HAMMER AND TONGUES REAL ESTATE (PRIVATE) LIMITED
versus
TRUSTEES FOR THE TIME BEING OF THE ZIMBABWE
CHILD SURVIVAL DEVELOPMENT TRUST
and
AFRICAN SENTIMENTALS (PVT) LTD
and
REGISTRAR OF DEEDS N.O

HIGH COURT OF ZIMBABWE
DEME J
HARARE, 22 October & 6 November 2024

Opposed Application

Adv T Mpofu, for the applicant.
Mr *K Kadzere*, for the 1st respondent
Ms V Chipamaunga, for the 2nd respondent
No appearance for the 3rd Respondent.

DEME J: The applicant approached this court seeking a declarator in terms of s 14 of the High Court Act [*Chapter 7:*06]. More particularly, the applicant prayed for the relief couched in the following manner:

> "(a) The 1st Respondent did not afford a proper opportunity to the Applicant to exercise its right of first refusal in respect of the property being Stand 3188 Salisbury of Salisbury Township Lands registered under Deed of Transfer Number 7820/1989 also known as Number 1 Elsworth Avenue, Harare.
> (b) It is declared that the purported sale agreement entered into by the 1st and 2nd Respondents in respect of Stand 3188 Salisbury of Salisbury Township Lands registered under Deed of Transfer Number 7820/1989 also known as Number 1 Elsworth Avenue, Harare, dated the 08th September 2022 was irregular and is therefore set aside.
> (c)The Applicant is entitled to exercise its right of first refusal before 1st Respondent can enter into any sale agreement with third parties in respect of the property being Stand 3188 Salisbury of Salisbury Township Lands registered under Deed of Transfer Number 7820/1989 also known as Number 1 Elsworth Avenue, Harare.
> (d) The Respondents shall pay to the Applicants costs of suit on the higher scale of legal practitioner and client scale only if they oppose the present application."

In May 2014, the applicant (being a lessee) and the first respondent (being a lessor) concluded a lease agreement in respect of property known as number 3188 Salisbury of Salisbury Township Lands registered under Deed of Transfer Number 7820/1989 also known as Number 1 Elsworth Avenue, Harare, (hereinafter called "the property"). The lease agreement expired in 2019 and was not subsequently renewed. The applicant averred that it continued as a statutory tenant at the property. Clause 16 of the lease agreement conferred upon the applicant the right of first refusal.

Pursuant to the provisions of Clause 16 of the lease, the first respondent, through its legal practitioners, invited the applicant to exercise the right of first refusal by copy of the letter dated 30 March 2022. The first respondent advised the applicant to exercise its right within seven working days failing which the first respondent would proceed to sell the property to third parties. In particular, the letter of 30 March 2022 stated as follows:

> "We write to you on behalf of our client, the Zimbabwe Child Survival and Development Foundation Trust.
>
> We have been instructed to advise as follows:
> (a) Our client intends to sell the property for best value.
> (b) In accordance with clause 16 of the lease agreement signed between the parties, your client has a right of first refusal.
> (c) May we kindly have your client's offer in the next seven (7) working days for ours' consideration.
> (d) Should we not hear from you within the period in (c) above, we shall take it that your client has opted not to exercise its right of first refusal and shall proceed to open the sale to third parties.
>
> May we hear from you as soon as possible."

The relevant portion of Clause 16 of the lease agreement, referred to in the letter of 30 March 2022, is as follows:

> "Should the lessor wish to sell the leased premises, the lessee shall be given the right of first refusal."

In response to the letter of 30 March 2022, the applicant's legal practitioners, by a copy of the letter dated 5 April 2022, requested to have sight of the resolution which authorised the sale of the property. More particularly, the contents of the letter are as follows:

> "We refer to the above matter and to your letter dated the 30th March 2022.
>
> We have forwarded the abovementioned letter to our Client. However, we have been instructed to request from you a resolution by the Board of Trustees authorizing the sale of the property. This is because our Client wants to ascertain that the representatives of your client have the requisite authority to sell the property.
>
> Our Client advises that the request is necessitated by the fact that for a long time, it has been trying to ascertain the identity of yours' Board of Trustees to no avail. As such, we are of the considered view that this is a legitimate request. In the circumstances, we look forward to receiving the resolution soon."

Responding to the applicant's letter, the first respondent declined to produce the resolution on the basis of confidentiality and insisted that the applicant ought to exercise its right of first refusal within the timelines outlined in the letter of 30 March 2022. The first respondent's response is as follows:

> "Thank you for your letter dated 5 April 2022. We do not see the necessity of furnishing you with the requested resolution as it is private and confidential and thus privileged communication between us and our client. The resolution will be exhibited to your client if its offer is accepted.
>
> May we have your client's offer within the time limits set out in our letter dated 30 March 2022."

The applicant averred that the legal practitioners of the two parties had a meeting where Mr *Kadzere* indicated that the first respondent was not prepared to accept any offer which is less than US$1 million, a fact which has been vehemently denied by the first respondent and Mr *Kadzere.* On 14 April 2022, the first respondent advised the applicant that it was now proceeding to open the sale of the property to third parties as the applicant had not responded within the stipulated time frame. The applicant, by copy of this letter, was also put on three months' notice to vacate the property in question. The first respondent, in the letter of 14 April 2022, stated that:

> "We refer to the above and in particular to our letter to you dated 30 March 2022.
>
> We have not received an offer from your client and take it that your client is not interested in purchasing the property. We advise that we are now going ahead to open the property for sale to third parties.
>
> We also hereby give your client three (3) months' notice to vacate the leased premises as our client intends to hand over vacant possession to whoever purchases the property.
>
> We advise accordingly."

The applicant later discovered that the first and second respondents concluded an agreement of sale in terms of which the second respondent purchased the property at the price of US$650 000.00. This agreement of sale was concluded in September 2022. According to the applicant, it ought to have been afforded the opportunity to match the purchase price offered by any third party including the second respondent.

The matter was opposed by the first respondent from various fronts. The first respondent affirmed that the lease agreement between the parties had since expired and can no longer be enforced. According to the first respondent, the lease was never renewed. It is the firm conviction of the first respondent that the applicant is now illegally occupying the property. The first respondent also alleged that the applicant, in terms of the 2014 lease, which later expired, was supposed to pay US$1 200.00 per month. Upon the expiration of the lease, the first respondent asserted that the applicant unilaterally fixed the rentals at the rate of ZWL1 200.00 per month. According to the first respondent, the amount of rentals paid by the applicant is so insignificant for the same to constitute fair rentals. On this basis, the first respondent contended that the applicant cannot claim to be a statutory tenant.

The applicant argued that the lease agreement is still extant. According to the applicant, the lease agreement was never formally cancelled. The applicant further maintained that the first respondent failed, on three occasions, at the Magistrates Court, to establish that the lease agreement was cancelled.

The first respondent further affirmed that the applicant was advised to exercise the right of first refusal within seven working days and failed to do so. The applicant, according to the first respondent, instead asked for a resolution which authorised the property sale. The first respondent's belief that the information requested was not relevant for purposes of exercising the right of first refusal. The first respondent also maintained that the applicant failed to make any offer from 14 April 2022 up to September 2022 when the property was finally purchased by the second respondent.

The first respondent denied that the purpose of the meeting of legal practitioners for the Applicant and the first respondent was to discuss the applicant's offer. According to the first respondent, the meeting was to negotiate the issue of vacant possession of the property and the applicant's outstanding rentals. The first respondent consequently prayed for the dismissal of the present application with punitive costs. The first respondent also prayed for an order that the lease agreement be deemed to be null and void.

The present matter was also opposed by the second respondent. The second respondent insisted that the sale is not irregular. The second respondent claimed that it is an innocent purchaser which was advised that the applicant was the tenant at the property in dispute. The second respondent further affirmed that it is prejudiced by the applicant's continued stay at the property. The second respondent prayed for dismissal of the present application with punitive costs. The second respondent additionally prayed for an order that the agreement of sale be declared to have been lawfully concluded.

In the answering affidavit, the applicant alleged that the second respondent had knowledge of its right of first refusal. Reference was made to the letters of 13 March 2023 and 24 July 2023 where applicant's legal practitioners wrote to the second respondent's legal practitioners advising them of their client's right of first refusal. In the letter of 24 July 2023, whose contents were substantially similar to the letter of 13 March 2023, the applicant's legal practitioners stated that:

> "1. We refer to the above matter and your letter addressed to our client dated 19 July 2023.
> 2. We have been instructed to address you as follows:
> 2.1 In as far as our client is concerned, the property belongs to the Zimbabwe Child Survival and Development Foundation to whom it pays rentals as agreed in terms of the lease agreement.
> 2.2 In terms of Clause 16 of the Lease Agreement, our client is entitled to exercise its right of first refusal. Our client has not exercised its right and is willing to do so. Accordingly, it should be or ought to have been afforded this right before any sale to third parties such as tour (sic) client.
> 2.3 for the record, we note that your client has not taken transfer of the property. May you therefore advise us of the basis upon which your client purports to claim ownership of the property.
> 3. We confirm that we wrote to your client on 13 March 2023 raising the same issues as per the above and requesting the same information but did not receive the response thereto. We attach hereto a copy of the lease for your convenience.
> 4. May you provide us with the details requested in the above so that we can advise our client accordingly. We look forward to hearing from you soon."

In the Heads of Argument, the first respondent raised two points *in limine*. Firstly, the first respondent argued that the applicant, having disassociated itself from the name "Hammer and Tongues Real Estate" specified in the lease, lacks *locus standi*. Additionally, the first respondent, by way of a second point *in limine*, argued that the applicant has failed to establish a cause of action for the present application for want of *locus standi*.

Responding to the points *in limine*, Adv *Mpofu* argued that the Magistrates Court in Case Number 2688/21 made a finding that the applicant and lessee identified in the lease is the same juristic person. At the Magistrates Court, the applicant had raised a point *in limine* that the first respondent had dragged to the court the wrong party not identified in the lease. This point in *limine* was dismissed by the Magistrates Court. The Magistrates Court observed that:

> "Without proof that Hammer and Tongue Real Estate is a registered entity and not just trading in that name this point in limine cannot succeed. The reason being on execution, the applicant would have an order but not be able to execute it. The court is of the view that applicant pursued the correct party. Accordingly, this point *in limine* is hereby dismissed."

It is certain that the two points *in limine* raised by the first respondent are interrelated. Once the first point *in limine* is unmerited, the second point *in limine* will no longer have any foundation to lean on. Based on the findings of the Magistrates Court which are still extant, the two points *in limine* raised by the first respondent lack merit and are accordingly dismissed.

The following issues arise for determination:

A. Whether the Applicant was offered the right of first refusal in respect of the sale of the property.
B. Whether the lease was lawfully terminated.
C. Whether the 2nd Respondent is an innocent purchaser of the property.
D. Whether the Applicant has satisfied the requirements of application for a declarator.
E. Whether this court can declare the lease to have been cancelled on the basis of the payment of allegedly unfair rentals by the Applicant.
F. Whether this court can declare the agreement of sale concluded between the 1st and 2nd Respondents to be valid.

It is not disputed that Clause 16 of the lease agreement confers upon the applicant the right of first refusal. By copy of the letter of 30 March 2022, the first respondent invited the applicant to exercise its right of first refusal. This is a realisation by the first respondent that the applicant is entitled to the right of first refusal. On this basis, the first issue is resolved.

Moving on to the second issue of whether the lease was lawfully terminated, it had been argued on behalf of the applicant that the lease was not lawfully terminated. The first respondent's counsel, Mr *Kadzere*, argued that the lease expired in 2019 hence the applicant

ceased to exist as a lessee thereafter. Mr *Kadzere* further alternatively argued that the applicant, who had not been paying fair rentals, must not be regarded as a statutory tenant. Adv *Mpofu* contended that the applicant became the statutory tenant at the expiration of the lease. He further argued that the issue of fair rentals is improperly before the court. Adv *Mpofu* submitted that if the first respondent is of the view that the applicant is not paying fair rentals, it ought to lodge a claim for fair rentals against the applicant.

It is evident after the expiry of the lease in 2019 that no lawful act to cancel the lease was pursued by the first respondent. No such evidence was placed before my attention by the first respondent despite being challenged to do so by the applicant. Consequently, it is certain that the lease was not lawfully terminated.

It has been argued on behalf of the applicant that the first respondent failed, on three occasions at the Magistrates Court, to eject the applicant from the disputed premises. At the end of the hearing of this matter, I directed the applicant to file the two judgments of the Magistrates Court. The third judgment is part of the record and is attached to the answering affidavit. I also directed the parties to file the supplementary Heads of Argument addressing the court on issues which could have arisen from the two judgments of the Magistrates Court. Arguing on behalf of the applicant, the counsel argued that the first respondent sought to reargue its case through supplementary Heads of Argument. Adv Mpofu moved this court to disregard such Heads of Argument. The first respondent's supplementary Heads of Argument have eight pages. Definitely, this is an attempt to reargue its case. Consequently, I will disregard the supplementary Heads of Argument. I would have disregarded only irrelevant arguments which do not relate to the two judgments. However, in light of the fact that the first respondent's counsel did not seek to assist the court on his legal opinion on the two judgments, I have no option but to disregard the entire supplementary Heads of Argument.

With respect to the two judgments, Adv *Mpofu* argued that the two judgments saw the dismissal of the two applications filed by the Magistrates Court. The nature of the applications is not clear as the two judgments were not timeously placed before my attention. The applicant's legal practitioners advised this court through the Registrar that they failed to file the two judgments as the Clerk of Court wanted to have the two judgments typed. I was forced to proceed without the two judgments given that it was not disputed that the two judgments saw the dismissal of the two applications. Whether or not the judgments are final will be a debate for another day, in my view.

Turning to the third issue, it is apparent that the applicant, in its founding affidavit, never stated that the second respondent was aware of its right of first refusal. This allegation was raised for the first time in the answering affidavit after being challenged by the second respondent. It is an established jurisprudential principle in our jurisdiction that an application stands or falls by its founding affidavit. In the case of *Badza and Ors* v *Mususa and Ors*[1], BHACHI MZAWAZI J superlatively commented as follows:

> "Given that scenario, the court is swayed by the respondent's submission that, it is established law that an application falls or stands on its founding affidavit. It is the cornerstone or pedestal of an applicant's case. It lays the foundation of the injured party's claim, outlines the nature of the harm and remedy sought from the court. In the absence of this key document then there is nothing before the court.
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> The honourable Gowora *JA* in *Zimbabwe Posts (Pvt) Ltd* above, stated that;
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> "An application must be deposed on the basis of the founding affidavit."
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> This whole application is now like a door without hinges. It falls.
>
> This has been a well traversed road with a trail of authorities as illustrated in the Supreme court case, where the Honourable, Justice Chatukuta JA, in *CABS-v-Finormagg Consultancy (Pvt) Ltd, SC 56/22,* had this to say, "It is trite that an application stands or falls on its founding affidavit. The founding affidavit sets out the case that a respondent is called upon to answer"'

Thus, in my view, this application must fall on the basis that the applicant failed to plead necessary facts for this court to nullify the agreement of sale concluded between the first and second respondents. In Paragraph B of the draft order, the applicant prayed for the relief that the sale of the property concluded between the first and the second respondents be nullified. The claimant of the right of first refusal must demonstrate that the third party was, at the time of concluding the agreement of sale, aware of the existence of the right of first refusal. In this regard, the Supreme Court, in the case of *Makoshori v Nyamushamba and Anor*[2], propounded the following remarks:

> "Makoshori, who was a schoolteacher in Mhangura town, must have been aware that sitting tenants of the immovable property in Mhangura town had been offered the right of first refusal. Mhangura did not deny having offered that right, and the offer must have been a matter of common knowledge in the small town of Mhangura at the relevant time.

[1] HCC45/23

[2] SC 9/06.

> In my view, Makoshori's denial that he was aware of the right of first refusal granted to all sitting tenants is significant, in that it indicates that he cannot be believed when he says he purchased the property innocently.
>
> In the circumstances, Mhangura had no right to sell the property to Makoshori. The essence of the right of first refusal or the right of pre-emption is that the grantor of such a right binds himself to the grantee of the right not to sell the object of the right to a third party unless the grantee of the right has been given an opportunity to purchase the object of the right and has not offered to do so. See *Madan v Macedo Heirs and Anor* 1991 (1) ZLR 295 (SC) at 302 A-B; and *Owsianick v African Consolidated Theatres (Pty) Ltd* 1967 (3) SA 310 (AD) at 316 C-D."

In the absence of compelling reasons, our courts are anxious to enforce the exact terms of contracts as stated. The courts have an obligation to ensure that the sanctity and freedom of contracts are upheld. In the case of *Book* v *Davidson*[3], the court observed as follows:

> "If there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice. Therefore you have this paramount public policy to consider - that you are not lightly to interfere with this freedom of contract.' (Printing and Numeric Registering Co v Sampson (1875) LR 19 Eq 462 at 465)"

I do not agree with Adv *Mpofu's* submissions that the innocence of the second respondent is of no relevance in the sale of the property where the tenant is entitled to the right of first refusal. It has been established in our jurisdiction that the remedy available to the claimant of the right of first refusal is to seek an order for interdict to prohibit the proposed sale failing which the claimant may claim damages arising from the sale which could have been concluded in violation of the right of first refusal. Where the claimant seeks to recover the property from third parties, it is imperative that the claimant must disclose sufficient facts which establish that the third party was aware of his or her pre-emptive right. Reference is made to the case of *Madan* v *Macedo Heirs and Anor*[4], where the Supreme Court observed that:

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[3] 1988 (1) ZLR 365.

[1]991 (1) ZLR 295 SC

> "The pre-emptive right only gives rise to a claim for an interdict to restrain a proposed sale, in appropriate circumstances, or for damages in the event of a sale in breach of such right. The holder of a right of pre-emption will only be permitted to assert his right and pursue its subject-matter in the hands of a third party to whom it has been delivered, if the facts disclose that the latter was aware of the existence of the right of pre-emption. See the *ASA Bakeries* case, supra, at 908D. This enquiry involves what is termed "the doctrine of notice"."

Adv Mpofu further submitted that the right of first refusal can be enforced against a third party where there is no transfer of the property. He referred the court to the case of *Madan* v *Macedow Heirs and Anor* (*supra).* This submission is contrary to the position established by the court in the case of *Madan* v *Macedow Heirs and Anor* (*supra).*

Our jurisdiction has outlined, in unambiguous terms, a step by step approach of how the right of first refusal may be effected by the contracting parties. In the case of *Sawyer* v *Chioza and Ors*[5], the court remarked as follows:

> "In my view, the above captions describe the essential elements of the right of pre-emption (or first refusal) in terms that are both clear and unambiguous. My reading of these requirements is that the following steps must, in that sequence, be followed in the exercise of the right of pre-emption:
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> a) a specific third party offers to buy the property at a given price:
> b) the grantor is prepared to sell at that price; but
> c) before accepting the buyer's offer, the grantor reverts to the right of pre-emption, informs him of his decision to sell at the price offered by the particular buyer and asks him (grantee) to exercise his right of first refusal.
>
> Thereafter, the outcome, in terms of who ends up buying the property, depends on the grantee's decision on whether to exercise his right. The grantor of a right of pre- emption cannot be compelled to sell the subject of the right. Should he, however, decide to do so, he is obliged, before executing his decision to sell, to offer the property to the grantee of the right of pre-emption upon the terms reflected in the contract creating that right."

Further, commenting on the steps to be taken by the contracting parties in the implementation of the right of first refusal, MALABA JA, as he then was, in the case of *Eastview Gardens Residents Association* v *Zimbabwe Reinsurance Corporation Ltd and Ors*, superbly postulated the following remarks:

> "A right of first refusal or pre-emption is created when, in an agreement, one party (the grantor) undertakes that when he decides to sell his property he will give the other party (the grantee) the opportunity of refusing or buying of the property at a price equal to that offered by another person. The grantor is then said to be under an obligation to do, at the time he sells the property, what he voluntarily bound himself to do, that is, offer the property to the grantee

[5] 1999 (1) ZLR 203 (H).

> first at a price equal to that offered by a third party or which he is prepared to accept from any other would-be buyer. The grantee is said to have acquired the correlative right to have the property offered to him first so that he can match the price offered by the third party or refuse the offer."

Given that the applicant failed to establish the second respondent's *mala fides* in purchasing the property, the fact that the first respondent failed to follow a step-by-step approach as per the case of *Sawyer* v *Chioza* (*supra)* cannot be the basis for motivating this court to make an order for the nullification of the sale concluded by the first and *second Respondents.* The applicant has other available remedies against the second respondent. The applicant failed to take an appropriate step of seeking a restraining order against any proposed sale, one of the remedies which was available before the conclusion of agreement of sale by the first and second respondents. This remedy is no longer available in light of the fact that the agreement of sale was subsequently concluded.

Adv *Mpofu* argued that the applicant must be afforded the protection of the first purchaser as was postulated in the case of *Guga* v *Moyo and Ors*[6], where the court elegantly made the following remarks:

> "The basic rule in double sales where transfer has not been passed to either party is that the first purchaser should succeed. The first in time is the stronger in law. The second purchaser is left with a claim for damages against the seller, which is usually small comfort. But that rule applies only 'in the absence of special circumstances affecting the balance of equities'."

No additional authorities were brought to my attention to substantiate this position. In the absence of this, I find it difficult to make a determination in this regard. It is evident that the Applicant did not purchase the property. The second respondent purchased the property. In light of this, there are no double sales. To this end, the law applicable to the right of first refusal is the one that remains applicable. Applying the law of double sales would lead to absurdity under such circumstances.

The fourth issue compels me to examine whether the applicant has managed to satisfy the requirements of the application for a declarator. In the case of *Johnson* v *Afc*[7], GUBBAY CJ, as he then was, commented as follows:

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[6] 2000 (2) ZLR 458 (S) at 459E-H

[7] 1995 (1) ZLR 65 (S) at p 72E.

> "The condition precedent to the grant of a declaratory order under s 14 of the High Court of Zimbabwe Act 1981 is that the applicant must be an "interested person", in the sense of having a direct and substantial interest in the subject matter of the suit which could be prejudicially affected by the judgment of the court. The interest must concern an existing, future or contingent right. The court will not decide abstract, academic or hypothetical questions unrelated thereto… At the second stage of the enquiry, the court is obliged to decide whether the case before it is a proper one for the exercise of its discretion under s 14 of the Act. It must take account of all the circumstances of the matter."

The present application is made in terms of s 14 of the High Court Act [*Chapter 7:06*] which provides as follows:

> "The High Court may, in its discretion, at the instance of any interested person, inquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon such determination."

Although the present application may be able to fit within the parameters of the first inquiry set out by the court in the case of *Johnson* v *AFC* (*supra),* the applicant found it difficult to convince the court that this is a matter where the court may exercise its discretion through the granting of the relief sought where the applicant has dismally failed, in its founding affidavit, to lay evidence that the second respondent was a *mala fide* purchaser. The evidence in the answering affidavit cannot supplement what was not stated in the founding affidavit. Admitting such new evidence would allow the applicant to mount a new case. In any event, the purported notification sent to the second respondent was only done after the conclusion of the sale. It is not disputed that the sale was concluded in September 2022. According to the answering affidavit filed, the first letter dispatched to the second respondent's legal practitioners was of 13 March 2023, some six months after the conclusion of the sale agreement. Thus, this late notification cannot interfere with this contract in the absence of compelling reasons. In light of this, the applicant has failed to satisfy the basic requirements of the application for a declarator.

Moving to the fifth issue, the first respondent, in its opposing affidavit, moved this court to declare that the lease be cancelled. As correctly argued by Adv Mpofu, the first respondent cannot introduce a counter application through the opposing affidavit. The first respondent ought to have lodged a correct application or counter application. For this reason, I am unable to make a determination of this issue based on an issue which has not been properly brought before my attention. The first respondent needs to approach the court

through the correct channel. The purported counter application is accordingly struck from the roll for want of compliance with the rules.

The last issue obliges me to assess whether or not this court can validate the agreement of sale concluded between the first and second respondents. I am alive to the fact that any decision which does not see the granting of the present application may implicitly lead to the same result. However, in light of the fact that the second respondent did not make a proper counter application seeking the same relief, it would be improper for me to make such a declaration in the absence of a formal application. This application was purportedly introduced in the opposing affidavit and not through the formal application.

I am of the view that the present application is not merited for the reasons highlighted above. As the applicant may pursue other remedies against the first respondent, dismissal of the present application may not be ideal. Such a decision may put the applicant out of the court and it will not be able to seek other available remedies against the first respondent. The appropriate order under such circumstances would be to strike the application from the roll. Reference is made to the case of *Stanley Nhari* v *Robert Gabriel Mugabe and Others*[8], where, in para 45, the Supreme Court opined as follows:

> "[45] I am inclined to agree with the appellant that the order dismissing the entire claim was, in the circumstances, improper. The court had found that it had no jurisdiction to entertain the claims because such claims lay in the province of labour. Having so determined, there was therefore nothing that remained before the court. There was nothing further to dismiss. In *Edward Tawanda Madza & Others v (1) The Reformed Church in Zimbabwe Daisyfield Trust (2) The Reformed Church of Zimbabwe (3) Naison Tirivavi (4) The Dutch Reformed Church* SC 71/14 this Court remarked as follows:-
> "It is a contradiction in terms to dismiss a matter on the twin bases that it not urgent and that the applicant has no *locus standi* for the latter basis indicates that a decision on the merits of the application has been made in which event the applicant is barred from placing the matter on the ordinary roll for determination. The effect of the dismissal on the latter basis is that the applicant is put out of court and is deprived of his right to have the matter properly ventilated in a court application or trial. Where, however, the matter is struck off the roll for lack of urgency, the applicant, if so advised, may place the matter on the ordinary roll for hearing." (at pp 8 – 9 of the judgment)"

The applicant must bear costs of this application on an ordinary scale. Such costs are reasonably sufficient. Costs ordinarily follow the outcome. I have not been motivated by the applicant's counsel to have a departure from this rule. In the result, it is ordered as follows:

[8] SC151/20.

The application be and is hereby struck from the roll with costs on an ordinary scale.

Mawere Sibanda, applicant's legal practitioners
Kadzere, Hungwe and Mandewere, first respondent's legal practitioners
Marufu Misi Law Chambers, second respondent's legal practitioners