

**MIDLANDS STATE UNIVERSITY  
FACULTY OF LAW**

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A DISSERTATION SUBMITTED IN PARTIAL FULFILMENT OF THE BACHELOR OF LAWS HONOURS DEGREE.

**RESEARCH TOPIC**

An analysis of the efficiency and effectiveness of protection of property rights in Zimbabwe in advent of the Deeds Registries Amendment Act number 8 of 2017.

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## Contents

APPROVAL FORM .....	i
DECLARATION .....	ii
DEDICATIONS .....	iii
ACKNOWLEDGMENTS.....	iv
1. CHAPTER 1.....	1
1.1. INTRODUCTION .....	1
1.2. BACKGROUND TO STUDY .....	2
1.3. PROBLEM STATEMENT .....	4
1.4. OBJECTIVES .....	4
1.5. LITERATURE REVIEW.....	5
1.6. METHODOLOGY.....	6
1.7. CHAPTER SYNOPSIS.....	7
1.7.1. CHAPTER ONE.....	7
1.7.2. CHAPTER TWO .....	7
1.7.3. CHAPTER THREE.....	7
1.7.4. CHAPTER FOUR .....	7
1.7.5. CHAPTER FIVE.....	8
2. CHAPTER TWO .....	9
2.1. INTRODUCTION .....	9
2.2. SUSCEPTIBILITY OF THE SECURITY OF PROPERTY TO FRAUD .....	10
2.3. THE LAW ON PROPERTY FRAUD .....	12
2.3.1. DOUBLE SALES .....	12
2.3.2. HOW DOES THE LAW RESOLVE SUCH A MATTER FOR THE AFFECTED PARTIES IF TRANSFER HAS NOT YET PASSED? .....	13
2.3.3. SPECIAL CIRCUMSTANCES AFFECTING BALANCE OF EQUITY .....	14
2.3.4. CRIMINAL LIABILITY .....	14
2.4. IMPERSONATION AND FORGERY .....	15
2.5. REMEDY WHICH IS AVAILABLE TO THOSE WHOSE PROPERTY HAS BEEN SOLD FRAUDULENTLY .....	16
2.6. CONCLUSION.....	18
3. CHAPTER 3.....	19
3.1. INTRODUCTION .....	19
3.2. The conveyancing system in Zimbabwe.....	19
3.2.1. Stage 1.....	19
3.2.2. Stage 2.....	19
3.2.3. Stage 3.....	20
3.2.4. Stage 4.....	20

3.3.	WEAKNESSES PRESENTED BY THE CURRENT METHOD OF CONVEYANCING IN ZIMBABWE IN RELATION TO PROPERTY RIGHTS .....	21
3.4.	Vulnerability of the current system to the acts of Fraud .....	21
3.5.	ACCESSIBILITY .....	23
3.6.	PAPER DOCUMENT MANAGEMENT .....	24
3.6.1.	Lack of storage space .....	24
3.6.2.	Prone to damage .....	24
3.7.	THE IMPACT OF THE DEEDS REGISTRIES AMMENDMENT ACT NUMBER 8 OF 2017 .....	25
3.8.	CONCLUSION .....	28
4.	CHAPTER 4.....	29
4.1.	INTRODUCTION .....	29
4.1.1.	Barbados .....	29
4.1.2.	The Netherlands .....	29
4.1.3.	Australia.....	29
4.1.4.	The United Kingdom .....	30
4.2.	CONVEYANCING IN BARBADOS.....	30
4.2.1.	ELECTRONIC CONVEYANCING IN BARBADOS.....	32
4.2.2.	The Barbados System and that of Zimbabwe.....	33
4.3.	CONVEYANCING IN THE NETHERLANDS .....	33
4.3.1.	ELECTRONIC CONVEYANCING IN THE NETHERLANDS .....	34
4.3.2.	Lessons for Zimbabwe .....	35
4.4.	CONVEYANCING IN AUSTRALIA.....	35
4.4.1.	ELECTRONIC CONVEYANCING IN AUSTRALIA .....	37
4.4.2.	Lessons for Zimbabwe .....	38
4.5.	The United Kingdom (England, Scotland and Wales).....	39
4.5.1.	Lesson and Recommendations for Zimbabwe .....	40
4.5.2.	Accessibility of the e-conveyancing system .....	40
4.5.3.	Pilot projects builds stakeholder confidence and buy-in .....	41
4.6.	Conclusion .....	41
5.	CHAPTER 5.....	42
5.1.	Introduction .....	42
5.2.	RECCOMENDATIONS .....	42
5.3.	CONCLUSION.....	45
	BIBLIOGRAPHY .....	46

## **APPROVAL FORM**

The undersigned certify that they have read and recommend to the Midlands State University for acceptance, research project titled AN ANALYSIS OF THE EFFICIENCY AND EFFECTIVENESS OF THE PROTECTION OF PROTECTION OF PROTECTION OF PROPERTY RIGHTS IN ZIMBABWE IN ADVENT OF THE DEEDS REGISTRIES AMMENDMENT ACT NUMBER 8 OF 2017 Submitted in partial fulfilment of the requirements for the Bachelor of Laws Honours Degree.

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## **DECLARATION**

I TABISON KUDZAISHE BVEKWA, do hereby declare that this dissertation is a result of my own investigation and research, save to the extent indicated in the acknowledgment, references and comments included in the body of the research, and that to the best of my knowledge, it has not been submitted either wholly or in part thereof for any other degree at any other University.

...../...../.....

**SIGNATURE DATE**

## **DEDICATIONS**

To my beloved parents Mr Norman Bvekwa and the late Mrs Susan Bvekwa. This is especially dedicated to you Mrs Susan Bvekwa I have fulfilled what I promised you. The Lord had other plans, it would have been a very special event if you could have been in flesh to see what we started coming to pass. I believe you are in his hands and may your soul continue to rest in peace until we meet again. To my father the journey begins.

## **ACKNOWLEDGMENTS**

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# 1. **CHAPTER 1**

## 1.1. **INTRODUCTION**

The right to ownership of immovable property is one of the most important rights regarding property rights. This right comes along with a high expenditure. The protection of this right is one of the core priorities in a state. The property rights are an assessment of the ability of individuals to accumulate private property secured by clear laws that are fully enforced by the state. The methods these rights are acquired and are alienated to a third party are as important as the rights themselves. There is a high risk of being defrauded mostly with immovable property transactions hence the legal framework which governs such an area should be able to protect everyone who is involved in the relevant area.

Transfer of immovable properties in Zimbabwe is conducted through conveyancing. Conveyancing which can be defined as the legal process whereby ownership in immovable property is transferred from one party to another and related aspects such as the registration of mortgage bonds and real rights in respect of immovable property.<sup>1</sup> Ownership in these properties is obtained upon transfer that is when one is said to have obtained real rights to the property in question.<sup>2</sup> The transfer of these properties are regulated by the Deeds Registries Act [Chapter 20:05] and Deeds Registries Regulations.

Ownership of the property is proved by the possession of a Deed of transfer which is proof of ownership of an immovable property. These deeds are kept in the deeds registries office while another is retained by the owner as proof.

Anyone can carry out a deed search in the deeds registries office, this helps to provide information on which deeds are registered to who.

The deeds office is a public office which is accessible by anyone and anyone can make enquiries in that office regarding to anything even if they are not interested parties. This has led to unfavorable situations whereby loss has been experienced regarding properties in the form of fraudulent transfers. The current legal framework is susceptible to high levels of fraudulent activities due to the ability of people to reproduce deeds in the form of copies. This is

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<sup>1</sup>Nel, H. Jones' Conveyancing in South Africa, Juta, 1991

<sup>2</sup> Sackstein NO v Van der Westhuizen en n ander 1996 (2) SA 431 at 432



due to prevalent high levels of corruption. Owners of properties and potential investors have been exposed to a dangerous cancer of deceit in the business area which involves immovable properties.

It defeats the real purpose of registering property in the first place because the rationale behind the system of land registration is to provide an efficient system of registration which is intended on giving security of title to land and rights in land which is not easily accessible to someone else.

## **1.2. BACKGROUND TO STUDY**

The Current Deeds Registries legal framework has failed to protect the unsuspecting owners of properties and innocent buyers who are day in day out being subjected to the tricks of the cunning fraudsters. The high risk is present during the transfer and deeds registries framework.

The Constitution of Zimbabwe (Amendment Number 20) provides for the protection of the right to ownership in section 71, this section in the constitution grants Property rights. Section 71 (2) states that “subject to section 72 every person has the right, in any part of Zimbabwe to acquire, hold, occupy, use, transfer, hypothecate, lease or dispose of all forms of property either individually or in association with others”<sup>3</sup>

The above cited section in the Zimbabwean Constitution places an obligation on the state to protect the rights to ownership in Property. The granting of that right by the Constitution does automatically mean that the state needs to protect the public from the loss of ownership through the state system. The Deeds Registries Act<sup>4</sup> and its Regulations form the basis of the land registration system in Zimbabwe<sup>5</sup>. This means that Zimbabwean legislation recognizes that the transfer of property is a pivotal aspect of the country’s legal system. The system of registration was based on long standing practices and procedures and the position in Zimbabwe is codified in terms of section 19 of the Act which provides for the manner and form of execution of deeds of transfer.

The current system in the deeds registry is facing challenges, and some of them being the registration gap which is the time lag that occurs between

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<sup>3</sup> The Constitution of Zimbabwe (Amendment Number 20)

<sup>4</sup> The Deeds Registries Act [chapter 20:05] shall be referred to in this book as the Act

<sup>5</sup> Mhishi, M. L (2004) A guide to the law and practice of conveyancing in Zimbabwe, LRF, Harare

settlement of sale and registration of title documents. This gives room for priority disputes and fraud. In the absence of a caveat on the title deeds which acts as constructive notice and a bar against alienation of the property, activities such as double sale scenarios increase as the purchaser at this point in time will just have personal rights in the immovable property which flows from the agreement of sale, for it should be noted that rights in an immovable property only become real upon registration.<sup>6</sup> The current system has also seen an escalation in fraudulent activities relating to documents at the Deeds office as the prevalence of fraudsters selling immovable properties on the basis of fake or forged documents is rife. This situation has emerged due to the lack of checks and balances in the deeds office, in other words there must be a verification system to check the identity of the people who wish to transact in the deeds office. In the case of *Chirimuta v Action Property Sales Private Limited*<sup>7</sup> a fraudster impersonated the identity of certain true owners of an immovable property and sold it to the plaintiff who lost her money and only got to discover the fraud when the payment of capital gains tax was due.

The Documents which are mainly the Target are the Special Powers of attorney which are generated to give a fake mandate to sell the Property in question. This has resulted in many cases being brought before the courts with many parties seeking cancellation of title deeds which would have been fraudulently obtained. In the case of *Mafukidze v Mafukidze*<sup>8</sup> which involved a forged power of attorney for the purposes selling an immovable property. The court held that a forged power of attorney can lead to the transfer of an immovable property being declared void.

The above openly shows that accountability is lacking on all the players in the transactions, these include but not limited to the conveyancers, real estate agents and sometimes the buyers themselves. The rise in the loss of money and properties by the public is an urgent issue. There is an urgent need to see to it that properties are protected in terms of enforceable laws which are in the country's legislation books.

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<sup>6</sup> Mhishi M, L. (2004) A guide to the law and practice of conveyancing in Zimbabwe p.16

<sup>7</sup> HH 05/07

<sup>8</sup> HH193/84

The Legislature has drafted the Deeds Registries Amendment Act number 8 of 2017. This Act is amending section 78 of the Deeds Registries Act [Chapter 20:05] to restrict the execution of Powers of attorney only to those witnessed by Legal Practitioners, Notaries public and Justices of the peace. This is doing away with the current position whereby commissioners of oaths and competent witnesses can witness the execution of a power of attorney.

The amendment number 8 to the deeds registries act is adding a part 4 to the Deeds Registries Act which establishes an electronic registry which is to run concurrent with the current paper based system. The establishment of the electronic Deeds registry is what this paper seeks to establish whether it protects the public from loss through Fraudulent activities along with some recommendations on how the system can be improved to make it safer.

### **1.3. PROBLEM STATEMENT**

The current paper based property transfer system is vulnerable to abuse and manipulation. Due to high levels of corruption and economic hardship criminal activity resulting in its manipulation has increased. Conman have been able to bypass the identity process and forging Deeds of Transfer and Powers of attorney. This has exposed the conveyancing laws in this country as not foolproof because fraudsters continue to exploit the weaknesses in the procedure for Registration of transfers to defraud innocent property seekers. Therefore, it is difficult to measure the degree to which a country's laws protect private property rights and the degree to which the government enforces these laws.

### **1.4. OBJECTIVES**

- To analyze the vulnerabilities and limitations of the current system of conveyancing in Zimbabwe,
- To explore the adequateness of the security which is offered on registered property.
- To explore the steps that can be taken to perfect the current system with the electronic registry, as a way of strengthening the protection of private property
- To analyze the strengths and weaknesses of the establishment of the electronic registry in the deeds registration framework,

- To analyze the positive steps and shortfalls of the Deeds Registries Amendment Act number 8 of 2017.
- To give recommendations and conclusions on how best can property ownership be protected in Zimbabwe considering the introduction of the Deeds registries amendment Act number 8 of 2017.

### **1.5. LITERATURE REVIEW**

The issue of the prevalence of fraudulent transfer of properties has not been covered very well in terms of literature in the Zimbabwean jurisdiction. What has however gained some momentum and found attention in literature has been the issue of an electronic registry in the Deeds office to facilitate the Transfer of properties. The adoption of the Electronic Registry has been long overdue and that was the drive towards its adoption. Muir.R<sup>9</sup>, states that after a long and relatively stable history of the paper based system, computerization has completely transformed the way land registration operates. Reference is made to the benefits of an electronic registry which are better security to data, efficiency and expediency in land registration. The efficiency of an electronic registration system has also been corroborated by other authors. Reference will be drawn to, Sandberg.H<sup>10</sup> who stated that the benefits of such a system are enormous and include the saving of cost in Labour and time, introduction of auto-indexing and a better supervision of the registration process. This in total reduces the risk of manipulation of documents which generally results in the production of fake Deeds of Transfer.

Courts have also called for reforms in this area to curb this issue of fraud in the immovable properties market, in the case of *Zavazava and Another vs Tendere and others* the court held that “it would appear that conveyancing laws in this country are not foolproof because fraudsters continue to exploit the weaknesses in the procedure for Registration of transfers to defraud innocent property seekers, the leakages in the system have meant that cases of unlawful transfer of immovable property continue to reach the courts with alarming frequency. There is a pressing need for reforms to be introduced in

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<sup>9</sup> Robbie Muir, E-conveyancing in New Zealand: Progress to date and Future Developments

<sup>10</sup> Sandberg H, E-land Conveyancing and Registration-Visions and Risks

conveyancing rules in order not to only modernize the system, but to also render the system foolproof and hopefully protect property owners”<sup>11</sup>

The sentiments by the court in the above referenced case serve to fortify the notion that the public needs to be protected from this issue of fraudulent transfers and the modernizing of the system will at least make the process less vulnerable.

The modernization of the land registration system as a way of making the system more secure is to be approached with caution. Effective security is the key requirement for all registration processes, Rajasekhar.P pointed out that the computer world is open to hacking and there may be need of a fireproof system to maintain security of data in the deeds office. In the Australian system only, registered subscribers are entitled to use the system on behalf of their clients or on their own behalf.<sup>12</sup> This method means that the registered members who are qualified for the work involved are the only ones who can access the system on behalf of the people they represent this helps to minimize system compromise.

The issue of Powers of Attorney to be Notarized is a matter of great benefit. Notarizing Powers of Attorney serves to reduce the risk of forgery as the office of the Notary public is one of high regard and the documents prepared by a notary public are solemn. This method of transacting protects the public from forgery and it also discourages the forgeries of the documents in that case.

## **1.6. METHODOLOGY**

This is a less explored area in the Zimbabwean jurisdiction thus no textbooks specifically dealing with the issue at hand were obtained. Due to this occurrence, heavy reliance will be placed on articles and recommendations in caselaw as to the effect of protecting the public by modernizing the system and analyzing the amendment. To realize the effectiveness of the Deeds Registries Amendment Act, 2017 a comparative approach with some jurisdictions which have succeeded in establishing an electronic registry will be adopted as a way of establishing how effective the method is as is about to be introduced by the Zimbabwean amendment Act. Secondary sources of

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<sup>11</sup> *Judge calls for property law reform: the chronicle*, published 25 September 2015

<sup>12</sup> Australian Registrars National Electronic Conveyancing Council (2012) *Proposed Electronic Conveyancing National Law*.

data will be consulted, entails utilization of the internet, articles and case law which has dealt with the issues of Fraudulent Transfers and how best can this issue be prevented.

## **1.7. CHAPTER SYNOPSIS**

### **1.7.1. CHAPTER ONE**

Introduces the analysis of the current system of property transfer, it also explores on the current method used in the protection of property rights, the purpose of the Deeds Registries Amendment Act, the background of the problem which has led to the introduction of the Amendment, the problem statement, literature review, research methodology and chapter review.

### **1.7.2. CHAPTER TWO**

The issue of fraudulent property transfers will be presented. Highlighting the challenges which are faced by the current Deeds Registries system and its shortfalls to provide adequate protection of ownership of property. The Chapter will analyze the current legal framework as it stands and the law which applies when one has fallen victim to fraud.

### **1.7.3. CHAPTER THREE**

Focus will be on the weaknesses of the current paper based system and how the Deeds Registries Amendment Act number 8 of 2017 has addressed these issues. Highlighting the benefits and flaws of the Proposed Electronic Registration system and the Notarization of Powers of Attorney as contained In the Amendment Act. The Chapter will also focus on the Strengths and Weaknesses of the amendment in relation to the flaws which are faced by the current land registration system which is leading to the rise in Fraud.

### **1.7.4. CHAPTER FOUR**

A comparative analysis of the system of the propopsed Electronic Registry system with other Jurisdictions in which the system has been fully adopted will be the main focus. The Chapter will also look at the shortfalls the system is likely to face and the Challenges which are related to such a system as contained in the Amendment and its effectiveness ion curtailing the problem of inadequacy leading to the Fraudulent transfer of Property and how the public can be protected. The Chapter shall also analyze the problems and lessons learnt in Jurisdictions with fully functional Electronic Land Registration

systems. The chapter's main objective will be looking at how the electronic registry will help in protecting ownership.

#### **1.7.5. CHAPTER FIVE**

This Chapter will focus on the recommendations on how to protect the public effectively from the loss of ownership of their property through the perspective of the proposed amendment as contained in the Deeds Registries Amendment Act number 8 of 2017.

## **2. CHAPTER TWO**

### **2.1. INTRODUCTION**

The issue of property fraud has been on the rise and has been left unchecked and whether the current system is adequate in providing security for property owners. This chapter specifically serves to outline what is property fraud and how it is perpetrated in the current conveyancing system. The chapter will also deal with the issue of the law relating to the fraudulent sales of immovable properties.

This chapter aims to explain the methods used to conduct the fraudulent activities which involve immovable property which then results in then loss of property. The chapter relates to the law relating to ownership of immovable properties and how this ownership is threatened by various acts of different people involved in the business.

Ownership on its own can be defined under common law as

“the most complete right a person can have about a thing. The point of departure is that a person, as far as an immovable is concerned, can do on and with his property as he likes. However, this apparently unlimited freedom is only partially true. The absolute entitlements of an owner exist within the boundaries of the law. The restrictions can emerge from either objective law or from restrictions placed upon it by the rights of others. For this reason, no owner ever has the limited right to exercise his entitlements in absolute freedom and in his own discretion.”<sup>13</sup>

The above quotation brings out clear the point that ownership should be the most secure and definite degree of security on one’s property which they own. The only way it can be taken away from the is either by them wanting it to be taken away through ways such as donation and sale. The other way will be through forced sales for them to fulfil their obligations. These are the only ways one can be deprived of their ownership.

The act of fraud in Zimbabwe is defined as “any person who makes a misrepresentation

- a. Intending to deceive another person or realising that there is a real risk or probability of deceiving another person and

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<sup>13</sup> Gien v Gien 1979 (2) SA 1113 (T)



- b. Intending to cause another person to act upon the misrepresentation to his or her prejudice or realising that there is a real risk or probability that another person may act upon this misrepresentation to his prejudice”<sup>14</sup>

## **2.2. SUSCEPTIBILITY OF THE SECURITY OF PROPERTY TO FRAUD**

Bogus estate agents are going around identifying properties whose registered owners are either in the rural areas or in the diaspora. After identifying targeted properties, they take photographs and videos and then make advertisements either in the local newspapers or internet to fleece unsuspecting victims. They further draft fake title deeds and fraudulent power of attorneys to authorise sale of the property they would have targeted.<sup>15</sup>

The above is an illustration of Fraudulent sales are made to pass. The process is a well calculated one which is meant to make the properties security weak.

In an article published in the Chronicle it was stated that “according to statistics, 38 cases of Fraud were reported in the city with 20 of them involving houses”<sup>16</sup> The registration system of properties is susceptible to Fraud. There are two main methods which are used by fraudsters to perpetrate fraud forgery and impersonation are the most common ones.

It has been noted that “Human ingenuity forms the basic ingredient of fraud and the variety of schemes is limited only by the imagination of the person carrying it out”.<sup>17</sup> The current paper based system which is still being used is vulnerable to various forms of Fraud. Fraudsters can dodge the securities that are provided by the Deeds Registries Office. The manual examination of deeds<sup>18</sup> is a mechanism which is designed to curtail the fraudulent activities however it is not enough.

If the security was sufficient the Registrar should be alerted to any fraudulent changes and alterations made to the records of the deeds concerned because the

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<sup>14</sup> Criminal Law (Codification and reform) Act [Chapter 9:23]

<sup>15</sup> Bogus Property sellers on the prowl, The Sunday mail published 29 March 2014.

<sup>16</sup> “House fraud cases spike, Cops issue warning” The Chronicle, Published 05 October 2016.

<sup>17</sup> Moskoff F, Fraud: AN overview (1981) at p23

<sup>18</sup> Section 5 of the Deeds Registries Act

changes will be noticeable to the registrar.<sup>19</sup> The safeguards which are currently in place are inadequate and people are still able to perpetrate fraud.

The owner's ability to hold title securely is highly compromised by the fraudulent activities which are threatening the system. In the case of *Stupendis Enterprises private Limited v Kasi and Others*<sup>20</sup> the case involved a forged power of attorney giving authority to pass transfer to an innocent third party, the Court in this matter drew precedent from the case of *Mafukidze v Mafukidze*<sup>21</sup> which case held that a forged power of attorney can lead to a transfer of an immovable property being declared void, in the main matter the transfer in the purchaser's favour was cancelled and a bond in favour of the building society was also cancelled.

The case above shows that people can make use of power of attorney's and forge them as a way of making transfer of immovables fraudulently. Another form of fraud to take note of impersonation of the identity of the lawfully owner of title to an immovable property. Courts have expressed concerns over this kind of behaviour by fraudsters and have tried to resolve the issues. The case of *Chirimuta v Action Property Sales Private Limited*<sup>22</sup>, the issue involved an agreement of sale which was entered by the parties. The parties did not meet at any material time during the negotiation of this sale, the purchaser only was alerted of the fraudulent nature of the transaction through her conveyancer who informed her that the title deeds were not real, and the seller was a fraudster. The court held that the defendant had breached a duty of care, skill and diligence they owed to the Plaintiff for the Delict committed by its fraudulent principal.

Another way fraud is perpetrated is due to the unnecessarily long registration gap. The process of passing title on immovable property in Zimbabwe is not instant. Registration is done later whilst the settlements of payment would have already been concluded. This creates a registration gap, which can be defined as the time between settlement of transaction and the registration of documents to confirm such

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<sup>19</sup> S Christensen: - Electronic Land Dealings in Canada New Zealand and the United Kingdom: Lessons for Australia (2004) VOL 11 *Murdoch University Electronic Journal Law* 78 and 80

<sup>20</sup> HH 72/12

<sup>21</sup> HH193/84

<sup>22</sup> HC871/05

a transfer.<sup>23</sup> This period is the time when the property is most vulnerable to Fraud and priority disputes. The purchaser at this stage only has an unregistered interest which is not real yet.

In the case of *Sackstein NO v Van der Westhuize en n ande*<sup>24</sup> it was stated that personal rights are transferred at the conclusion of the sale contract of immovable property and the transfer of real rights takes place upon registration of the transfer.<sup>25</sup> The Zimbabwean courts have also stated their position on that aspect, In The case of *Machiva v Commercial Bank of Zimbabwe*<sup>26</sup> in which the court held that the Purchaser does not become owner until transfer has taken place and until that time he only has personal rights against the seller. The case of *Chapeyama v Chapeyama*<sup>27</sup> also held the same view regarding transfer of title in view of real and personal rights.

These cases illustrate how the security of property is compromised during the registration process. The registration gap causes such vulnerability to occur. The process is circumvented by cunning fraudsters who are in nature daring. Also on its own the process is not fool proof.

### **2.3. THE LAW ON PROPERTY FRAUD**

As a way of trying to secure people's property the law was enacted and it criminalised fraud under section 135 of the Criminal Law (codification and Reform) Act [Chapter 9:23]

#### **2.3.1. DOUBLE SALES**

The starting point is on the issue of double sales, A double sale occurs where a seller has fraudulently sold his/her immovable property to two different buyers and both buyers paid the full purchase price for the property. An example will be “**A** sells a house to **B** and thereafter sells the same house to **C**”

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<sup>23</sup> S. Riley, 'The Electronic age: Virtual Conveyancing and the Torrens title system' (2005) University of Technology Sydney at 10.

<sup>24</sup> 1996 (2) SA 431

<sup>25</sup> *Sackstein NO v Van der Westhuize en n ande* 1996 (2) SA 431 at 432

<sup>26</sup> 2000 (1) ZLR 302

<sup>27</sup> 2000 (2) ZLR 103 (S)

### **2.3.2. HOW DOES THE LAW RESOLVE SUCH A MATTER FOR THE AFFECTED PARTIES IF TRANSFER HAS NOT YET PASSED?**

The correct legal position in double sales was stated by McNally JA in *Guga vs. Moyo & Others*<sup>28</sup> had this to say,

*“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 from the seller, which is usually small comfort. But the rule applies only ‘in the absence of special circumstances affecting the balance of equities.’”*<sup>29</sup>

When the second purchaser is entirely ignorant of the claims of the first purchaser, and takes transfer in good faith and for value, his real right cannot be disturbed. Where a double sale has occurred, and the second buyer has obtained transfer of the property, the first buyer may seek an order for the second buyer to transfer the property to him/her because the second buyer had knowledge of the first sale before transfer of the property was registered in the second buyer’s name. The second purchaser’s real right can and normally will be overturned subject to considerations of practicality.

In the case of *Chimphonda v Rodriguez & ors*<sup>30</sup> in which the seller had fraudulently sold her immovable property to two different buyers. Both buyers paid the full purchase price for the property. The second buyer had obtained transfer of the property to it. The first buyer sought an order that the second buyer transfer the property to him because the second buyer had knowledge of the first sale before transfer of the property was registered in the second buyer ‘s name.

Robinson J Held that,

“in a double sale situation, the second buyer has knowledge of the first sale of the property, either at the time of the sale or at the time it took transfer of the property, then, unless there are special circumstances affecting the balance of equities, the first buyer can recover the property from the second buyer. In such an instance, the second buyer ‘s only remedy is an action for damages against the seller. In deciding whether there are special circumstances affecting the balance of equities, the court must bear in mind that

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<sup>28</sup> 2000 (2) ZLR 458

<sup>29</sup> *Guga vs. Moyo & Others* 2000 (2) ZLR 458 at 459

<sup>30</sup> 1997 (2) ZLR 63

the primary right of the wronged buyer is the remedy of specific performance which will be granted unless there is some equitable reason disqualifying him from obtaining such relief<sup>31</sup>

The crux of the matter is not whether the first purchaser can prove that the second purchaser had acted fraudulently regarding its purchase of the property but whether, after agreeing to purchase the property but before the property was transferred to it, the second purchaser had notice or knowledge of the prior existing sale of the property to the first purchaser. If the first purchaser can prove that the second purchaser had such notice or knowledge, then this would favour the first purchaser's claim to the property in the absence of special circumstances affecting the balance of equities.

### **2.3.3. SPECIAL CIRCUMSTANCES AFFECTING BALANCE OF EQUITY**

Special circumstances affecting the balance of equity will include mortgage bonds, caveats or other encumbrances registered against the property by the second purchaser. Whether the second purchaser has spent money repairing or making improvements to the property. Whether complete transfer of the property has occurred and so forth. In deciding whether there are special circumstances affecting the balance of equities, the court bears in mind that the primary right of the wronged buyer is the remedy of specific performance which will be granted unless there is some equitable reason disqualifying him from obtaining such relief.

### **2.3.4. CRIMINAL LIABILITY**

There are two instances where parties to a double sale may face criminal charges: -

- a. A seller who receives money from two purchasers whether he has informed one of the parties or not commits the crime of fraud. The fact that the seller has misrepresented facts to one of the parties is enough for him to be charged with fraud.
- b. A second purchaser who knowingly and with intent to defraud the first purchaser takes transfer. His real right can and normally will be overturned subject to considerations of practicality. In effect, the second purchaser is bound by the rights of the first purchaser in the property, and it is a species of fraud on his part if he attempts to defeat those rights. It is not necessary to

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<sup>31</sup>1997 (2) ZLR 63 at 65

prove any intention to frustrate the rights of the first purchaser. The mere fact that the second purchaser is aware of the existing rights and nevertheless continues to enforce his own rights, and thereby defeats or infringes the earlier rights, constitutes a species of fraud upon the first purchaser.

#### **2.4. IMPERSONATION AND FORGERY**

Nearly all property fraud involves dishonest parties posing as property professionals. This is the trap which lures unsuspecting buyers into contracting with these fraudsters. It also leads us to the issue of impersonation and forgery of title deeds and power of attorneys.

A Power of Attorney is a written authorization to represent or act on another's behalf in private affairs, business, financial or some other legal matters. In the case of immovable properties, one needs to sign a special power of attorney. Before the enactment of the deeds registries amendment a special power of attorney could be signed before a commissioner of oaths.

In the case of *Stupendis Enterprises private Limited v Kasi and Others*<sup>32</sup> the case involved a forged power of attorney giving authority to pass transfer to an innocent third party, the Court in this matter drew precedent from the case of *Mafukidze v Mafukidze*<sup>33</sup> which case held that a forged power of attorney can lead to a transfer of an immovable property being declared void, in the main matter the transfer in the purchaser's favour was cancelled and a bond in favour of the building society was also cancelled. The case above shows that people can make use of power of attorney's and forge them as a way of making transfer of immovables fraudulently.

Another form of fraud to take note of impersonation of the identity of the lawfully owner of title to an immovable property. Courts have expressed concerns over this kind of behaviour by fraudsters and have tried to resolve the issues. The case of *Chirimuta v Action Property Sales Private Limited*<sup>34</sup>, the issue involved an agreement of sale which was entered by the parties. The parties did not meet at any material time during the negotiation of this sale, the purchaser only was alerted of the fraudulent nature of the transaction through her conveyancer who

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<sup>32</sup> HH 72/12

<sup>33</sup> HH193/84

<sup>34</sup> HC871/05

informed her that the title deeds were not real, and the seller was a fraudster. The court held that the defendant had breached a duty of care, skill and diligence they owed to the Plaintiff for the Delict committed by its fraudulent principal.

This shows that the conveyancing laws in Zimbabwe are questionable in terms of protecting the security of title from fraudsters. *Cosmas Luckyson Zavazava and Vongai Zavazava vs Jonah Tendere and Tendai Idzai Anania Tendere and Thermo-Dynamics Real Estate and the Registrar of Deeds NO* <sup>35</sup> the court had this to say;

“It would appear that conveyancing laws of this country are not fool proof because fraudsters continue to exploit the weaknesses in the procedure for registration of transfers to defraud innocent property seekers. The leakages in the system have meant that cases of unlawful transfers of immovable property continue to reach the courts with alarming frequency”.

## **2.5. REMEDY WHICH IS AVAILABLE TO THOSE WHOSE PROPERTY HAS BEEN SOLD FRAUDULENTLY**

Though the protection of one’s right to ownership on property is highly compromised the law still protects those who would have fallen victim to that scam. When one has a right of ownership to a property they are protected by the law hence ownership is jealously guarded.

Where property is transferred without one’s knowledge the position of the law in that regard is aptly stated by the learned author R H Christie in the following words;

“An owner whose property has been sold and delivered without his consent remains the owner, as the seller cannot pass ownership that was not his. The true owner can bring a vindicatory action to recover his property from anyone, including a bona fide buyer in whose hands he finds it. The general rule that the seller can give no better title than he has operates in favour of the true owner, unless the purchaser proves that the true owner is estopped from denying the seller’s authority to sell”. <sup>36</sup>

The above shows that a vindicatory action is the best that one can institute for the recovery of their property which they would have lost to Fraudsters. McNally JA

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<sup>35</sup> HH 740-15

<sup>36</sup> , *Business Law in Zimbabwe*, 2<sup>nd</sup> Ed, Juta & Co Lt at page 149-150.

developed that point further in *Mashave vs Standard Bank of South Africa Ltd*<sup>37</sup> when he pronounced:

“The Roman-Dutch law protects the right of an owner to vindicate his property, and as a matter of policy favours him against an innocent purchaser. See for instance *Cheity vs Naidoo* 1974 (3) SA 13 (A) at 20 a-c. The innocent purchaser’s only defence is estoppel”.<sup>38</sup>

The standing point in all these cases is that one cannot transfer rights that he does not possess. The *nemo dat quod non habet and nemo plus iuris and alium transferre potest quam ipse habet*, that is, no one can give what he does not have, and no one can transfer any right greater than he himself possesses are firmly rooted in our legal science. Therefore, where a person who is not the owner and possesses no mandate to do so purports to transfer property, such transfer is a nullity<sup>39</sup>

The *action rei vindication* is available to the owner whose property is in the possession of another without his authority or consent. Its concept is that an owner cannot be deprived of his property against his will. Such owner is entitled to recover the property from any person who is in possession of it without his consent. All the owner is required to prove is that he is the owner and that the property is in the possession of another at the commencement of the action.

Proof of ownership shifts the onus to the possessor to prove a right of retention, this position was outlined in the case of *Jolly v A Shannon & Anor*<sup>40</sup> in which the court held that;

“The principle on which the *actio rei vindicatio* is based is that an owner cannot be deprived of his property against his will and that he is entitled to recover it from any person who retains possession of it without his consent. The plaintiff in such a case must allege and prove that he is the owner of a clearly identifiable movable or immovable asset and that the defendant was in possession of it at the

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<sup>37</sup> 1998 (1) ZLR 436 (S)

<sup>38</sup> 1998 (1) ZLR 436 (S) at 438

<sup>39</sup> Silberberg and Schoeman; *The Law of Property*, 2<sup>nd</sup> ed, p 72.

<sup>40</sup> 1998 (1) ZLR 78



commencement of the action. Once ownership has been proved its continuation is presumed.”<sup>41</sup>

Therefore, in such unfortunate cases that one has lost their property to fraudsters they can make use of the remedy of rei vindicatio. The cases above clearly states that ownership cannot just be taken away from its lawfully entitled person and the law protects ownership.

## **2.6. CONCLUSION**

It is apparent from the above that property fraud is rife. The law protects the owners of properties which would have been fraudulently sold. The law however does not prevent the fraudulent transfer of properties in the first place. This raises questions on the effectiveness and adequateness of the laws which relates to the protection of property rights. Though one can be protected after approaching the courts it is however well known that litigation is expensive to initiate and sustain. Hence it can be said that one needs to have an analysis of the laws relating to the protection of property rights in Zimbabwe and ascertain whether they are adequate to enable safe protection of title.

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<sup>41</sup> 1998 (1) ZLR 78 at 88

### **3. CHAPTER 3**

#### **3.1. INTRODUCTION**

The issue of property fraud has been on the rise the pervious chapter dealt with law relating to fraudulent dealings in property. The courts have recommended that there be an improvement to the conveyancing laws to ensure more protection to the title holders. This chapter aims to analyse the system of property rights protection in Zimbabwe. The chapter will analyse the efficiency and effectiveness of the property rights protection laws in Zimbabwe. The chapter will analyse the current mode of transfer and will venture into the changes that have been brought about by the introduction of the Deeds Registries Amendment Act. A procedure of the steps involved in the registration of immovable property in Zimbabwe under circumstances where there are no disputes as to the ownership of the property which is subject to transfer.

#### **3.2. The conveyancing system in Zimbabwe**

##### **3.2.1. Stage 1.**

Upon settlement of transfer fees, the seller engages a conveyancer who drafts a proposal deed of transfer in duplicate deriving the authority to act from the agreement of sale. The capability of the seller to facilitate alienation of the immovable property is achieved through the engagement of the services of a registered conveyancer. A power of attorney grants the power to a conveyancer to appear before the registrar of deeds to pass transfer. In drafting the proposal deed of transfer, the conveyancer refers to the deed from the seller and other information from the deeds office. The deed of transfer conveys the real right of ownership where such right has been originally granted<sup>42</sup>. At this stage a search of the property is conducted by the conveyancer at the deeds office.

##### **3.2.2. Stage 2.**

An application for the Rates Clearance Certificate to the local authority under whose jurisdiction the property falls is made by the seller through his

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<sup>42</sup> Section 14 of the Act

conveyancer<sup>43</sup>. The local authority will provide an assessment of how much is payable by way of advance rates and outstanding rates. These rates are paid by the purchaser as a pro forma costs which will then be returned by the seller on the date of transfer for the advance rates paid calculated on pro-rata basis from the date of payment to date of transfer.

### **3.2.3. Stage 3.**

An application for the Capital Gains Tax is made which is assessed by the Zimbabwe Revenue Authority (ZIMRA)<sup>44</sup>. Capital Gains Tax is a percentage of the residual value after making deductions from the gross selling price of certain allowances and inflationary adjustments<sup>45</sup>. The Registrar of Deeds can only register a transfer of immovable property on production to him of proof that Capital Gains Tax has been paid<sup>46</sup>. In the case of *Givemore Sambadzi & Anor v Registrar of Deeds*<sup>47</sup> In this case the applicant had purchased a certain immovable property but could not get transfer effected into his name because a caveat had been placed on the property by another party on the basis that the said property belonged to his minor children and had been fraudulently sold by his wife. Certain discrepancies were noted including that there was no consent from the master, no capital gains tax certificate had been issued, a discrepancy in the rates clearance certificate and that the title was not following the sequence of relative causes. Based on these discrepancies, the application of the plaintiff was dismissed, and transfer restored to the two minor children.

### **3.2.4. Stage 4.**

Transfer documents are then lodged with the Registrar of the Deeds Office for examination and registration. The stamp duty and registration fee are paid upon lodging at the Deeds Office. Declarations are then submitted by the parties indicating the value of the property and the improvements thereon<sup>48</sup>. If there are no mistakes or the mistakes have been rectified, the deed is

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<sup>43</sup> Section 109 of the Rural District Councils Act [chapter 29:13] and section 282 of the Urban Councils Act [chapter 29:15] prohibits the registration of transfer or of a consolidated or registered title before a rates clearance certificate is issued.

<sup>44</sup> ZIMRA is a body corporate established in terms of the Revenue Authority Act [ Chapter 23:11]

<sup>45</sup> M.L. Mhishi, A guide to conveyancing in Zimbabwe page 69

<sup>46</sup> HH 333/13.

<sup>47</sup> *ibid*

<sup>48</sup> Section 28 Of the Act

registered by the Registrar of Deeds or by his or her designate. A copy of the deed is filed in the Deeds Office and another copy is sent back to the conveyancer for onward transmission to the new property owner.

### **3.3. WEAKNESSES PRESENTED BY THE CURRENT METHOD OF CONVEYANCING IN ZIMBABWE IN RELATION TO PROPERTY RIGHTS**

The registration system of property in Zimbabwe is the doorstep for the perpetration of Fraud in Zimbabwe. The process requires a change in the way in which it is done. There are competing interests which need to be addressed to ensure security. The issues of expediency and efficiency of paramount importance. There is an increased demand for security to match with the ways in which modern day fraud is being committed. The importance of the conveyancing laws was emphasized by the high court due to the alarming rates at which the conveyancing system is facing.

The High court in the case of *Cosmas Luckyson Zavazava and Vongai Zavazava vs Jonah Tendere and Tendai Idzai Anania Tendere and Thermo-Dynamics Real Estate and the Registrar of Deeds NO* <sup>49</sup> expressed concern and had this to say;

“It would appear that conveyancing laws of this country are not fool proof because fraudsters continue to exploit the weaknesses in the procedure for registration of transfers to defraud innocent property seekers. The leakages in the system have meant that cases of unlawful transfers of immovable property continue to reach the courts with alarming frequency”.

The conveyancing system requires attention.

### **3.4. Vulnerability of the current system to the acts of Fraud**

The current system which is under usage before the introduction of the amendment to the deeds registries act has been the paper based system. As mentioned earlier in the previous chapter this system has been subject to heavy manipulation by fraudsters. This is because the safeguards which are there to prevent the commission are not adequate. There is no automatic way or an immediate way to tell whether someone has tampered with the deeds which are lodged in the deeds registries office it is difficult to establish such.

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<sup>49</sup> HH 740-15

the first issue is the system incapability to protect against fraudsters who forge documents which are used in the transfers of immovables. The owner's ability to hold title securely is highly compromised by the fraudulent activities which are threatening the system. In the case of *Stupendis Enterprises private Limited v Kasi and Others*<sup>50</sup> the case involved a forged power of attorney giving authority to pass transfer to an innocent third party, the Court in this matter drew precedent from the case of *Mafukidze v Mafukidze*<sup>51</sup> which case held that a forged power of attorney can lead to a transfer of an immovable property being declared void, in the main matter the transfer in the purchaser's favour was cancelled and a bond in favour of the building society was also cancelled.

The first is the forging the power of attorney which is a requirement when one intends to pass transfer. The above case clearly shows how the fraudsters can deprive people of their hard-earned resources through these acts of Fraud. The case in point also serves to prove that the system is inadequate in that it is not able to guard against such malicious and deceitful activity which is perpetrated by the fraudsters. The System lacks on identification methods to ensure that people cannot forge such signatures.

The issue of forging title deeds and impersonation also comes into consideration. It is worrying to note that one can be able to impersonate the identity of another so that they are able to make transfer of their property. Bogus estate agents are going around identifying properties whose registered owners are either in the rural areas or in the diaspora. After identifying targeted properties, they take photographs and videos and then make advertisements either in the local newspapers or internet to fleece unsuspecting victims. They further draft fake title deeds and fraudulent power of attorneys to authorise sale of the property they would have targeted.<sup>52</sup>

The case of *Chirimuta v Action Property Sales Private Limited*<sup>53</sup> had an opportunity to deal with fraud which had been perpetrated by bogus real estate agents, the case involved an agreement of sale which was entered by the parties. The parties did not meet at any material time during the negotiation of this sale, the purchaser only was

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<sup>50</sup> HH 72/12

<sup>51</sup> HH193/84

<sup>52</sup> Bogus Property sellers on the prowl, The Sunday mail published 29 March 2014.

<sup>53</sup> HC871/05

alerted of the fraudulent nature of the transaction through her conveyancer who informed her that the title deeds were not real, and the seller was a fraudster. The court held that the defendant had breached a duty of care, skill and diligence they owed to the Plaintiff for the Delict committed by its fraudulent principal.

The court had to come to the rescue after a diligent conveyancer had noticed these discrepancies and this matter was therefore brought to court.

The other issue goes with the issues of double sale scenarios which are most rife during the registration gap. This is because now this property has an owner and a purchaser who has a competing interest. Registration is done later whilst the settlements of payment would have already been concluded. This creates a registration gap, which can be defined as the time between settlement of transaction and the registration of documents to confirm such a transfer.<sup>54</sup> At this stage the purchaser does not have any real rights vested in him therefore all they have are personal rights. Real rights are attained when transfer has passed completely.

In the case of *Sackstein NO v Van der Westhuize en n ande*<sup>55</sup> it was stated that personal rights are transferred at the conclusion of the sale contract of immovable property and the transfer of real rights takes place upon registration of the transfer.<sup>56</sup> The Zimbabwean courts have also stated their position on that aspect, In The case of *Machiva v Commercial Bank of Zimbabwe*<sup>57</sup> in which the court held that the Purchaser does not become owner until transfer has taken place and until that time he only has personal rights against the seller. This is where the problem comes in that the process to register an immovable takes time and during all this time a property is vulnerable to fraud. The current system as it stands also faces other problems which might create problems on the security of property.

The paper based system has its own disadvantages which will be explained below.

### **3.5. ACCESSIBILITY**

Zimbabwe's deeds registries department has a centralized system where there are only two deeds offices in the country, one at Harare and the other one at

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<sup>54</sup> S. Riley, 'The Electronic age: Virtual Conveyancing and the Torrens title system' (2005) University of Technology Sydney at 10.

<sup>55</sup> 1996 (2) SA 431

<sup>56</sup> *Sackstein NO v Van der Westhuize en n ande* 1996 (2) SA 431 at 432

<sup>57</sup> 2000 (1) ZLR 302

Bulawayo<sup>58</sup>. This setup means that conveyancers in rural and remote areas must travel long distances to either conduct an enquiry<sup>59</sup> or register a deed and the effect is that clients must incur more costs for the travelling expenses of the conveyancers. The problem is worsened by the power of the registrar in exercising his discretionary powers on examination in which he can raise a query on a document and this means that several lodgments will be done whilst increasing financial stress on the client<sup>60</sup>.

### **3.6. PAPER DOCUMENT MANAGEMENT**

The transfer of property is a paper intensive process and it follows that the management of documents requires a structure to warrant that information is filed, found expediently. Currently the Deeds Office is employing the use of folios, filing cabinets and indexing rods and its main challenge of the cabinet filing system is the time it takes to access a file which increases risk of illegal activities. Finding and retrieving a document using a paper-based system is slow whilst the re-filing process poses a risk of misplacement of the files. The specific problems associated with paper documents management include:

#### **3.6.1. Lack of storage space**

Title deeds storage can take up a substantial amount of space, and the need for space gets bigger as the number of documents grows.

#### **3.6.2. Prone to damage**

There is a real risk that the office and its documents can be damaged by natural disasters such as floods or fire<sup>61</sup>. A fire could also wipe out onsite archives. It also follows that documents can also be damaged from the wear and tear of regular handling.

The above is the system which was operational before the introduction of the Deeds registries amendment bill of 2016 which was later signed into law and will be referred to as the Deeds Registries Amendment Act of 2017. This Act was a response to the problems which were brought about by the old system of our conveyancing laws which was highly compromising the security and protection of the right to ownership.

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<sup>58</sup> Section 3 (1) of the Act

<sup>59</sup> Section 9 of the Act

<sup>60</sup> Section 5 (b) of the Act

<sup>61</sup> The Hansard of 9 June 2004 at page 35 states that the Electra House which houses the deeds office is built on the rivulet of Mukuvisi and when it rains it collects water on the ground floor thereby destroying documents.

Hence the paper system was a weak form of conveyancing system and was very prone to fraud.

### **3.7. THE IMPACT OF THE DEEDS REGISTRIES AMMENDMENT ACT NUMBER 8 OF 2017**

This act was a reaction to the problems being faced in the immovable properties sector in which properties are being fraudulently transferred leading to loss of property and costly litigation. The Act seeks to amend section 78 of the principal Act<sup>62</sup> to restrict the execution of powers of attorney only to those witnessed and signed by a legal practitioner, notary public or justice of the peace in the presence of the person executing the power of attorney. Attestations of such powers by "competent witnesses" or commissioners of oaths will no longer be competent for deeds registry purposes.

Furthermore, amendments will permit the digitisation of the deeds registry and the eventual establishment of an electronic deeds registry which will supplement the paper-based one, thereby greatly expediting and facilitating deeds registry administration. Access to the electronic registry for information-gathering and conveyancing work or notarial practice will be subject to certain safeguards against fraud, violations of privacy and other abuses.

The new Act has introduced the electronic registry in the country however this will work together with the paper based system. Of importance also is the amendment of section 78<sup>63</sup> which states that commissioners of oath are no longer competent witnesses when it comes to the signing of Powers of Attorney Only Notaries public and justices of the peace can be competent witnesses can be competent witnesses. This is very progressive in that fraud is perpetrated less with the involvement of Notaries public in the signing of powers of attorney. The office of the notary public is attached with great importance and documents executed by a notary public are regarded highly. The significance of having documents notarialy executed flows from the high nature of the office and duties of the notary public.

There is a tradition of honesty and reliability attached to the office of the notary public. Legal Practitioners and notaries take oaths of allegiance to Zimbabwe promising to be honest, candid, fair and truthful in the execution of their duties. This

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<sup>62</sup> Deeds Registries Act [Chapter 20.05]

<sup>63</sup> Deeds Registries Act [Chapter 20.05]



was reiterated in the South African case of *Incorporated Law Society Transvaal v Kuype*<sup>64</sup> where the court held that

‘The office of a notary is not only of very great antiquity but one of the highest importance and responsibility...the greatest confidence and trust is reposed in any document by a notary. A notarial deed seems to me to be a document of such great moment that one may call it a solemn document, all solemnities should be observed’. This tradition of honesty and reliability therefore makes notarialy executed documents important.’<sup>65</sup>

The involvement of Notaries public will reduce the risk of Fraudulent alteration or forgery of powers of attorney.

The Deeds Registries Amendment Act number 8 of 2017 introduces chapter 4 to the Act which establishes the electronic registry. The registry is not yet established but on its establishment, it has its own advantages and improvements to the current system. The establishment of the electronic registry will bring with it some advantages and security to that effect. The e-conveyancing network cannot be accessible to all for security purposes hence should be limited to a few users. A person may only have access to the network under authority given by Registrar through a network access agreement.<sup>66</sup> The act provides for the suspension of errant members which is a safeguard against abuse of the system.

The act introduced digital signatures which means that hacking and account interference will be limited. This reduces the risk of abuse and fraud in that a specific person is liable for their own logging in and signatures. Digital signatures are a safe measurer of avoiding fraud in the deeds office.

The electronic system significantly reduces the registration gap by many days to maybe minutes. One of the complaints that people have with the current paper-based conveyancing system is the amount of time it takes for a conveyancing transaction to be completed. There are a lot of manual steps involved in the current system which could be greatly speeded up if an e-conveyancing system was to be operational. Therefore, the benefit of establishing an e-conveyancing system is that it

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<sup>64</sup> 1925 TPD 780 TPD

<sup>65</sup> ibid

<sup>66</sup> Section 93 of the Deeds Registries amendment act, which states that one should apply first to be a registered user

would greatly reduce the amount of time taken by conveyancers to complete each step of the conveyancing process required of them, and lessen the amount of information requiring verification as the system would be able to check certain details automatically. To add on, Errors with the deeds would most likely to be identified at an early stage and consequently there would be no delay in the entire conveyancing process. This also reduces the risk of fraudulent activity.

Additionally, the Deeds Office is also responsible for aiding the courts by reporting on applications made to court in cases of disputes over land or interests in land<sup>67</sup> and provides the public with information pertaining to title deeds and any other documents which are kept in the registry<sup>68</sup>, it then follows that the introduction of e-conveyancing within the Deeds registry framework would increase the speed at which the information can be retrieved. Where there is expediency crime is less.

The e-conveyancing process is fortified by central principles of prior authentication of the client's identity. Strong levels of security accompanying e-signatures and the verification process guarantee against signatures<sup>69</sup> and documents being falsified for instance the use of finger print system<sup>70</sup>. It therefore means that the use of e-signature incorporates essential security features ordinarily related with the role of a witness. It therefore follows that it provides an added level of security thereby reducing chances of fraud and forgery. Authenticated access provided by Network Access Agreement serves to protect the confidentiality and integrity of documents and communications within the portal and this would ensure higher levels of technical security<sup>71</sup>.

There is a propensity of document losses or misfiling at the Deeds registry. Therefore, with an introduction of an e-conveyancing system, there is far less likelihood of documents going missing or being damaged due to poor storage facilities. Electronic documents are not prone to the risks of destruction, damage or theft that apply to paper documents, and once created and backed up, electronic

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<sup>67</sup> Hansard of 9 June 2004 at page 33

<sup>68</sup> *ibid* at page13

<sup>69</sup> Section 94 of the Deeds Registries Amendment Act.

<sup>70</sup> Sophie Riley, *The Electronic Age: Virtual Conveyancing and the Torrens Title System*, University of Technology Sydney at page 8

<sup>71</sup> The Law Society of England: *The E-Conveyancing Taskforce* 20 July 2009, Chancery, London

documents last essentially forever. The only problems which might arise relate to system failure, but this can be cured with a backup

### **3.8. CONCLUSION**

Its apparent that the deeds registries system which is being currently used in Zimbabwe is inadequate it does not provide sufficient protection of property rights. Lawful holders of title have a risk in which they may face situations where they may lose their properties. The deeds registries amendment Act number 8 of 2017 has introduced safeguards such as notarized powers of attorney, the securities which also comes in handy if property rights protection is concerned. The new system is visible as one which will improve the protection of ownership.

## **4. CHAPTER 4**

### **4.1. INTRODUCTION**

This chapter examines the existing conveyancing systems of four countries that have embarked on a journey to roll out an electronic system to convert the paper-based property registrations to an electronic-based registration process. The Netherlands, Australia, United Kingdom and Barbados have been specifically selected because they have undertaken innovative land administration exercises and there have been important project interventions in conveyancing. The following is an overview why each of the four countries was selected.

#### **4.1.1. Barbados**

In Barbados the title of ownership is backed by Government. Therefore, Barbados follows a positive system of registration. Barbados also implemented an electronic system to process and manage their title transfers, but it is not used consistently throughout the country. All the information placed into the electronic system still must be assessed manually.

#### **4.1.2. The Netherlands**

The Netherlands operates on a negative system of registration. In the Netherlands, the land registration and the cadastre are combined into one organisation. Currently all cadastral maps are in digital format. The Land Register was computerised in 1999. Notaries lodge all title transfers.

#### **4.1.3. Australia**

In Australia, the state guarantees that the deeds registry is correct which means that Australia operates on a positive land registration system. Each state in Australia used to use its own conveyancing system. An end-to-end electronic system was built by the Government of Victoria to submit title transfer lodgements electronically. It has currently been modified to become a National Electronic Conveyancing System.<sup>72</sup>

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<sup>72</sup> Clark, E. 2011. E-conveyancing in Australia: An important step along the journey to E-government [online]. Journal of Law, Information and Science, Vol 21, No 1, 2011: [62]-88.

#### **4.1.4. The United Kingdom**

The initial impetus for the adoption of e-conveyancing in England was borne out of the challenge that the registration gap has been a great source of difficulty in the English system<sup>73</sup>. England and Wales are amongst the first jurisdictions to establish an e-conveyancing system and have aimed at a complete e-conveyancing system<sup>74</sup>.

#### **4.2. CONVEYANCING IN BARBADOS**

At present, Barbados operates largely under the unregistered system of title, although there are some areas which have become registration districts. It is, therefore, advisable to use a local attorney-at-law when purchasing real estate in Barbados, so that the title can be properly investigated, and other requirements properly dealt with.

Barbados seems to have successfully migrated from an entirely manual system to a partly systems-based conveyancing system.<sup>75</sup>The land administration system in Barbados is, to a large extent, designed for middle and upper income groups.

There are currently two systems of registration operating in the Barbados Land Registry Department <sup>76</sup>These are the “common-law system,” which is a recordation of deeds system, and the “registration system”, which is a registration of title system. Under the common law system, a title must be traced from owner to owner, as far back as what is called “a good root of title” which must be at least 20 years old. A seller must be in possession of all the original title deeds from the date of the root to the date of the new transaction. For land still under the common law system, a deed is used to convey ownership of real estate under Section 59 Property Act Cap. 236 of the Laws of Barbados (Property Act). According to the Section 67 Property Act, a deed is construed as conveying the entire estate or interest that the grantor owns, unless a contrary intention is expressed in the deed.<sup>77</sup>

Under the registration system there are no deeds, simply a certificate of title or charge, which contains all the information about the title. Land, for which title has

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<sup>73</sup> Harpum, Bridge and Dixon Law of Real Property 242–243; Abbey National Building Society v Cann 1991 1 AC 56; Cooke "E-Conveyancing in England" 289.

<sup>74</sup> Alistair Rennie, Michael Samuel, Roger Mackenzie (2001) The Age of E-Conveyancing, The Journal for The Law Society of Scotland

<sup>75</sup> Barnes, G. 1998. A Study of Land Tenure Issues in Barbados. InterAmerican Development Bank. May 1998 at 28

<sup>76</sup> Clarke Gittens Farmer Attorneys. Training Seminar (Course notes). Savitri, St J., Clarke, G. F.

<sup>77</sup> *ibid*

been declared under the registered system, it is effected by a transfer, lease or other prescribed form in accordance with the Land Registration Regulations of 1988. The title is backed by Government.<sup>78</sup> This means that Barbados follows a positive system of registration.

A Sale and Purchase Agreement is prepared by the vendor's lawyer and agreed between the parties. A sale agreement commits a buyer to buying the property in question. A buyer should, therefore, not sign the sale agreement until he has secured the necessary funding. A deposit is paid when the property is identified and the buyer risks losing his deposit if he cannot obtain the full amount for the purchase price to the property. A 10% deposit is paid by the purchaser to the vendor's lawyer on the signing of the Agreement

The original title deed is necessary to exclude the possibility of the property being bonded with another financial institution, as well as to ensure resale of the property in the event of a default on the mortgage loan payments. An investigation of title is carried out by the purchaser's conveyancer, to whom copies of the prior title deeds must be provided. Searches are conducted to check for judgements, title, taxes paid, and company searches where applicable. If applicable, the line-marks to the property are pointed out to the purchaser. The conveyance is prepared by the vendor's lawyer and is perused by the purchaser's lawyer. Once approved, the seller's conveyancer has the conveyance signed by his/her client. At closing, the original conveyance and prior title deeds and property plan, along with other necessary documents, are provided to the purchaser's lawyer in exchange for the balance of the purchase price.<sup>79</sup> The purchaser's lawyer has the conveyance recorded at the Land Registry of Barbados.

Land is registered in a central register at the Land Registry. The Register contains a brief description of the land and a plan of the land. If the proprietor gives his consent to a search of his title, all new entries on the Register are suspended for two weeks from the date of the search. This guarantees that the search results remain accurate and up-to-date during this time. Transaction documents are submitted in triplicate to the Registry, along with the existing certificate of charge/title.<sup>80</sup> The prominent points

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<sup>78</sup> Clarke Gittens Farmer Attorneys. Training Seminar (Course notes). Savitri, St J., Clarke, G. F.:2008.

<sup>79</sup> Clarke Gittens Farmer Attorneys. Training Seminar (Course notes). Savitri, St J., Clarke, G. F. 2012).

<sup>80</sup> *ibid.*

must be contained in the transaction documents which are entered in the Register. A copy of the document is kept for the Register, and two copies returned, with the stamp of the Registry as proof that it has been registered, along with the updated certificate of charge/title.

The borrower's conveyancer issues a cheque to the seller's conveyancer for the purchase price and the seller's expenses. Recording and registration for non-individuals takes about two months to complete, while transactions involving individuals may take as little as two weeks. The record becomes final 60 days after the notice is published. Generally, the certificates of charge are returned from the Registry within two months.

#### **4.2.1. ELECTRONIC CONVEYANCING IN BARBADOS**

An electronic system of conveyancing is available in Barbados, but it is not widely used, and most attorneys still make use of the very manual method of registrations. The electronic system was set up by an attorney who does not seem to be a conveyancer. The impression exists that this electronic system does not do much more than the manual system does. The vendor has not succeeded in convincing most law firms to start using the system. There may be doubts as to the efficacy of the system and the vendor's own capacity and experience as an attorney at law in the real estate field.

It therefore appears that stakeholder management is a crucial component which should be considered when embarking on new ventures such as the rolling out of new processes and technological systems. It may thus be concluded that initiatives to switch to an electronic system should be initiated and managed by authorized bodies instead of individuals, to receive wider support and use.

The cumbersome searches necessary to determine title in the common law system have led to the introduction of a second system based on the registration of title.<sup>81</sup> It therefore seems as though the security of the title is still based in a paper-based document as opposed to an automatic update of the register. The switch to an electronic system was useful to electronically record a significant amount of previously unrecorded land parcels, but it appears information placed into the

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<sup>81</sup> Barnes, G. 1998. A Study of Land Tenure Issues in Barbados. InterAmerican Development Bank. May 1998 at 28

Barbados electronic system must still be manually assessed, updated and recorded. Not all conveyancing transactions are currently captured on the electronic system as mainly the bigger attorney firms make use of the system.

#### **4.2.2. The Barbados System and that of Zimbabwe**

It is important to note that the research focuses on the protection of property rights. Barbados has a problem of prevalent squatting, which makes it difficult to protect ownership of title.

The Zimbabwean system has a different approach in which all land is registered with the state and it is known that this belongs to who. In Barbados some land is not known as to who are the registered owners to it. It is however crucial that the Zimbabwe adopt the way of seeking consent from the lawful owner so that one can do a property search it reduces the risk of real estate fraud. Zimbabwe should also learn from the Barbados situation in which the system has faced resistance due to lack of consultations to the stake holders of the system.

#### **4.3. CONVEYANCING IN THE NETHERLANDS**

In the Netherlands, the land registration and the cadastre are combined into one organisation. The Civil Code in the Netherlands provides for a closed system of rights. The Netherlands operates on a negative system and does not guarantee the accuracy of the title register. The Registrar maintains a supervisory role, and the conveyancer remains responsible for drafting and submitting the deed, as well as signing the deed on behalf of the parties. The transaction is recoded in a national register, as opposed to previous duplications in regional registers.

A normal procedure of a land transfer is as follows: In most cases an estate agent would assist a buyer and seller in the purchasing of property. It is, however, not necessary for an estate agent to be involved in the process. A mortgage advisor may become involved in the process to facilitate the loan application together with insurance requirements, as the need may be. The purchase price is paid over to a notary public who keeps it until evidence of the deed record is received.

The notary will also verify that the seller has a right to dispose of the property by means of a property search and will draft a notarial deed of transfer. The buyer and seller sign the deed, thereafter the notary certifies the deed to be a true copy. It is then submitted to the cadastre electronically, who does formal checks, records the



deed and provides evidence of the record to the notary. The purchase price is then paid to the seller by the notary.

A notary and not a conveyancer is used for property transfers in the Netherlands. This is probably the biggest difference between conveyancing in the Netherlands and Zimbabwe. In the Netherlands, cadastral registers are kept in the electronic conveyancing system which is referred to as the Automated Kadaster Register (AKR). Maps are kept in a survey and mapping information system (LKI).

These are two separate systems with an interface connection to appropriately coordinate the on-going updating of the cadastral registers and maps.<sup>82</sup>The registration process takes up to forty days, from the time the conveyancer receives the instruction to register to the time the transaction registers.

#### **4.3.1. ELECTRONIC CONVEYANCING IN THE NETHERLANDS**

The Netherlands works on a negative system and does not guarantee the accuracy of the title register. The electronic recording of deeds started in 2005 in the Netherlands. The land registration and the cadastre are combined into one organisation. Currently all cadastral registers and maps are in digital format. Electronic copies and an advanced electronic signature are delivered at the same time.

The Land Register was computerised in 1999 and paper documents are scanned on receipt. The paper documents that were manually filed in cabinets pre-1999 were scanned onto microfilm and may be transferred into a digital format on request. The deeds, registered supporting documents, and contracts from 1998 onwards are accessible online.

Electronic copies and an advanced electronic signature are delivered together. Electronic dispatches are received a day earlier than paper documents and payment can be made a day earlier. The same legality certainty exists as with the paper documents.<sup>83</sup>Deeds are lodged electronically, and registration notifications are sent via the internet. The conveyancer checks for any changes between the execution and registration of the deed after the deed has been registered with the Land

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<sup>82</sup> Wakker, W., van der Molen, P. and Lemmen, C. 2003. Land registration and cadastre in the Netherlands, and the role of cadastral boundaries: The application of GPS technology in the survey of cadastral boundaries. at 5.

<sup>83</sup> Louwman, W. 2011. E-Conveyancing in the Netherlands. Chief Registrar of the Land Register Cadastre and Mapping Agency

Registry. An automatically generated electronic copy of the deed is forwarded to the Registrar. However, a written deed is kept by the notary public.<sup>84</sup>

#### **4.3.2. Lessons for Zimbabwe**

In Zimbabwe, paper documents are lodged with the Deeds Registry for registration. A similar electronic system should be investigated for Zimbabwe. An Electronic registration system is still to be established. The major difference with the Netherlands system is that Notaries Public handle conveyancing instead of Conveyancers this will not be possible for Zimbabwe as it will mean an entire change to the whole conveyancing system.

The most efficient and protective aspect about the Netherlands system is that it avoids the issue of a registration gap and there is an electronic trail on pending transactions and a secure title preservation system which makes it difficult to easily manipulate the system.

#### **4.4. CONVEYANCING IN AUSTRALIA**

The Torrens system was introduced in Victoria, South Australia in 1862. The Torrens system is a method of recording and registering of land ownership and interests. It is based on a single title document. As the Land Titles Register contains all the information of ownership, it is not necessary to prove ownership and other titles by means of documents such as the title deed. Countries that are using the Torrens system include Australia, New Zealand, Ireland, Malaysia, Singapore, Iran, Canada, Madagascar, England and Wales.<sup>85</sup> The Torrens title system employs the following three principles:

- i. The maintenance of a public register of titles and interests on land
- ii. The assurance that, once registered, a title or interest cannot be
- iii. The guarantee of a compensation fund in the event of a fraudulent or erroneous registration

Even though each state in Australia has its own land registration practices and procedures, all states have adopted the Torrens system for land title registration. This study will focus on the registration process in Victoria.

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<sup>84</sup> Rajashekhar, P.V. 2006. e-Conveyancing: Challenges and Ambitions. International Conference on Enhancing Land Registration and Cadastre for Economic Growth in India. New Delhi. At 6.

<sup>85</sup> Garoupa, N.M. and Gómez Ligüerre, C. 2011. The Evolution of the Common Law and Efficiency (April 7, 2011). Georgia Journal of International and Comparative Law, 2012; Illinois Program in Law, Behavior and Social Science Paper No. LBSS11-16.

When selling property in Victoria, the seller has the choice of, either selling the property on auction, or by means of a private sale which often includes the services of an estate agent. The estate agent charges a commission of 2–2,5% of the selling price.<sup>86</sup>

The agent will do an estimate of the house price and arrange for open house inspections to take place. When a prospective buyer makes an offer on the house, he/she must immediately pay 10% of the selling price of the property into a trust account that is administered by the estate agent. If the seller chooses the auction route to sell a house, the auction will roughly cost about two thousand Australian dollars. The auctioneer will start the bidding and the owner is also allowed to bid. The owner retains the right to decide whether he wants to sell the property at a certain price or not. If he decides not to sell, it is said that the seller has 'passed in' the property.<sup>87</sup>

The buyer must pay the balance of the property price within 30 to 60 days. The conveyancing of the transfer of the property is done by each party's conveyancer. The title is changed from the seller to the buyer at the Deeds Registry. The paper title document is kept with the bank until the loan has been repaid by the buyer. The loan may take up to 20 years to repay. Investment properties, however, have the option of interest only being repaid to the bank. Other loans will pay interest and an amount to reduce the capital owed on the loan. The interest rate may be at fixed or variable.<sup>88</sup>

A factor unique to the Australian conveyancing process is that a buyer may buy a conveyancing kit and choose to do his own conveyancing. The conveyancers who assist the buyer and seller also do not have to be a qualified attorney. If not qualified, these people are referred to as Information Brokers.<sup>89</sup>

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<sup>86</sup> Low, R. 2009. From Paper to Electronic: Exploring the Fraud Risks Stemming from the Use of Technology to Automate the Australian Torrens System. *Bond Law Review*: Vol. 21: Iss. 2, Article 7

<sup>87</sup> Park, M.M. 2009. Removing the disharmony from Victoria's Land Title Registration system. Paper delivered at Land Surveying Commission Seminar

<sup>88</sup> Low, R. 2005. Maintaining the integrity of the Torrens system in a Digital environment: A comparative overview of the Safeguards used Within the Electronic Land Systems in Canada, New Zealand, United Kingdom and Singapore.," *Australian Property Law Journal* 155, 176

<sup>89</sup> Low, R. 2009. From Paper to Electronic: Exploring the Fraud Risks Stemming from the Use of Technology to Automate the Australian Torrens System.

#### **4.4.1. ELECTRONIC CONVEYANCING IN AUSTRALIA**

During the 1980s land titles in Australia were moved into electronic records. Although there are still some titles in a paper format, most them are held in an electronic format. An Australian e-conveyancing system was launched by the Department of Sustainability and Environment of Victoria, Australia in 2006.<sup>90</sup> It was initially used by a few smaller financial institutions. A more modern version that was launched in 2008, created potential for the system to be used by more entities. Each user must meet specified access requirements and must protect their security items, namely, Certificates, pins and passwords.<sup>91</sup> The subscribers can become the gatekeepers to the system by obtaining a signed authorization from each client (buyer and seller) which enables them to sign the document electronically on behalf of the respective client.

This conveyancing system in Virginia, Australia was successfully built at a tremendous cost to link all the stakeholders in the service chain, but was rejected by stakeholders as they were not involved in the design of the system. The conveyancing system has been ignored by conveyancers who feared additional liability exposure, as well as the major lending banks who refused to work with eight different systems, as each state worked with their own system and their own set of statutes, processes and regulations. The banks preferred a single national electronic conveyancing system that will enable consumers across the country to use the same electronic system to settle all property transactions.<sup>92</sup> Differences and inconsistencies in the registered land statutes between the eight different schemes of the various states have been removed.<sup>93</sup> Stakeholder buy-in and lack of recognition, therefore, seem to be an important element to consider and comply with.

The challenges Australia faced include the merger of electronic services into a system that was reliant on the generation of paper documents and realizing a level of security with electronic documents as secure as paper documents<sup>94</sup>. To solve the problem of integration of the electronic documents, the legislature enacted the

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<sup>90</sup> e-Government Resource Centre, 2006

<sup>91</sup> Ostrzenski, V. 2012. Reconfiguring Perception and Procedure: An Exploration of the E-Commerce Record.

<sup>92</sup> Merritt, C. 2009. The Australian. Available from <http://www.theaustralian.com.au/business/legal-affairs/state-secretly-pushes-on-with-ecv-bid/story-e6frg97x-1111117649310>.

<sup>93</sup> Park, M.M. 2009. Removing the disharmony from Victoria's Land Title Registration system. Paper delivered at Land Surveying Commission Seminar, Bulleen, 21 May 2009.

<sup>94</sup> Sophie Riley at page 4

Victorian Transfer of Land (Electronic Transactions) Act of 2004 and the Electronics Transactions Act 2000, wherein electronic documents can be considered comparable to paper documents.

In Australia, the State guarantees that the state deeds registry is an authoritative record of land ownership. This means that Australia has a positive land registration system. It appears the Victorian e-conveyancing system will be limited to the electronic submission of documents and will not make provision for any automatic updates of the register. Manual intervention by staff in examining and processing the electronic document and thereafter updating the register will still be required.<sup>95</sup>

#### **4.4.2. Lessons for Zimbabwe**

In applying the system in Zimbabwe and considering the technological position of the country, it is necessary that the whole program should be introduced step by step and delivered in a modular and incremental basis through a portfolio of activities and projects, amounting to a series of service improvements that will build up to implement full e-Conveyancing vision. The implementation of the e-conveyancing system should be attempted only after staging a pilot programme, or else a radical departure from the manual system will only prove to be a doomed revolution.

As was almost the case with Australia. Stakeholder involvement is important. Assurances as to cover losses on the part of the deeds registries are also important as the Australian system has a fund which works to ensure that losses due to mistakes and fraudulent activity are covered. The issue of the Registration gap has not been completely eradicated as indicated that there is a waiting period for which payment is to be made. The Zimbabwean system differs mostly from the Australian system in that Australia allows anyone to undertake conveyancing work whilst in Zimbabwe only registered conveyancers can attend to conveyancing work.<sup>96</sup>

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<sup>95</sup> Low, R. 2005. Maintaining the integrity of the Torrens system in a Digital environment: A comparative overview of the Safeguards used Within the Electronic Land Systems in Canada, New Zealand, United Kingdom and Singapore.," Australian Property Law Journal 155, 176.

<sup>96</sup> Section 8 (2) (c) of the Legal Practitioners Act [Chapter 27:07] which states that " *Subject to this Act, a registered legal practitioner who is in possession of a valid practicing certificate issued to him may practice the profession of law.(2) Without derogation from the generality of subsection (1), but subject to this Act—(c) a registered conveyancer who is in possession of a valid practicing certificate issued to him may prepare any document for registration in a Deeds Registry or for attestation or execution by a registrar of deeds.*"

#### **4.5. The United Kingdom (England, Scotland and Wales)**

The initial impetus for the adoption of e-conveyancing in England was borne out of the challenge that the registration gap proved to be a great source of difficulty in the English system<sup>97</sup>. England and Wales are amongst the first jurisdictions to establish an e-conveyancing system and have aimed at a complete e-conveyancing system<sup>98</sup>. Consequently, England and Wales system have made great strides with the conceptualization of a system of a comprehensive e-conveyancing and the creation of an inventory of legal provisions for its implementation<sup>99</sup>.

The major challenge the English system faced related to obstinate legislation hence to give effect to full e-conveyancing, legislation had to be amended to pave way for e-conveyancing. The major lesson from the UK system is that the substantive law itself must be first reformed before e-conveyancing can be adopted. Subsequently, the Land Registration Act (LRA) of 2002 was promulgated and came into force in 2003 with Part 8 thereto setting out the structure by which e-conveyancing will operate. The Finance Act 2003 altered the way Stamp Duty was considered and regulated, paving the way for electronic transactions in form of electronic fund transfers. The Electronic Communications Act of 2000 was promulgated to deal with the technological aspects of the system. Among the issues it deals with are the data protection, licensing and control of trusted third parties for issuing keys for the data encryption and Internet Service Provider liability.

In the early implementation phases Scotland faced comparable challenges to England and Wales. Like the latter jurisdictions, Scotland promulgated laws to support the e-conveyancing system. The Land Registration (Scotland) Act of 2012 (Commencement No. 2 and Transitional Provisions) Order 2014 introduced Part 10 and Schedule 3 were passed and they form the basis of the e-conveyancing regime in Scotland. Jenna McLean<sup>100</sup> opines that the Order made changes to the Requirements of Writing (Scotland) Act of 1995. The Act removed the requirement of reducing the contract pertaining to land to writing and allow for contracts to be concluded in electronic format. The Electronic Documents (Scotland) Regulations of

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<sup>97</sup> Harpum, Bridge and Dixon Law of Real Property 242–243; Abbey National Building Society v Cann 1991 1 AC 56; Cooke "E-Conveyancing in England" 289.

<sup>98</sup> Alistair Rennie, Michael Samuel, Roger Mackenzie (2001) The Age of E-Conveyancing, The Journal for The Law Society of Scotland

<sup>99</sup> Haim Sandberg at page 5

<sup>100</sup> Jenna McLean (2014) Electronic Conveyancing – a new chapter for Scottish Property Law

2014 stipulate the requirements for e-documents and e-signatures to be binding and self-proving is that the e-document must have an e-signature and the e-signature affixed to the e-document has to be certified by the relevant authority.

Furthermore, the implementation stages in England faced problems relating to the authentication of documents. To solve this problem, a set of rules and orders were promulgated in 2007 namely the Land registration (E-Conveyancing) Rules, Land Registration (Electronic Communications) Order and Land Registration Network Access Rules. The Network Access Agreement appeared to be the basis of the solution to the problem of maintaining the authenticity of signatures and documents since the obligation for securing the genuineness of instruments is reposed on the contractors (conveyancers) who act as 'gatekeepers' to the e-conveyancing system.

#### **4.5.1. Lesson and Recommendations for Zimbabwe**

#### **4.5.2. Accessibility of the e-conveyancing system**

The e-conveyancing network cannot be accessible to all for security purposes hence should be limited to a few users. A person may only have access to the network under authority given by Registrar through a network access agreement. Consequently, the system must provide for three types of network access agreements namely:

- I. Full Network Access which will confer full access to the e-conveyancing system to registered conveyancers.
- II. Read-Only Network Access which will confer access to members of the public, estate agents and banks. This type of access in the UK system gives limited access to the network for viewing information about their transactions<sup>101</sup>.
- III. Signature Network Access Agreement which will permit access to conveyancers' clients to view information on the Deeds Office Network and append e-signatures to the e-documents.

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<sup>101</sup> Schedule 5 of the UK Land Registration Act of 2002 asserts that a person who is not a member of the land registry may only have access to a land registry network under authority conferred by means of an "agreement with the registrar".

#### **4.5.3. Pilot projects builds stakeholder confidence and buy-in**<sup>102</sup>

Chief to attaining stakeholder buy-in in England was the resolution to conduct piloting projects and concept demonstrations. Additional provision was made for steering phases with a model pilot and chain matrix pilot to guarantee complete functionality of the system<sup>103</sup>. Adoption of similar a programme in Zimbabwe would ensure stakeholder buy-in and a successful adoption of the e-conveyancing system.

#### **4.6. Conclusion**

It is apparent that a good conveyancing system warrants better protection of property rights. The issues of security are paramount to establishing a good conveyancing system hence the need for digital signatures and passwords. Limited access is also another key issue on this matter. Protection of ownership is very vital, and every country takes the necessary steps to protect its citizens

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<sup>102</sup> BearingPoint at page 99

<sup>103</sup> BearingPoint at page 99



## **5. CHAPTER 5**

### **5.1. Introduction**

From the previous four chapters it is apparent that the issue of property fraud is a troublesome one in the jurisdiction of Zimbabwe. This chapter aims to conclude this research and make recommendations as to how the laws can be amended and adjusted to make the issue of property fraud combated. It has been clear from the newspaper articles and judicial recommendations that is a problem in relation to the laws governing our conveyancing system in Zimbabwe in relation to Property Fraud.

### **5.2. RECCOMENDATIONS**

Identity fraud and scams are increasingly prevalent throughout the community and the property industry is not immune to falling victim to such events. regulations may prescribe rules of conduct to be observed during the carrying on of business or the exercise of functions under a licence or certificate of registration. Penalties apply for breaches of rules of conduct. This is applicable for real estate agents who would have participated in fraudulent activities which will lead to the loss of property by anyone. The threat to the right of ownership is high due to the active participation of Estate Agents in these scams.

Bogus estate agents are going around identifying properties whose registered owners are either in the rural areas or in the diaspora. After identifying targeted properties, they take photographs and videos and then make advertisements either in the local newspapers or internet to fleece unsuspecting victims. They further draft fake title deeds and fraudulent power of attorneys to authorise sale of the property they would have targeted.<sup>104</sup> The above was published in the local newspaper in which concern was aired by the paper in relation to the rate of property fraud.

The courts also have been involved in the cautioning of this kind of behaviour. In the case of *Cosmas Luckyson Zavazava and Vongai Zavazava vs Jonah Tendere and Tendai Idzai Anania Tendere and Thermo-Dynamics Real Estate and the Registrar of Deeds NO*<sup>105</sup> the court had this to say;

“It would appear that conveyancing laws of this country are not fool proof because fraudsters continue to exploit the weaknesses in the procedure for registration of transfers to defraud innocent property seekers. The leakages in the system have

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<sup>104</sup> Bogus Property sellers on the prowl, The Sunday mail published 29 March 2014.

<sup>105</sup> HH 740-15

meant that cases of unlawful transfers of immovable property continue to reach the courts with alarming frequency”.

This was a very accurate observation, the legislature responded with the Deeds Registries Amendment Act number 8 of 2017. This Act introduces the Electronic Registry and it also amends on the issue of who can witness Power of Attorneys authorising the sale of properties. This was a very bold move by the Government in trying to combat the issues to do with property fraud and safeguarding property rights.

When selling a property, confirm that dealings are with the true owner(s) of the property [i.e. the registered proprietors or their properly appointed representative]. The agency agreement must contain a statement to the effect that the principal warrants that they have authority to enter into the agreement, this may not be sufficient to protect an agent and they should ensure that this authority is verified in some manner before acting for the principal.

In some cases, the person with the legal right to sell the property may not be the registered owner. These would include but would not be limited to the holder of a Power of Attorney, an executor, a mortgagee in possession, or a person with an appropriate Court order. In these cases, the original or a copy that has been certified as a true copy of the document conferring the power of sale should be sighted and where possible confirmed with the current registered owner, or their legal representative, that the person is authorised to act on their behalf.

Confirm the identity of the owner or the person or persons with the legal right to sell the property through an identification check Identity Checklist. When confirming the identity of the owner, the agent should:

- i. Check that the name on the agency agreement is the same as that on the property certificate if the owner is selling the property themselves.
- ii. Conduct the check face to face and sight original documents to verify identity.
- iii. Verify the seller’s identity from an original primary photographic identification document and an original or certified copy of a secondary non-photographic identification document,

- iv. Verify the legal ownership of the property from an original or certified copy of a primary property ownership document such as an original title deed current rate notice or other document conferring the power of sale.

In verifying the information from the relevant documents, the agent should be reasonably satisfied that:

- v. The documents are legible and do not appear to have been altered in any way; and There is no apparent discrepancy between the information collected from the agent and the information contained in the documents (other than a discrepancy that can be reasonably explained and supported, such as a change of name or the owner of the property has recently been married); and
- vi. In the case of a primary photographic identification document it should be established that the photograph contained in the document is a true likeness of the owner of the property.
- vii. Proof of identification or legal ownership of property documents referred to should not include documents that have expired for example passports.
- viii. A copy of a document should only be certified as a true copy of the original by a person authorised to do so such a registered Notary public.
- ix. If the person or persons are not directly available, the original documents should be
- x. sighted and verified as a true copy of the original by a suitable independent witness.
- xi. Agents should be especially vigilant if the client is overseas or remote, or if dealings with
- xii. that person are not face-to-face and unreasonable excuses are given for their unavailability to meet. This is because properties of people who are overseas are the ones which are most vulnerable to crime and these people are not adequately protected.

for purposes of identity verification, the writer suggests that there should be a connected interphase between the Deeds Registries Office, the Estate Agents, Conveyancers and the Central registry so as to enable these key players in the property market to be able to verify the identities of their dealers from a source which is definite. This should through further legislative reforms. These property

fraud scams come as a result of the lack of adequate means to verify identity documents in most circumstances.

### **5.3. CONCLUSION**

It is apparent from this study that the issue of real estate fraud is rife in Zimbabwe. It is important to protect property rights by all means for it is the cornerstone of ownership in the country. The protection of rights of ownership is important that the legislature reacted with the Deeds Registries Act number 8 of 2017 which introduces the electronic registry which is a step forward in the protection of property rights. The recommendations forwarded will go a long way in protecting the right of Zimbabweans.

# **BIBLIOGRAPHY**

## **STATUTES**

### **Zimbabwe**

Deeds Registries Act [Chapter 20:05]  
Rural District Councils Act [chapter 29:13]  
the Urban Councils Act [chapter 29:15]  
Legal Practitioners Act [Chapter 27:07]  
Criminal Law (codification and Reform) Act [Chapter 9:23]

### **United Kingdom**

Land Registration Act of 2002  
The Electronic Communications Act of 2000  
The Land Registration (Scotland) Act of 2012

### **Barbados**

Property Act Cap. 236

### **Australia**

Electronics Transactions Act 2000  
Transfer of Land (Electronic Transactions) Act of 2004

## **CASES**

*Sackstein NO v Van der Westhuizen en n ander* 1996 (2) SA 431  
*Mafukidze v Mafukidze* HH193/84  
*Gien v Gien* 1979 (2) SA 1113 (T)  
*Machiva v Commercial Bank of Zimbabwe* 2000 (1) ZLR 302  
*Chapeyama v Chapeyama* 2000 (2) ZLR 103 (S)  
*Guga vs. Moyo & Others* 2000 (2) ZLR 458  
*Chimphonda v Rodriguez & ors* 1997 (2) ZLR 63  
*Cosmas Luckyson Zavazava and Vongai Zavazava vs Jonah Tendere and Tendai Idzai Anania Tendere and Thermo-Dynamics Real Estate and the Registrar of Deeds* NO HH 740-15  
*Mashave vs Standard Bank of South Africa Ltd* 1998 (1) ZLR 436 (S)  
*Jolly v A Shannon & Anor* 1998 (1) ZLR 78  
*Incorporated Law Society Transvaal v Kuyper* 1925 TPD 780 TPD  
*Stupendis Enterprises Private Limited v Kasi and Others* HH 72/12  
*Chirimuta v Action Property Sales Private Limited* HH 05/07

## **REPORTS**

Australian Registrars National Electronic Conveyancing Council (2012) *Proposed Electronic Conveyancing National Law*

The Hansard of 9 June 2004

The Law Society of England: The E-Conveyancing Taskforce 20 July 2009, Chancery, London

## **ARTICLES**

Barnes, G. 1998. A Study of Land Tenure Issues in Barbados. InterAmerican Development Bank. May 1998.

Clark, E. 2011. E-conveyancing in Australia: An important step along the journey to E-government [online]. *Journal of Law, Information and Science*, Vol 21, No 1, 2011

Garoupa, N.M. and Gómez Ligüerre, C. 2011. The Evolution of the Common Law and Efficiency (April 7, 2011). *Georgia Journal of International and Comparative Law*, 2012; Illinois Program in Law, Behaviour and Social Science Paper No. LBSS11-16

Harpum, Bridge and Dixon *Law of Real Property* 242–243; *Abbey National Building Society v Cann* 1991 1 AC 56; Cooke "E-Conveyancing in England"

Jenna McLean (2014) *Electronic Conveyancing – a new chapter for Scottish Property Law*

Louwman, W. 2011. E-Conveyancing in the Netherlands. Chief Registrar of the Land Register Cadastre and Mapping Agency.

Low, R. 2005. Maintaining the integrity of the Torrens system in a Digital environment: A comparative overview of the Safeguards used Within the Electronic Land Systems in Canada, New Zealand, United Kingdom and Singapore.," *Australian Property Law Journal* 155, 176.

Low, R. 2005. Maintaining the integrity of the Torrens system in a Digital environment: A comparative overview of the Safeguards used Within the Electronic Land Systems in Canada, New Zealand, United Kingdom and Singapore.," *Australian Property Law Journal* 155, 176.

Low, R. 2009. From Paper to Electronic: Exploring the Fraud Risks Stemming from the Use of Technology to Automate the Australian Torrens System. *Bond Law Review*: Vol. 21: Iss. 2, Article 7.

Moskoff F, Fraud: AN overview (1981)

Ostrzenski, V. 2012. Reconfiguring Perception and Procedure: An Exploration of the E-Commerce Record

Page, C. and Meyer, D. (2006): Applied research design for business and management. McGraw-Hill, Australia

Park, M.M. 2009. Removing the disharmony from Victoria's Land Title Registration system. Paper delivered at Land Surveying Commission Seminar, Bulleen, 21 May 2009

Park, M.M. 2009. Removing the disharmony from Victoria's Land Title Registration system. Paper delivered at Land Surveying Commission Seminar, Bulleen, 21 May 2009.

Rajashekhar, P.V. 2006. e-Conveyancing: Challenges and Ambitions. International Conference on Enhancing Land Registration and Cadastre for Economic Growth in India. New Delhi.

Rennie A, Samuel Mackenzie M (2001) The Age of E-Conveyancing, The Journal for The Law Society of Scotland

Robbie Muir, E-conveyancing in New Zealand: Progress to date and Future Developments

S Christensen: - Electronic Land Dealings in Canada New Zealand and the United Kingdom: Lessons for Australia (2004) VOL 11 *Murdoch University Electronic Journal Law*

S. Riley, 'The Electronic age: Virtual Conveyancing and the Torrens title system' (2005) University of Technology Sydney

Sandberg H, E-land Conveyancing and Registration-Visions and Risks

Wakker, W., van der Molen, P. and Lemmen, C. 2003. Land registration and cadastre in the Netherlands, and the role of cadastral boundaries: The application of GPS technology in the survey of cadastral boundaries.

## **BOOKS**

Christie R, H. *Business Law in Zimbabwe*, 2<sup>nd</sup> Ed, Juta & Co Ltd

Christie, J. 2008. Conveyancing practice guide. 3rd ed. LexisNexis. Durban

Jones N, H.' Conveyancing in South Africa, Juta, 1991

Mhishi, M. L (2004) A guide to the law and practice of conveyancing in Zimbabwe, LRF, Harare

Silberberg and Schoeman; *The Law of Property*, 2<sup>nd</sup> ed LexisNexis. Durban

Van Der Walt A, J. Pienaar GJ (2002) Introduction to the law of property 4<sup>th</sup> ed, Juta & co Ltd

### **INTERNET SOURCES**

Merritt, C. 2009. The Australian. Available from <http://www.theaustralian.com.au/business/legal-affairs/state-secretly-pushes-on-with-ecv-bid/story-e6frg97x-1111117649310>