applicant, he wanted US\$50 000.00 to buy a property in Harare but when the applicant eventually paid, he only got US\$39 000.00 when it was too late. He, therefore, did not sign the agreement of sale of the property with his wife, the second respondent. He prayed for the dismissal of the application with costs.

I noted that in their opposing affidavit, the first and second respondents further prayed for an order declaring the agreement of sale dated 22 September 2022 null and void, that the parties reach an agreement within 30 days of the court order and that an independent conveyancer be appointed to facilitate the change of ownership of Plot 35 St Faith into the applicant's name. However, this prayer in the opposing affidavit is not properly before the court as the respondents could only have sought such relief through a counter application. There was no such counter application filed by the respondents for the said relief. Accordingly, the said draft relief sought by first and second respondents can only be struck out as this court has proceeded to do. The only draft order before this court is the one sought by the applicant and attached to this application.

### **THE LAW**

It is trite law that a caveat is a temporary measure meant to secure the interest of another person in the property. It only creates a personal right pending the determination of a matter that concerns the property and is not meant to be placed on the property *ad infinitum*. The court will not order the placement of a caveat on another person's property unless the applicant demonstrates that he or she has a caveatable interest. DUBE J (as she then was) in *Stenhop Investments (Pvt) Ltd v Mukoko & Anor* HH 132-18 at p. 4 put the position of the law aptly as follows:

“The term ‘caveat’ is a Latin term which means ‘let a person beware’ It is a notice or warning that is registered over a property by a person who claims to have some interest in the property concerned. The purpose of a caveat is to preserve and protect the rights of a person who seeks to have a caveat placed on a property, known as a caveator. The effect of a caveat on a property is that the property cannot be sold or disposed of without giving effect to the caveator’s interest. Once a caveat is placed over a property, the said property cannot be transferred, mortgaged or disposed of without the caveator’s consent. No further dealings over the property are allowed unless the caveator consents to the upliftment of the caveat, it lapses, is cancelled, withdrawn or removed. Any person who deals with the property does so at his own risk.”

At pp. 4 – 5 she went on further to outline the requirements for the registration of a caveat as follows:

“The law does not permit a person to lodge a caveat over another’s property without good cause. An applicant who applies to place a caveat over a property must show that he has an interest in the property concerned. The interest claimed must exist at the time the caveat is lodged and should not be an interest that arises in the future. The caveator must show that his claim arises from some dealing with the registered property. It is only those interests that are connected to the land that can be subject of a caveat. The interest must attach to the property, thus, a person seeking to place a caveat over a property is required to show that he has a caveatable interest to lodge the caveat. A caveator does not have to show that the other party is about to dispose of the property. The applicant has to show that he has a matter pending that concerns the property. The moment that the pending matter is determined, the caveat lapses by operation of law. The caveat cannot continue in perpetuity. The interest claimed by the caveator may be challenged by the owner of the property. It is the duty of the court to determine the validity and correctness of the application for a caveat.”

The legal requirements for the placement of a caveat are, therefore, that:

1. The applicant has an interest in the property itself;
2. The interest claimed must exist at the time the caveat is lodged.
3. The applicant’s claim must arise from some dealing with the registered property. It is only interest shown to be connected to the property that can be the subject of a caveat.
4. There must exist a pending matter that concerns the property.

### **APPLICATION OF THE LAW TO THE FACTS**

The applicant was required to satisfy all the requirements for the placement of a caveat. He must show that he has an interest in the property itself. In *casu*, the applicant’s submission was simply that the funds he paid for Plot 35 St Faith were used to purchase the Tynwald property and that alone establishes his interest in the Tynwald property or that he has a caveatable interest. Before considering whether or not he satisfied this requirement, it should be pointed out that there was no evidence which was placed before this court establishing the fact that the first respondent

used the proceeds of the sale of Plot 35 St Faith to purchase the Tynwald property. The applicant simply said he was advised by a “reliable source” but never revealed this source. The law is clear that one who alleges must prove. See *Circle Tracking v Mahachi* SC 4-07.

There was a belated attempt by counsel for the applicant to try to lead evidence from the bar on the source of the information but the court could not permit that. Ms *Chiminya* then submitted that the allegation was not disputed and must, therefore, be taken to have been admitted. However, this court noted that in para. 18 of the first respondent’s opposing affidavit, he denied the contents of para. 12 of the applicant’s founding affidavit wherein that allegation had been stated. The submission by counsel for the applicant could not, therefore, be merited. Realising the futility of its submission, the applicant’s counsel referred the court to para. 3 of the second page of the letter dated 12 June 2023 written by the first respondent at p. 13 of the record which reads:

“I have (*sic*) left with nothing tangible. I would appreciate a situation whereby I would buy a house in Harare of the value of US\$45 000.00 and left with an amount of +/- US\$20 000.00, not this situation whereby I left (*sic*) with almost nothing after paying a house for US\$42 000.00”. (My emphasis)

The said letter must be read in the context of the whole document. It is trite law that words in any document, contract or statute must be interpreted in their context and must be given their ordinary grammatical meaning unless to do so would lead to some absurdity. See *Lungu & Ors v Reserve Bank of Zimbabwe* SC 04-24 at p. 12. The above paragraph does not say that the first respondent bought a property in Harare with the proceeds of the sale at all. Rather the first respondent is simply contemplating an ideal situation where he would prefer to remain with some funds after buying a property in Harare. That is the situation he would accept not that he is saying he had already purchased any property in Harare. In any event, the first respondent did not make any indication in that letter that he purchased the Tynwald property using the proceeds of the sale. The attempts to put words into his mouth in the context of the said letter are unacceptable.

Even if I could have found that the proceeds of the sale of Plot 35 St Faith were used to purchase the Tynwald property, which conclusion I could not make as there was no such evidence, I would still be unable to agree that that fact establishes an interest by the applicant in the property. Attached to that requirement is the requirement that the caveator must show that his claim arises from some dealing with the registered property. The applicant has not shown that he has dealt with the respondents’ property in question, namely the Tynwald property. There is nothing placed

before the court in that regard. It is only the interests shown to be connected to the registered land, in this case, the Tynwald property, that can be subject of a caveat. The evidence on record shows that the property the parties dealt with or had the transaction over is Plot 35 St Faith only.

Further, the applicant also failed to establish the requirement that the interest must exist at the time the caveat is lodged. That interest does not exist. The interest is only one that arises in the future when he obtains a judgment in his favour in the contemplated litigation. In para. 13 of the applicant's founding affidavit, it is stated clearly that:

"I intend to institute proceedings in this Honourable Court against the first respondent for fraudulently selling me Plot 35 of St Faith. There are great prospects of success that the court will find in my favour. In the event that the first respondent fails to pay the money as per the judgment, I will have to attach his property that will satisfy the value of the money claimed. The only property of value belonging to the first respondent that I am aware of is stand 216 Tynwald..."

He continued in para. 14 and averred that:

"I am afraid that the first respondent might try to alienate the immovable property (Stand 2126 Tynwald South Township of stand 1042 Tynwald Township...) to frustrate execution of a court order."

It is a settled principle of the law that an application stands or falls on its founding affidavit and the facts alleged therein. See *Foyana v Moyo* SC 54-06; *Muchini v Adams* SC 47-13 and *Austerlands (Pvt) Ltd v Trade and Investment Bank Ltd & Ors* SC 80-06. The application establishes that the applicant's interest in the Tynwald property lie in the future as it was dependent on the judgment being issued in future by the court in the intended legal action. This would be for the execution of the judgment which he may obtain in that future action. The claim he intends to lodge, in any event, is not a matter concerning the Tynwald property. He was required to show that his claim arises from some dealing with the property and that there exist a pending matter concerning the same property. His claim has got nothing to do with the Tynwald property over which he sought an order for the placement of a caveat. The filing of summons or an application against another person does not automatically create a caveatable interest in the property of the person one is suing.

Lastly, the applicant is basing this application on what he stated is the intended legal action against the first respondent in future. His application can only stand or fall on the allegations contained in his founding affidavit. There is no pending matter concerning the Tynwald property that was mentioned in that affidavit to create the legal basis for a caveat. As stated in *Stenhop*

*Investments supra*, the caveat is not meant to be placed on a property *ad infinitum* but temporarily for the protection of a party with a caveatable interest pending the matter concerning the property. In this case, the applicant failed to show that he has such a case pending involving the Tynwald property. While the first respondent mentioned the summons matter filed at Rusape Magistrates Court, he argued that the matter was abandoned. I agree with that conclusion as the applicant did not mention that matter at all in his founding affidavit as a matter pending between the parties. In his answering affidavit, the applicant did not even deal with that pending matter directly and insisted that the land in question is state land and cannot be transferrable. The main claim in the said suit was for the transfer of title in the land and the continued insistence by the applicant that the land was not transferrable simply meant that he could not have pursued a claim from such relief. I am also fortified in this view by paragraphs 13 and 14 of the applicant's founding affidavit wherein he clearly averred that he intends to institute legal action over what he alleged was the fraudulent sale of Plot 35 St Faith.

The applicant's counsel, however, urged me in the interests of justice to consider the said summons filed at Rusape Magistrates Court as the matter pending for the purpose of fulfilling the requirements for a caveat. This court is unable to do so as such a position is not supported by the applicant's founding affidavit. It is a settled principle of the law that an application must be disposed of on the basis of the founding affidavit. See *Zimbabwe Posts (Pvt) Ltd v Communication & Allied Services Union* SC 20-16. The contents of the founding affidavit take precedence over what is submitted by counsel from the bar. In any event, even accepting that the said suit at Rusape Magistrates Court is the pending matter between the parties that will not change anything for the applicant. The pending matter must still relate to or concern the property, in this case, the Tynwald property. The claim in the said suit only relates to Plot 35 St Faith. It does not deal with or concerns the property over which the caveat is sought, that is, the Tynwald property.

Ms *Chiminya* referred the court to the decisions in *Anyhome (Pvt) Ltd v Matsika & Ors* HH 160-22 and *Majabvu v Majabvu & Anor* HH486-16 but the said judgments cannot assist the applicant in any way. The decision in *Anyhome (Pvt) Ltd supra* was of an urgent chamber application where the issue of a caveat was not even the issue before the court and therefore, was never considered. MUSITHU J simply noted that the property in issue was the subject of a pending application for the registration of a caveat. In *Majabvu supra*, CHIGUMBA J outlined the law on



what a caveat is in general but again did not touch on any issue relevant to the present application. The applicant in that case failed to make the necessary averments to establish a right to have a caveat placed over the property registered in the name of Norton Town Council. These cases referred to by the applicant's counsel, therefore, did not assist this court in the resolution of this matter.

**CONCLUSION**

The applicant has completely failed to show good cause for the placement of a caveat against the respondent's Tynwald property on a balance of probabilities. All the requirements for the placement of a caveat were not met. I, therefore, find this application to be hopelessly without merit. There is no reason for this court to depart from the general principle that the costs shall follow the cause.

**DISPOSITION**

In the result, it is hereby ordered that:

1. The application be and is hereby dismissed with costs.

**DEMBURE J:** .....

*Chiminya & Associates*, applicant's legal practitioners