THE TRUSTEES OF THE SEPTEMBER FAMILY TRUST
versus
GODWILLS MASIMIREMBWA
and
TRUSTEES OF PETROS MAGEJO SHITTO TRUST
and
INNOCENT SHITTO
and
THOMAS SYDNEY SHITTO
and
TONDERAI MASIMIREMBWA
and
NEW CENTURY PRODUCTIONS (PVT) LTD
and
RANT DUTOIT PROPERTY DEVELOPERS (PVT) LTD
and
THE REGISTRAR OF DEEDS
and
THE REGISTRAR OF COMPANIES
and
CLEOPUS MAJONI

HIGH COURT OF ZIMBABWE
CHIKOWERO J
HARARE, 3,8,10, 15 and 22 September 2021 and 18 October 2021

Urgent chamber application

L. Uriri with *T.M. Kanengoni*, for the applicants
A. Gumbo, for the 1st respondent
F. Chinyama with *R.F. Mushoriwa*, for the 2nd, 4th and 6th respondents
N. Muhlolo, for the 3rd respondent
No appearance for the 5th, 8th and 9th respondents
E. Mubaiwa, for the 7th and 10th respondents

CHIKOWERO J: This is a classic case of applicants who, having failed to act when the need to do so arose, fastened on a single incident not directly related to an already long drawn-out

dispute to justify their approach to court through the urgent chamber book. Needless to say, that is not the type of urgency that is contemplated by the rules.

In *Kuvarega* v *Registrar-General and Another* 1998 (1) ZLR 188 (H) CHATIKOBO J said at 193 E-F:

> "There is an allied problem of practitioners who are in the habit of certifying that a case is urgent when it is not one of urgency. In the present case, the applicant was advised by the first respondent on 13 February 1998 that people would not be barred from putting on the T-shirts complained of. It was not until 20 February 1998 that this application was launched. The certificate of urgency does not explain why no action was taken until the very last working day before the election began."(underlining is mine)

In poignant remarks that have been cited times without number in this jurisdiction, His LORDSHIP then defined urgency, at 193 F, in these words:

> "What constitutes urgency is not only the imminent arrival of the day of reckoning; a matter is urgent, if at the time the need to act arises, the matter cannot wait."

In words apposite to that which, twenty-three years later, I am now seized with CHATIKOBO J explains at 193 F-G, what disqualifies a matter as urgent and reiterated how the situation may be redeemed where there has not been a timeous launching of an urgent chamber application:

> "Urgency which stems from a deliberate or careless abstention from action until the deadline draws near is not the type of urgency contemplated by the rules. It necessarily follows that the certificate of urgency, or the supporting affidavit must always contain an explanation of the non-timeous action if there has been any delay."

I get the distinct impression that the decision in *Kuvarega* (*supra*) is a teaching judgment.

For my purposes, it is necessary that I refer also to the *dicta* in another well-known judgment, namely *Document Support Centre (Pvt) Ltd* v *Mapuvire* 2006 (2) ZLR 232 (H). There, at 244 C-D, MAKARAU JP, as she then was, underscored the issue of what it is that constitutes an urgent application:

> "In my view, urgent applications are those where if the courts fail to act, the applicants may well be within their rights to dismissively suggest to the court that it should not bother to act subsequently as the position would have become irreversible and irreversibly so to the prejudice of the applicant." (underlining is mine)

It is with these principles in mind that I now grapple with the first preliminary point raised by the 1st, 2nd, 4th, 6th, 7th and 10th respondents- that the application is not urgent.

The background is this. On 1 September 2021 I took over this matter from the Judge originally allocated the same. Having perused the papers and formed the impression that it was urgent, I caused the matter to be set down for 3 September 2021 at midday. Come 3 September 2021, and with the consent of the legal practitioners for the parties, the matter was postponed to 8 September 2021 at 10:00am for argument. Time-lines were set for the filing of the opposing and answering papers. On 8 September 2021 the 10th respondent was joined as a party to the proceedings. His affidavit, hitherto filed as a supporting affidavit to 7th respondent's opposing papers, was to stand as his own opposing affidavit. With that, the matter was further postponed to 10 September 2021 at 2.15pm. This was to afford the applicant the opportunity to file another answering affidavit, this time to the 2nd, 6th and 7th respondents opposing affidavit. These particular respondents had failed to meet the timelines set on 8 September 2021. The matter was moved from 10 September 2021 to 15 September 2021 because Mr *Uriri* had suffered a family bereavement. On the latter date, the matter was then postponed to 22 September 2021 because Mr *Uriri*, at short notice, was appearing in the Supreme Court. On 22 September 2021 I heard argument on all the preliminary points, and the merits. I reserved judgment.

The applicants are the trustees of the September Family Trust which is a trust registered with the Registrar of Deeds (8th respondent) by notarial deed. The first respondent is a director in New Century Productions (Pvt) Ltd (6th respondent). The second respondents are the trustees of the Petros Magejo Shitto Trust, a trust duly registered with the 8th respondent. They are the custodians of shareholding in 6th respondent on behalf of the beneficiaries of the trust. The 3rd respondent is the Secretary of the 6th respondent. The 4th respondent is a shareholder in and director of the 6th respondent. The 6th respondent is a company duly incorporated in terms of the laws of this country. A non-trading company, its sole asset is an immovable property called Boronia Farm. This property, held by 6th respondent in terms of a registered deed of transfer, measures 1200,8383 hectares. The 7th respondent is a property development company registered in terms of the laws of this country. The 9th respondent is the registrar of companies. The 10th respondent is a male adult who seems to be a real estate agent.

On 31 August 2021 the applicants filed the present application seeking the following interim relief:

"INTERIM RELIEF GRANTED
Pending the finalization of this matter, the applicants are granted the following relief:

1. That the 1st to the 7th respondents and /or their agents or nominees be and are hereby barred and interdicted from selling or causing to be sold or facilitating the sale of or otherwise alienating or in any way encumbering any part or the whole of Boronia Farm held under parent deed of transfer number 4197/80 or any other deed or (*sic*) transfer that may be issued for individual residential stands created on Boronia Farm.
2. That the 7th respondent be and is hereby ordered to file with the Registrar of the High Court, within forty-eight hours of the grant of this provisional order, a full account of the residential stands it has sold on Boronia Farm giving details of the stand number; the purchase price, the purchaser's name and identifying particulars; the amounts received from the purchaser towards the purchase price, any disbursements of the purchase price done by the 7th respondent and the identity of the person to whom the disbursement was made, which account shall be copied to all parties herein, failing which the Sheriff of Zimbabwe be and thereby empowered to enter the offices of the respondent and gain access to, seize and remove into his custody all records kept by the 7th respondent on the Chiedza Park/Boronia farm residential project.
3. That any records seized by the Sheriff of Zimbabwe under paragraph 2 shall be available for inspection by the parties hereto by prior arrangement with the Sheriff of Zimbabwe and the parties shall be allowed to make copies of all or part of such records as they may require at their own expense.
4. That the 7th respondent be and is hereby directed to deposit all funds held by it representing payments made towards the purchase of residential stands on the Chiedza Park/Boronia Farm housing development into a trust account held by the Registrar of the High Court of Zimbabwe, within forty-eight hours of the grant of this provisional order and to furnish all the parties with proof of such deposit."

As the final relief the applicants seek, among other things, a declaration of nullity of any sale of any part or the whole of Boronia Farm by the 1st to the 7th respondents or their agents before the final determination of the matter under HC 967/20.

Essentially, the applicants contend that, by way of interim relief, they seek an anti-dissipation interdict. They argue that I should interdict the 1st to the 7th respondents from diminishing the value of the former's shares in the sole asset of the 6th respondent, being Boronia Farm until the dispute in case number HC 967/20 is determined. They suggest that if I do not intervene now, to interdict the 1st to 7th respondents from selling any part or the whole of Boronia Farm, then the court might as well not bother to render judgment in HC 967/20 because by then their shares may very well be worthless by dint of Boronia Farm, the sole asset of 6th respondent, having been parcelled out and dissipated.

The certificate of urgency consists of twenty-three paragraphs running into almost three and half pages. The founding affidavit is a sixteen page document. It contains one hundred and twelve paragraphs. The question of urgency is related to in the founding affidavit in dealing with

the apprehension of irreparable harm if the interdict is not granted. The same issue is again dealt with from paragraphs ninety-eight to one hundred and one of the same affidavit. It is a long affidavit indeed. I observe that the issue of urgency has therefore been repeatedly dealt with in the founding affidavit.

The applicants say the cause of action arose on 18 August 2021. It is on that date that they came across an electronic advertisement, flighted by the 7th respondent, offering residential stands for sale on Boronia Farm. They caused their legal practitioners, on 20 August 2021, to write an urgent letter to the legal practitioners of the defendants in case number HC 967/20 demanding that such defendants cease the sale of land on the farm pending the resolution of that matter, which is still pending. Undertakings were sought that the demand will be complied with. In addition, posing as a prospective purchaser, the applicants send one of their employees to confirm if indeed land was being sold at the farm. The employee appeared at the 7th respondent's offices on 27 August 2021. He obtained such confirmation. The advertisement was thus no fluke. The visit of 27 August 2021, it is said, was prompted by letter dated 23 August 2021. In that letter, the 1st and 6th respondents' legal practitioners had stated that the 7th respondent did not hold any mandate from the 1st and 6th respondents to sell any stands on Boronia Farm. In the same letter, however, the 1st respondent's legal practitioners made the following pertinent remarks:

> "2. We have however taken note of your demand for all parties to desist forthwith from any sale or alienation of the sole asset of New Century Production (Pvt) Ltd and for parties to make an undertaking highlighting the same. With respect, the demand is not only misplaced but out of time and turn. Our client cannot make an undertaking to desist from conduct already done. Your client has at all material times known of ours' intention to transact and deal with his share in the company as he deemed fit. As at the time of your letter, our client had already disposed all his share interests in the property in third party transactions. There can therefore be no claim for an interdict against a past event as the horses have already bolted.
>
> 3. Through several correspondence, our client has always indicated his intention to deal with his share in the property in issue as deemed fit. No interdict was sought by yours to bar this act and as at the time of writing this letter, there exists no court order or directive which bars our client from acting as he had warned. To demonstrate that you have always been aware of the sale of stands by our client, your client made a Police report against ours in February 2020 under CCD NR DR 112/02/20 and the matter is still pending. In the said police report, your client alleges the same conduct which you now seek to interdict on an urgent basis.
>
> 4. We reiterate that the agreement between our client and yours remains cancelled. And, while we acknowledge the pending court proceedings dealing with this matter we submit that there is no

> basis upon which our client must be held hostage and barred from exercising his interests as he has already so done."

In a nutshell, the applicants are saying the 7th respondent is committing fraud by selling 6th respondent's land without the registered owner's authority. The 7th respondent must be interdicted from doing so lest the value of the applicants' shares in the 6th respondent is rendered worthless by the time this court hands down judgment in case number HC 967/20.

In dealing with the issue of urgency, in particular when it is that the need to file the present application arose, the applicants' argue as follows in para(s) 14 and 17 of their heads of argument:

> "14. That the applicant satisfied the above requirement *in casu* does not call for any responsible debate. As stated earlier this application is for the preservation of the integrity of proceedings in HC 967/20 and applicants rights and interests in sixth respondent pending determination of case number 967/20. The dispute in HC 967/20 deals with the validity of sale of shares agreement and its consequent effect on applicant's relationship with sixth respondents. It relate directly to the values of shares that applicant has in sixth respondent and which is subject to confirmation by the court. If the integrity of the outcome of those proceedings which is not protected, that matter can be rendered *brutum fulmen* and redundant by the actions of the respondent of disposing of land in sixth respondent. Whatever rights applicant might derive in terms of judgment in that matter are at risks as a result of the respondents' conduct of dissipating 6th respondent's sole asset on which shares the applicant purchased derive value from.
> 15 …..
> 16 …..
> 17 The submission that the applicant has always known of the facts giving rise to this matter and therefore the matter is not urgent must not detain this Court. This submission, titillating as it may be results from a skewed understanding of what motivated filing of this application on an urgent basis. The same applies to the submission by the 2nd and 6th respondents to the effect that the applicant has always known that the procurement of a permit implies sale of land and therefore that the matter is not urgent. What motivated filing of this application on an urgent basis is not 1st respondent's alleged sale of land following procurement of the permit; it is selling of land by the 7th respondent in opaque circumstances and pursuant to a mandate of opaque origins." (Underlining mine)

In oral submissions touching on urgency, Mr *Uriri* essentially spoke to paragraphs 14 and 17 of the applicants' heads of argument.

What is case number HC 967/20 all about? It is an action instituted by the present applicants on 10 February 2020. The defendants therein are the present 1st to 6th respondents. That suit is founded on a written agreement of sale of shares entered into between the applicants and the 1st respondent. The agreement is dated 18 February 2017. In terms thereof, the 1st respondent sold its entire shareholding (being 22.4%) in the 6th respondent to the applicants at a price of US$11 298

039.14. The parties agreed on terms and certain mechanisms of payment of the purchase price. These included a provision that payment of a balance of US$10 737 039-14 would commence when the applicants acquire a subdivision permit of a certain hectarage of land on Boronia Farm. Payments to liquidate this balance would be raised at a rate of 60% of all the proceeds of the sale of the subdivisions until the balance was cleared.

Payments in reduction of the purchase price were effected. Thereafter, a dispute arose between the applicants and the first respondent. The latter alleged that the former had fraudulently misrepresented certain material facts and thereby induced the 1st respondent to enter into the sale of shares agreement. The parties exchanged correspondence. The 1st respondent's letter of 10 April 2017 is one such. The upshot was a three and quarter page letter written by the 1st respondent to the applicants. It is dated 19 February 2018. The material portions of the same read as follows:

> "In the circumstances, I hereby resile from the unperformed part of the agreement of sale of shares entered between myself and The September Family Trust on the 18th February 2017 over my entire shareholding in the New Century Productions (Private) Limited.
> …….
> For the avoidance of doubt I hereby advise you that I have resiled from the unperformed part of the sale of shares agreement entered into between the September Family Trust and myself on the 18th February 2017 because of the material misrepresentation you made to me…when in truth and fact you …..knew that the aforementioned stands were not serviced. Your material misrepresentation induced me to enter into the agreement of shares.
>
> Be guided accordingly."

A copy of this letter is attached to the first respondent's opposing affidavit.

It is pertinent that I refer to three letters addressed by the applicants' legal practitioners to the 1st respondent's then legal practitioners, Messrs Muringi Kamdefwere. They are not part of the documents attached to the founding affidavit. They are annexed to the applicant's answering affidavit.

The first is a letter dated 14 September 2018. It bears an "URGENT" sticker. The concluding paragraph of the letter is in these words:

> "Our client maintains that there has been no valid cancellation of the parties' agreement and will seek appropriate legal recourse to affirm this position and hold your client to his obligations in terms of the parties' agreement. Further we advise, depending on what your client has done with property due to ours in terms of the parties' agreement, that there may arise a criminal aspect to this matter which again our client is minded to pursue"

The second is another "URGENT" letter dated 25 October 2018. Para X thereof reads as follows, in material part:

> "Our client thus, maintains that the parties' agreement remains extant and it is in this context that it puts on record, as it has previously done that any actions by your client that run contrary to the agreement carry with them the potential of criminal sanction. Your client, we advise, ought to take this aspect very seriously……."

The third is letter dated 19 November 2018. I quote the relevant portions:

> "In short, our clients' position remains unchanged from what has been expressed in previous correspondence *viz* the purported termination of the referenced agreement. In our clients' respectful view, their position is apparent from and vindicated by the parties' agreement and correspondence exchanged from the inception of their dealings *viz* Boronia Farm.
>
> Suffice to state that our clients hold firm to their position and so advise your client that failure to act in terms of clause 3.8 of the sale of shares agreement ie appointment of a firm of chartered accountants to deal with the proceeds of sale of stands on Boronia Farm as previously requested, constitutes a continuing breach of contract by your client. We are instructed as we hereby do, to give notice on behalf of our clients in terms of clause 12 of the parties' agreement for your client to rectify its breach in this respect.
>
> We are further instructed to highlight the provisions of clause 6 of the parties' agreement *viz* vacant possession. Our clients were afforded possession and legal occupation of the property upon signing of the agreement. Your clients continuing actions at Boronia Farm which include barring our clients from exercising their rights to vacant possession and sale of the subject matter of the parties agreement to third parties remains unlawful and in breach of the parties agreement. Notice is thus also given in terms of clause 12 of the agreement for your client to rectify its breach.
>
> Be guided accordingly." (the underlining is mine)

On 8 January 2019 the first respondent's then legal practitioners had written to the applicants' legal practitioners on the agreement of sale of shares as follows:

> "We refer to previous correspondence pertaining to the above matter and write to give you a summary of what has transpired between your client and ours between 18 February 2017 and 12 December 2018, both dates inclusive.
>
> Because of the material misrepresentation/ non-disclosure our client resiled from the sale of shares agreement. Clause 12 of the Agreement of Sale of Shares (the breach clause) does not apply to the issues of resiling from the contract because it is a clause dealing with failure to perform on a valid contract, whereas our client resiled from the contract on the grounds of material misrepresentation/ non-disclosure on the part of your client.
>
> To your client's knowledge our client has long disposed part of his shareholding to another party. Indeed after the granting of a sub division permit at the end of August 2018, in a letter dated 23 November 2018 to the Department of Physical Planning, Mashonaland East Province, you wrote as follows 'We are further advised that using the said copy of the subdivision permit, Mr Masimirembwa has caused certain works to be commenced at Boronia Farm….'

> Our client never made it a secret that he was immediately after resiling from the contract, entitled to deal with his shares as he pleased and he has so dealt with his shares.
>
> The issue left concerns the return of stands 269, 423 and 826 Gletwyn and the (ii) sale of stands 824, 825 and 826 Gletwyn Township." (the underlining is my own)

Copy of this letter is annexure "D" to the 1st respondent's opposing affidavit.

The response came almost a month later. The pertinent portion of that letter, dated 4 February 2019, reads as follows:

> "Your client confirms in your referenced letter, his unlawful act of disposing of shareholding that he sold to our client, to a third party. As we have previously been instructed to communicate, we reiterate that this is fertile ground for criminal prosecution of your client for fraud and he must tread carefully in this respect. (underlining is mine)
>
> Further, our client maintains that the breach notifications given to your client ought to be taken heed of and attended to by the purging of your clients breach of the parties' agreement.
>
> Be guided accordingly"

A copy of this letter is attached to the applicant's answering affidavit.

It was only on 10 February 2020 that the applicants issued summons under case number HC 967/20. The summons was served on all the respondents on 13 February 2020. No relief was sought against the 2nd to the 6th respondents. The relief prayed for, against the 1st respondent only, is in these terms:

> "1. An order declaring the written agreement of sale of shares entered by the plaintiff (applicants) and the 1st defendant (1st respondent) on 18 February 2017 to be valid and subsisting.
>
> 2. An order declaring that the plaintiffs (applicants) have not breached the provisions of the written sale of shares agreement entered by the plaintiff (applicants) and the 1st defendant (1st respondent) on 18 February 2017.
>
> 3. An order directing the 1st defendant (1st respondent) to transfer, within seven (7) days of grant of this order shareholding in New Century Production (Pvt) Ltd to the plaintiffs (applicants), equivalent to the sum of US$2 666 290 (two million six hundred and sixty-five thousand two hundred and ninety United States dollars) in terms of clause 2.1 of the sale of shares agreement entered by the plaintiffs (applicants) and the 1st defendant (1st respondent) on 18 February 2017.
>
> 4. An order directing the 1st defendant (1st respondent) to comply, within seven (7) days of the grant of this order, with the provisions of clauses 3.4 and 3.8 of the written sale of shares agreement entered by the plaintiffs (applicants) and the 1st defendant (1st respondent) on 18 February 2017.
>
> 5. Costs of suit against the 1st defendant (1st respondent) on the scale as between attorney and client."

The 1st to 6th respondents have pleaded to the summons, on the merits. In addition, the 1st respondent has filed a special plea and a counter-claim. The applicants have excepted to the counter-claim. The applicants and the 1st respondent have filed their heads of argument dealing with the exception. The exception was set down for hearing on 8 June 2021 whereupon the court, with the consent of the parties, removed the matter from the roll to enable the litigants to engage each other.

In a nutshell, the respondents argued that this application is not urgent because the applicants have deliberately sought to mislead the court by claiming that the need to act arose over the period 18 August 2021 to 27August 2021 when the applicants discovered that the respondent was selling stands at Boronia Farm "in opaque circumstances and pursuant to a mandate of opaque origins." They argue that the need to act arose as way back as 19 February 2018 when the 1st respondent resiled from the sale of shares agreement. This application should have been filed at that time. Another opportunity presented itself on 10 February 2020 when the applicants filed the summons under case number HC 967/20. The two lawsuits could have been filed at the same time if there is any credence in the applicants' argument, that they acted "swiftly" (on 31 August 2021) by filing the present application to protect the integrity of the proceedings under the action instituted eighteen months earlier. Further, the 1st respondent, in averring that the application is not urgent, said in paragraph 10 of his opposing affidavit:

> "10. To emphasise on when the applicant ought to have acted, I will also state to the court that there is a pending police case which the applicant reported under reference DR CCD NR 112/02/20. In that particular case the applicant got me arrested on allegations of illegally removing Mr Tutisani from the Company Directors and also <u>for selling stands</u> on Boronia Farm. I never denied the fact that I was selling stands on the farm, this fact was admitted even to the police and much to the knowledge of the applicant who at the time chose not to seek recourse in the manner they now do"

That the applicants made this police report is confirmed by letter dated 5 August 2020. Therein, the applicants' legal practitioners wrote as follows:

> "Detective Inspector Cain Muchingambi
> CID Serious Frauds
> Harare
>
> Dear Sir

RE: SEPTEMBER FAMILY TRUST: GODWILLS MASIMIREMBWA: RICHARD SHITTO: NEW CENTURY PRODUCTIONS (PVT) LTD: REQUEST FOR WITNESS STATEMENTS

Reference is made to the above matter wherein our client, September Family Trust, is the complainant.
In furtherance of other matters pending before the High Court, our client has requested that it be furnished with the statements recorded from the following individuals in this matter:

- Mr Godwills Masimirembwa
- Diston Matiya of Enhanced Mortgaging and Housing (Pvt) Ltd.
- Online Rudo Kanyenze of Dumfard Real Estate Agents.
- Innocent Shitto
- Richard Matengambiri of Rawson Real Estate Agency.

We thank you for your assistance…."

A copy of this letter is attached to the applicants' answering affidavit.

On 18 September 2020 the Zimbabwe Republic Police, Criminal Investigations Department under the hand of R Chibwereva, Chief Superintendent in his capacity as Acting Director of the Commercial Crimes Division responded as follow:

"….
Your correspondence dated 5 August 2020 was forwarded to Commissioner General of Police for approval according to Zimbabwe Republic Police Standing Orders.
Please be advised that your request to have the statements released was not approved. May you note that the investigations are still in progress and your client who is our witness in the matter shall be kept updated of the investigations.

This office is there to assist you accordingly….."

In attaching a copy of this and the letter under reply to their answering affidavit, the deponent to the applicants' affidavit simply points out that he does not know the contents of the relevant statements by dint of the response availed to him by the police. The deponent does not say he does not know the contents of the report that he made to the police, for it is that which matters for purposes of the application.

For completeness' sake I record that the 7th respondent explained the advertisement flighted by itself and the sale of stands on Boronia Farm pursuant thereto. This is what it said, through Solomon Chinwadzimba (its property consultant) in para 1.4 of its opposing affidavit:

"[1.4] Seventh respondent has been advertising the land for sale on behalf and as duly authorised agent of Cleopus Majoni who indicates that he received 24 hectares of land from 1st respondent pursuant to an agreement between the two. The advertisement flighted and sales conducted by 7th

respondent pertained exclusively to these 24 hectares and nothing more. We have no mandate from or relations with either 1st or 6th respondents. We do not act on their behalf neither do they have knowledge or input in what we have been doing. Our remit comes from Cleopus Majoni exclusively. A supporting affidavit from him is attached."

Among other documents, 10th respondent attaches the following to his affidavit:

- Memorandum of agreement dated 24 November 2019 between 6th respondent and himself wherein he was to engage Rawson Properties to contract 6th respondent in a joint venture to develop and service at least 822, 654 hectares on Boronia Farm.
- Memorandum of agreement between 1st and 10th respondents, dated 19 November 2018, wherein the latter was allocated residential stands on Boronia Farm for successfully facilitating a joint venture agreement between the 1st respondent and Enhanced Mortgaging and Housing (Pvt) Ltd for the servicing and development of land on Boronia Farm.

The 7th and 10th respondents said the land which the latter was said to have been selling in "opaque circumstances and pursuant to a mandate of opaque origins" is in fact the twenty-four hectares that 10th respondent was allocated for his work. Nothing less, nothing more.

7th respondent complained that it was unnecessarily put out of pocket by defending this application. The applicants could have got these facts had they been forthright. Instead, the applicants needlessly decided to send one of their employees, James Elliot, under the guise of a prospective purchaser.

I have deliberately extensively referred to the papers placed before me to allow the matter to speak for itself.

In my view it is manifest that the applicants abused court process to manufacture their own urgency in order to have the case, which has all the hallmarks of an ordinary court application, dealt with as an urgent chamber application.

The applicants could have launched an urgent application when the 1st respondent resiled from the sale of shares agreement on 19 February 2018. That is more than three years ago. They could also have rushed to court between 14 September 2018 and 10 February 2020 instead of exchanging correspondence with 1st respondent's erstwhile legal practitioners. Inexplicably, some of the correspondence, authored by the applicants' legal practitioners during that lengthy

period, bore "URGENT" stickers. But no urgent chamber application came out of that correspondence.

Indeed, the summons issued on 10 February 2020 is itself evidence that there was need to approach the court on an urgent basis. Surprisingly, the applicants were content to file summons only. The applicants could have, at that time, done what they now seek to do on a supposedly urgent basis. This brings to mind the words of the Supreme Court in *Crundall Brothers (Pvt) Ltd* v *Lazarus No and Anothe*r 1991 (2) ZLR 125 (SC) at 135B:

> "It is strange, too, that Mr Passaportis should not have been able to file a petition for an interdict, because on that very date, 8 September 1989, he filed an affidavit by Mr Crundall in the related proceedings concerning the extension of the six-week period. That very affidavit could have been used to found an interdict application. An urgent application could have been made in terms of r 237."

Still in February 2020, the applicants, in addition to issuing summons, made the police report that I have already referred to. They chose to utilize the criminal justice system. That they appear not to have obtained the result they wanted through that route cannot be a basis to have another bite of the cherry, this time through the urgent chamber book.

As for 7th and 10th respondents' sale of land on Boronia Farm, I take the view that this is a classic case of "fraudulent diligence in ignorance". The applicants contrived to rely on the electronic advertisement without squarely verifying the 7th respondent's mandate to sell the land. This they did so as to justify the citation of the 1st to the 6th respondents, to mask the real reason why they have finally awoken from their deep slumber. As for the 10th respondent, even as I write this judgment, para 1 of the interim relief sought excludes that respondent.

The net result is that it is the applicants, not this court, who failed to act on an urgent basis when the need to do so arose. They have not explained that lengthy delay. Since they did not treat the matter as urgent, that has sealed the fate of this application. The matter is not urgent. The first preliminary point is thus upheld. The need to determine the other points *in limine* and the merits of the matter does not arise.

The 1st, 2nd, 4th, 6th, 7th and 10th respondents asked for costs on the higher scale. That stance is fully justified. Dishonest conduct of litigation on the part of the applicants is what this matter is all about.

The 3rd respondent neither opposed the application nor prayed for costs. He chose to abide the decision of the court. The 5th, 8th and 9th respondents did not participate in the proceedings.

In the result, the following order shall issue:

1. The application is removed from the roll of urgent matters.
2. The applicants shall pay the 1st, 2nd, 4th, 6th, 7th and 10th respondents' costs on the legal practitioner and client scale.
3. As between the applicants and the 3rd respondent each party shall bear its own costs.
4. As between the applicants and the 5th, 8th and 9th respondents there is no order as to costs.

Nyika, Kanengoni and Partners, applicants' legal practitioners.
Curious and Co Legal Practitioners, 1st respondent's legal practitioners
Mushoriwa Pasi Corporate Attorneys, 2nd, 4th and 6th respondents' legal practitioners
Muhlolo Legal Practice, 3rd respondent's legal practitioners
Maphosa and Ndomene, 7th and 10th respondents' legal practitioners