FUNGAI BRYAN KATSANDE
versus
FADZAI KATSANDE N.O (In her capacity as the Executor Dative
for Estate Late TONGAI MAXWELL KATSANDE)
and
STANISLAUS CHOGUGUDZA
and
THE MASTER OF THE HIGH COURT
and
THE TOWN CLERK OF CHITUNGWIZA MUNICIPALITY N.O
and
THE SHERIFF OF THE HIGH COURT
and
CHITUNGWIZA MUNICIPALITY
and
FADZAI KATSANDE

HIGH COURT OF ZIMBABWE
MUCHAWA J
HARARE; 18 October & 10 November 2023, 13 March & 9 May 2024

Opposed Court Application

Mr A Basira, for the applicant
Mr *N Mugiya*, for the 1st & 7th respondent
No appearance for the 2nd, 3rd, 4th and 5th respondents

MUCHAWA J: This is a court application for the granting of a declaratory order. The terms of the draft order sought are as follows:

> "IT IS DECLARED AND ORDERED THAT:
>
> 1. The applicant, Fungai Brian Katsande is a registered holder of rights, title and interests in stand 14478 Zengeza 3 Extension Chitungwiza.
> 2. The second respondent be and is hereby ordered to correct the cession papers and cede rights in stand number 14478 Zengeza 3 Chitungwiza leased by the fourth respondent to the applicant.
> 3. In the event that the second respondent does not sign the fifth respondent is hereby ordered to attend to the transfer of rights from the second respondent to the applicant.
> 4. The first respondent pays costs of suit on a higher scale between legal practitioner and own client."

The Parties

The applicant is suing in his personal capacity as Fungai Bryan Katsande or otherwise referred to as Fungai Brian Katsande.

The first respondent is Fadzai Katsande who is cited in her official capacity as the executor dative for the Estate Late Tongai Maxwell Katsande.

The second respondent, Stanislaus Chogugudza is cited in his capacity as the original holder of the rights, title, and interests in house number 14478 Zengeza 3, Chitungwiza.

The third respondent is the Master of the High Court who is cited in his official capacity as the one responsible for registration and administration of deceased estates in Zimbabwe.

The fourth respondent, Town Clerk of Chitungwiza Municipality is cited in his or her official capacity as the one responsible for overseeing all houses under cession which is the subject of this application.

The fifth respondent is the Sheriff of the High Court of Zimbabwe.

The sixth respondent is Chitungwiza Municipality, a party joined to these proceedings by order of this court.

Fadzai Katsande, cited in her personal capacity was also added to these proceedings as seventh respondent by order of this court.

Background

The brief background to this matter is that the applicant and the late Tongai Maxwell Katsande were brothers and Fadzai Katsande was wife to Tongai Maxwell Katsande. Tongai Maxwell Katsande died on 23 February 2007. His wife Fadzai Katsande was appointed executor dative for his estate. In this estate was an immovable property, stand number 14478 Zengeza 3 Chitungwiza (hereafter called the property) which upon the winding up of the estate, was awarded to Fadzai Katsande, in her personal capacity.

The applicant's version is that he is resident in the United Kingdom. He claims to have entered into an agreement for the sale of the property on 12 August 2004 with the second respondent. The agreement of sale is attached as annexure B. The purchase price is said to have been set at $75 000 000.00 (seventy-five million dollars) with forty five million being paid upon signing of the agreement and the balance of thirty million was to be paid upon verification of ownership with Chitungwiza Municipality. The forty-five million dollars was allegedly paid by bank transfer. The applicant says he then instructed his late brother to attend to the verification process at Chitungwiza Municipality and proceed to pay the balance. The remaining thirty million dollars was allegedly borrowed from the applicant's uncle one Mr Karumazondo who has filed a supporting affidavit as annexure C.

Furthermore, the applicant says his brother thereafter informed him that he had paid the balance and attended to transfer of rights, title and interest from the second respondent to him at Chitungwiza Municipality. He says he offered his late brother and his family the right to occupy the property as he had become of ill health. Even after Tongai Maxwell Katsande's death, his family remained in occupation.

The applicant says that it was only in 2016 when he was in a divorce suit with his wife that he learnt with shock that the property had not been transferred into his name, but his brother's name. this was some nine years after his brother's death.

Attempts to correct this with the first respondent during the period 2019 to 2020 are said to have been futile leading the applicant to resort to self help by changing locks. In turn the first respondent sought spoliatory relief and was granted same.

On the other hand, the first respondent, whilst acknowledging that indeed the applicant initially acquired the property as his, she says he then sold it to her late husband who paid for it in installments over five years through a gentleman's agreement. She claims that after the completion of payment, the applicant then transferred the house into the late Tongai Maxwell Katsande's name.

This is why the applicant has lodged this application.

At the very initial hearing, the first respondent raised the point *in limine* that there was a fatal non joinder of the Chitungwiza Municipality. I ordered that it be joined as sixth respondent. The applicant however did a substitution of the fourth respondent with Chitungwiza Municipality. What stands is my order and Chitungwiza Municipality is the sixth respondent.

At the next hearing, the first respondent, who seemed bent on avoiding going to the merits at all costs, raised another point. It was that the first respondent had been cited in her official capacity yet she had already wound up the estate and had been discharged from her duty as executor. It was argued that the application was therefore a fatality and ought to be dismissed as Fadzai Katsande should have been sued in her personal capacity. I relied once again on r 32(12) and ordered the joinder of Fadzai Katsande as seventh respondent. Once the seventh respondent had been joined, she was granted leave to file her notice of opposition, and thereafter heads of argument.

Applicant's submissions

At the final hearing Mr *Basira* submitted that the sixth respondent is barred for failure to file heads of argument.

It was submitted that the application is supported by the agreement of sale between the applicant and second respondent. Second respondent who did not file any papers in opposition was said to be not disputing the existence of the sale agreement. The first respondent is also said not to be disputing that the applicant bought the property as alleged and that the first respondent was a witness to the sale.

The transfer of the property from the second respondent to the first respondent was alleged to have been fraudulently done whilst applicant was outside the country. Mr *Basira* said that the first respondent acted contrary to the instructions given to him by the applicant pointing to some connivance between the first and second respondents despite the fact that it was applicant who paid the full purchase price.

The supporting affidavits of Neria Katsande and Samuel Karumazonde are alleged to support the averment that applicant paid the full purchase price.

When it was pointed out by Mr *Mugiya* that the agreement of sale on record is not signed by the purchaser Mr *Basira* conceded to this and explained that it is because the applicant is not based in Zimbabwe, and he left the first respondent to attend to this. This was however later withdrawn as the concession was purely leading evidence from the bar and contrary to the founding affidavit.

In response to the first respondent's averment in her opposing affidavit that indeed after the applicant bought the property, he, in turn, sold it to first respondent who paid in instalments over five years, and she was there when the last instalment was paid. Mr *Basira* pointed out that this could not be possible as that would mean the last instalment was paid in 2009 yet Tongai Maxwell Katsande died in February 2007.

It was argued that if this was a gentleman's agreement as alleged by the first respondent, it ran foul of the Contractual Penalties Act [Chapter 8:04] which provides that every instalment sale of land has to be reduced to writing.

Furthermore, Mr *Basira* pointed out that the first respondent's version that the property was transferred from the applicant to her husband contradicts the information in the cession on record which shows that the property was transferred from second respondent to first respondent.

It was also averred that the first respondent had failed to provide any evidence such as an agreement of sale to show that the property was bought by first respondent from the applicant.

Costs on a higher scale were prayed for together with the granting of the prayer in the draft order.

First respondent's submissions

Mr *Mugiya* submitted that the applicant had not complied with the court order for joinder of Chitungwiza Municipality and had instead substituted fourth respondent with Chitungwiza Municipality. This substitution was argued to be incompetent as the Chitungwiza Municipality was dragged in late and may have failed to file opposing papers due to that. It was argued that this defect is fatal.

Mr *Mugiya* contended that there are material disputes of fact in this matter as there are two conflicting versions making it impossible for the matter to proceed on motion.

It is averred that the second respondent's failure to file opposing papers cannot be taken to mean that he is not opposed or that he does not deny the existence of an agreement of sale between the applicant and himself.

It is questioned how the sixth respondent transferred the property in the light of the agreement between the applicant and second respondent as the founding affidavit does not explain this. The allegation of a fraudulent transfer is denied and the applicant was asked to show the basis of his allegations of connivance as he has a higher onus to discharge.

Mr *Mugiya* said that the cession form does not speak to any fraud and does not relate to the agreement between the applicant and second respondent, and this too is not explained in the founding affidavit. It is argued that the applicant should have complained against the sixth respondent who is the owner of the property because if there was any fraud, it would have been perpetrated by the sixth respondent.

Mr *Mugiya* re-emphasized that the agreement of sale relied on is not signed by the purchaser.

It was also pointed out that there is an inconsistency in the names of the applicant herein who is Fungai Bryan Katsande and the Fungai Katsande in the agreement and we may very well be dealing with two different people.

Mr *Mugiya* argued that the estate of Tongai Maxwell Katsande was duly wound up and the applicant did not object to the advertised distribution account and is therefore estopped from approaching this court as he has done.

The draft order is impugned as reflecting the applicant as registered holder of right, title and interests. This was said to be impossible of execution as the applicant cannot be declared a registered holder as registration of title in terms of the Deeds Registries Act [*Chapter 20:05*] and cannot happen through cession.

Paragraph 2 of the draft order is said to be shockingly disorderly as the court is being asked to order the second respondent to correct what are called cession papers and cede rights to the applicant yet it is only the sixth respondent that can cede rights to the applicant. This flaw was said to extend to para 3 of the draft order.

It is averred that costs on a higher scale are not justified as the proper administration of the estate was followed so the first respondent cannot be penalized.

On the applicability of the Contractual Penalties Act, Mr *Mugiya* said that it does not bar parties from entering into an instalment agreement verbally. If that happens, then the onus shifts to the one alleging to prove the existence of the agreement. The first respondent is alleged to have successfully done so in para 14 of the opposing affidavit filed of record.

Mr *Mugiya* submitted that the seventh respondent's failure to file heads of argument cannot result in a bar as the court order did not indicate that this would be a consequence of failure to file, not that the matter would proceed in terms of the Rules.

It was also pointed out there is now a new party to these proceedings who appears on annexure AA1 of the electronic record who in case HCH 395/24 seeks to enforce his rights. It is averred that the applicant ought to have applied for joinder of that party to these proceedings.

The answering affidavit filed on 15 January 2024 was alleged to be incompetent as it is said to have introduced new issues by narrating investigations with the sixth respondent and the Master's office, which were done after receiving the opposing affidavits. In particular, a letter from the Chitungwiza Municipality attached as annexure B which seeks to prove ownership of the property is singled out.

The agreement of sale is alleged to be a fraud as the purchase price deposit is changed to $45 000 000.00 from $37 500 000.00 at the instance of an alleged witness.

It is questioned how the applicant whose given address in the agreement is a United Kingdom address which is inscribed by hand, signed the agreement as alleged.

Further, Mr *Mugiya* questioned how the court will make an adverse finding against the sixth and seventh respondents whose cases are not set out in the founding affidavit.

The sixth respondent claims to have finished off payment of the instalments after her husband's death from her cross-border trade earnings.

It is averred that the applicant should have objected to the final distribution account which awarded the property to her from her husband. The seventh respondent says thereafter she got the property attached in security for a debt which she took from Coresearch P/L which she failed to pay and then that company sold the property to one Phillip Dengeza who is now the lawful owner as per annexures AA1 and AA2.

Applicant's Submissions In Replication

Mr *Basira* insisted that the seventh respondent remains barred as no application for condonation was sought and no heads of argument were filed.

On the applicant's answering affidavit filed on 15 January 2024, Mr Basira was opposed to having this expunged as it would close an opportunity to respond to the seventh respondent's notice of opposition.

The alleged agreement of sale annexure AA2 entered between Coresearch (Private) Limited and Phillip Dengedza is said to be a cooked document as it was signed on 4 March 2023 when the proceedings were already before the court. That agreement, clause 6, is said to provide for cession to be done within three months but none was done and seventh respondent is said to have been served with court process at the address in issue.

The letter from Chitungwiza Municipality is said to be dated 12 December 2023 and seventh respondent's opposing affidavit is dated 19 December 2023. Since the investigation at the sixth respondent's offices was done before the seventh respondent's opposition to the application, it is argued that there is nothing improper.

Issues for determination

Because of the piece-meal handling of this matter due to the joinder of the sixth and seventh respondent and the need to allow the other parties to respond, this matter was gathering and bringing up new issues as we went along.

I believe the issues which fall for my determination are:

1. Whether there are any material disputes of fact in this matter, and if so, how to proceed.
2. Whether the seventh respondent is barred for failure to file heads of argument.
3. Whether the applicant's answering affidavit filed on 15 January 2024 should be expunged from the record.
4. Whether the applicant is seeking an impossible cause and relief.
5. Whether the applicant purchased and paid the full purchase price of the property and if so, whether he subsequently sold the property to the late Tongai Maxwell Katsande.
6. Whether the seventh respondent subsequently acquired rights to the property.

I deal with these points in turn below:

Whether there are material disputes of fact

Mr *Mugiya* did not raise this point in the heads of argument but at the hearing on 10 November 2023 and said it can be raised as either a point *in limine* or on the merits. He said that there are two conflicting versions from the applicant and first respondent.

Mr *Basira* denied that there are any material disputes of fact. He contended that not every dispute of fact is material and it is up to the court to examine the alleged dispute of fact to see whether in truth there is a real issue of fact which cannot be satisfactorily determined without the aid of oral evidence because if this is not done then the respondent might raise fictitious issues of fact to simply delay the hearing of the matter to the prejudice of the applicant. See *Peterson v Cuthbert and Company Limited* 1945 AD 420 @ 428 and in *Supa Plant Investments (Pvt) Limited* v *Edgar Chidavaenzi* HH 92/09.

In casu, the applicant bases his claim on the fact that he bought the property from second respondent and paid the full purchase and because he was based in the United Kingdom, he delegated his brother Tongai Maxwell Katsande to attend to transfer in his absence into his name.

In response to this material fact, the first respondent in para 7 says that:

> "The truth of the matter is that the applicant acquired the said property as his initially and then asked my husband to pay for it gradually. It took my husband over five years to finish the instalments which were to be paid to the applicant through a gentleman's agreement since the two were brothers."

The other alleged dispute of fact is that the applicant is cited as Fungai Bryan Katsande, yet the agreement only reflects Fungai Katsande. This issue is easily resolved by the first

respondent's opposing affidavit in which she acknowledges that the applicant Fungai Bryan Katsande did indeed buy the property in issue. It is clear that the parties understand that there is only one applicant who is known by both names.

I believe the alleged disputes of fact do not fall in the class of disputes which MAKARAU J stated in *Supa Plant Investments (Pvt) Limited* v *Edgar Chidavaenzi supra*. She stated:

> "A material dispute of fact arises when such material facts put by the applicant are disputed and transversed by the respondent is such a manner as to leave the court with no ready answer to the dispute between the parties in the absence of further evidence."

In casu, after perusing the applicant's and respondents' affidavits, I am not left with no ready answer to the dispute. I can certainly proceed to weigh each party's evidence and reach a conclusion on a balance of probabilities.

I accordingly find that there are no material disputes of fact to derail the court.

Whether the seventh respondent is barred

On 10 November 2023, Mr *Mugiya* raised a point of law that the application was a fatality as the first respondent had not been cited in her personal capacity but in her official capacity, which office she was already discharged from due to the winding up of the estate. I found that the joinder of Fadzai Katsande in her personal capacity was a necessity as I deemed it just. I then gave the following order:

1. Fadzai Katsande be and is hereby joined to these proceedings in her personal capacity as the seventh respondent.
2. The applicant shall serve a copy of the application on the seventh respondent within ten days of this order together with a transcribed record of the hearing of 10 November 2023.
3. The seventh respondent is granted leave to file her notice of opposition within ten days of the date on which service of the application is effected upon her.
4. The applicant is granted leave to file any answering affidavit within ten days of service of the notice of opposition on him.
5. The seventh respondent is granted leave to file her heads of argument within ten days of the filing of the answering affidavit.
6. Thereafter, the matter shall proceed in terms of the High Court Rules 2021.

Mr *Mugiya* cannot seriously argue, in the face of that order that the seventh respondent who failed to file heads of argument is not barred. His argument that the order did not say failure to file heads of argument would lead to a bar is rather lame. Paragraph 6 of the order states that after the filing of the answering affidavit, the matter would proceed in terms of the Rules. The seventh respondent is given a timeframe within which to file heads of argument.

Rule 59(22) provides that where heads of argument are required to be filed and are not filed within the period specified, the respondent concerned shall be barred.

Mr *Mugiya* disingenuously averred that the first respondent and the seventh respondent are one and the same implying he was content to rely on the earlier heads of argument filed for the first respondent.

On this point I agree with Mr *Basira* that the seventh respondent is barred.

Whether the answering affidavit of the applicant filed on 15 January 2024 should be expunged from the record

Mr *Mugiya* submitted that the answering affidavit filed by the applicant on 15 January 2024 must be expunged from the record because it is introducing new issues such as the investigations with the sixth respondent and the Master's office after receipt of all opposing affidavits. The first and seventh respondent are said to have no opportunity to reply to that.

Secondly, the annexure attached to the answering affidavit being a letter from sixth respondent is said to be out of place as it is alleged to be a document establishing the cause of action in this matter.

The case of *Busangabanye* v *Matsika & Ors* HH 680/22 was referred to as establishing that one cannot attach annexures in an answering affidavit or lead new evidence therein.

Mr *Basira* explained that the answering affidavit was filed in compliance with the court order of 1 December 2001 and its expunging would take away the applicant's opportunity to respond to seventh respondent's notice of opposition.

The *Busangabanye* v *Mutsika & Ors supra* judgment is quite seminal on this subject. The law, purpose, nature and contents of answering affidavits was put thus:

"It is a well-established position that an answering affidavit must not contain new evidence or fresh facts, especially if such have the effect of varying the cause of action."

The case of *Kaskay Properties (Pvt) Ltd* v *Minister of Lands and Rural Resettlement & 2 Ors* HH 762/17 expounds this position as follows:

> "A litigant who makes a conscious decision to sue through motion, as opposed action proceedings is enjoined to anticipate the respondent's defence. Having anticipated such he must include in his founding affidavit all the evidence which supports his case including such evidence as will rebut the respondent's defence. Where he adopts the stated line of reasoning, the court will not find him wanting when he restates his position in the answering affidavit as he will merely be confirming what he has already told the court. A litigant in other words, should not leave material facts which support his case or rebuts the respondent's case to the answering affidavit. Where he does so, he runs the risk of the court not taking into account new evidence which he places in the answering affidavit as the respondent would not have had an opportunity to make comments on the new evidence which he includes in the answering affidavit."

CHILIMBE J in *Busangabanye v Matsika & Ors supra,* went further to interrogate whether the fresh facts and evidence alter the original cause of action. He states that the cause of action set out in the founding affidavit must not be varied to the prejudice of the other party or obfuscation of the controversy. In that case the applicant had attached 6 new affidavits to the answering affidavit and a supporting affidavit. Even though the applicants had not provided an explanation as to why they had not attached such evidence with the founding affidavit, the court reasoned that this was not fatal to the applicant's cause. It was considered that no serious argument had been mounted regarding the authenticity or relevance of the documents. The additional annexures were considered as material that they would assist a court to dispose of the matter. It was noted too that there had been no suggestions of impropriety or *mala fides* on the part of the applicants or that the applicant completely sought to panel beat their causa out of desperation. The application to expunge certain parts of the record was consequently dismissed.

In casu, Mr Mugiya did not point out any other offending parts of the answering affidavit except the letter from Chitungwiza Municipality. Expunging the whole answering affidavit will offend against the very purpose of an answering affidavit and shut out the applicant from replying to the seventh respondent's opposing affidavit.

The letter from Chitungwiza Municipality's authenticity has not been questioned. It was written well before the seventh respondent's opposing affidavit. There are no suggestions of impropriety or *mala fide* seriously mounted. Above all, the annexure simply confirms a position already set out in the founding affidavit: that the property is registered in the name of the late Tongai Maxwell Katsande.

The application to expunge the answering affidavit and its annexure is dismissed.

Whether the applicant is seeking an impossible cause and relief

Mr *Mugiya* submitted that it is highly improper for a party to jump to the High Court and ask it to set aside a lawful process of estate administration without just cause, especially through motion proceedings.

Paragraph 1 of the draft is said to be incapable of being granted in its current form as it would convey a lie that the applicant is a registered holder of rights, title and interest in the property. This is alleged to because registration of title can only be done through the Deeds Registries Act and not through a cession as the property has no title deed.

The relief in para 2 is said to be shockingly disorderly as the court is being asked to order second respondent to correct cession papers and cede rights to the applicant. This is alleged to be an impossible order to execute as well as para 3.

It is averred too that there is no cause of action in respect of the seventh respondent who was joined to the proceedings at the instance of her legal practitioners who contended that she needed to be joined to the proceedings in her personal capacity as the property was alleged to be now in her name.

Mr *Basira* submitted that the draft order is just a draft and has no legal effect until confirmed by the court which can amend it to capture the appropriate remedy merited and articulated in the founding affidavit. For this assertion reliance is placed on the case of *Sekard Learning Development Solution (Pvt) Ltd* v *Routhy World Education Adventure and Anor* HH 247/17, *Econet Wireless (Pvt) Ltd* v *Trustco Mobile (Pty) Ltd & Anor* 543/13.

It is submitted that this is a proper case for this court to exercise its powers set in s 14 of the High Court Act [*Chapter 7:06*] which provides that the court, in its discretion, at the instance of any interested party, may inquire into and determine any existing, future or contingent right or obligation.

I find that in the light of s 14 of the High Court Act, there is no bar to this court proceeding to determine this matter.

The alleged incompetence of the draft order on account of a claim to declare the applicant as the holder of rights, title and interests in stand 14478 Zengeza 3 Extension Chitungwiza as read with paragraphs 2 and 3 is easily resolved by reference to the founding affidavit. The applicant in para 16 states that he asked his brother to attend to transfer of rights on his behalf at Chitungwiza

Municipality. In para 28 he says that his late brother fraudulently gave himself rights he did not possess by not ensuring that title was ceded to him as per his instructions.

The case of *Hippo Quarries (TVL)(Pty)* v *Eardley* 1992(1) SA defines a cession as follows:

"Cession it is trite, is a particular method of transferring a right."

In *Madzima* v *Mate* HH 86/17 there is a simpler definition. DUBE J (as she then was) stated:

> "Put simply, a cession is a method by which rights are transferred. It involves a transfer of personal rights by agreement between a cedent and a cessionary. Once a cession has taken place, the right vests in the cessionary. There are no formalities for the transfer of rights in a cession. The subject matter of the cession should be capable of being ceded by the cedent. The right sought to be ceded must fall within the estate of the cedent. A cedent may only cede existing rights. He may only cede rights that he is entitled to dispose of….must have the capacity to do so. The agreement concluded between the cedent and cessionary constitutes the *justa causa* for the cession. Once a cession has taken place, the cessionary steps into the shoes of the cedent and the thing ceded becomes part of the cessionary's estate. A cession is not a mode of transferring real rights."

In casu, the court simply has to be clear that it is not conferring real rights on the applicant. It should also make clear that the cedant passes on his rights to the proper cessionary who bought the property. The role of Chitungwiza Municipality, sixth respondent as the owner of the land is provided for in the form of cession. The applicant is clearly not seeking registration of title through the Registrar of Deeds.

Even where the draft order is inelegantly drafted, I stand by ZHOU J's sentiments in *Sekard Learning Development Solution (Pvt) Ltd supra* where he stated.

> "I am, however, of the view that the defect in the formulation of the relief sought is not fatal as the court is at large to amend the draft order. As long as the court is satisfied that the relief sought is supported by the cause as pleaded in the founding affidavit it can amend the draft order. After all, as its name suggests, it is only a draft which the court is not bound by."

The averment that there is no cause of action in respect of the seventh respondent cannot be seriously made as she was joined to the proceedings at the insistence of her legal practitioners who wanted to avoid going to the merits and stated there was a fatal non joinder. Unfortunately for them, the court decided it was necessary to have her joined to the proceedings as non-joinder does not defeat a cause. She was given an opportunity to be heard. In the founding affidavit the applicant does relate what actions the seventh respondent has engaged in her personal capacity and those done in her official capacity as first respondent. Examples are found in paragraphs 18 where she stayed in the house in her capacity as sister-in-law. Several other paragraphs such as 33 and

37 show that she is referred to as sister-in-law and not the executor. She was even able to mount a spirited notice of opposition.

In the circumstances I find that the applicant is not seeking an impossible cause and relief.

Whether the applicant purchased and paid the full purchase price for the property, and if so, whether he subsequently sold the property to the late Tongai Maxwell Katsande?

The applicant's averments in the founding affidavit are that he purchased the property stand no 14478 Zengeza 3 Extension at an agreed price of seventy-five million dollars from the second respondent. He says he paid forty-five million upon signing the agreement and the balance of thirty million would be payable upon verification of title from the Chitungwiza Municipality. The initial deposit is said to have been paid by bank transfer and the second respondent is alleged to have acknowledged receipt of such payment in the agreement.

An agreement of sale has been tendered which does capture these alleged details. Unfortunately, it does not appear to have been signed by both the purchaser and seller in the spaces provided. They seem to have endorsed their signatures, not above but beside their names.

The first respondent alleges that the agreement of sale is not signed and is irregular but accepts that "the truth of the matter is that the applicant acquired the said property as his initially."

There is a supporting affidavit by one Neria Katsande who conforms that she was present the applicant and the second respondent entered into the agreement of sale in issue. She says that she did not sign as a witness to that agreement but the late Tongai Maxwell Katsande signed. She confirms too that the late Tongai Maxwell Katsande was given instructions to finalize the sale and carry out verifications at the Chitungwiza Municipality as the applicant was travelling back to the United Kingdom.

Another supporting affidavit is from a Samuel Karumazondo who is an uncle to both the applicant and the late Tongai Maxwell Katsande.He corroborates the applicant's case that he loaned thirty million dollars to the applicant on or about 13 August 2004 who was intending to pay off the balance of thirty million dollars for the purchase of stand 14478 Zengeza 3 Extension Chitungwiza.

There is no notice of opposition filed by the second respondent.

In the case of *Mining Industry Pension Fund* v *DAB Marketing (Pvt)Ltd* SC 25/12 it was held that a formal admission made in pleadings cannot be ignored by the court before whom it is

made and it prevents the leading of any further evidence to prove or dispose the facts. It becomes conclusive of the issue or facts admitted. *In casu*, the first respondent admitted that the applicant did purchase the property. The critique of the form of the agreement of sale is therefore inconsequential.

The question of whether the applicant purchased the property and paid the full purchase price is answered in the affirmative.

The next inquiry is whether the applicant then subsequently sold the property to the late Tongai Maxwell Katsande. This is an allegation made by the first and seventh respondent and the onus to prove this is on them.

The first respondent says that after the applicant had bought the property, he then sold it to the late Tongai Maxwell Katsande who paid for it gradually and it took him five years to finish the instalments which were paid to the applicant through a gentleman's agreement as they were brothers.

It is further averred that after the late Tongai Maxwell Katsande had finished paying for the house, the applicant then transferred the house to Tongai Maxwell Katsande's name. She even says she was present when the last instalment was paid and the applicant instructed her husband to go to council and get cession forms so that they could be completed before applicant returned to the United Kingdom. In compliance to that, she says that her husband did go to Council. This is in the first respondent's opposing affidavit.

In the seventh respondent's affidavit she now qualifies this and says she paid back some of the money herself as she was a cross border trader. What blundering?

The change in position is made in the face of some serious cracks being exposed in her case. The applicant questions how, the late Tongai Maxwell Katsande, who died in 2007, could have paid the last instalment after five years from 2004? The patching up of the cracks does not work in this case. The respondent had made clear that her husband was present in 2009 when the last instalment was paid and he went to collect cession forms from council. How could the dead Tongai Maxwell Katsande have done that?

To add to the widening cracks, the first or seventh respondent have not placed before the court the alleged cession form which shows that the applicant transferred his rights to the late

Tongai Maxwell Katsande. The only cession form on record is that provided by the applicant which shows that the second respondent ceded his rights to the late Tongai Maxwell Katsande.

There is no proof of any payments made by the late Tongai Maxwell Katsande to the applicant.

It is my finding that the first and seventh respondent have woefully failed to discharge the onus to prove that the applicant sold the property to the late Tongai Maxwell Katsande.

Whether the seventh respondent subsequently acquired rights to the property which she could dispose of

The seventh respondent avers that an advertisement was flighted calling on anyone to object to the final distribution account which awarded the property to her husband's estate.

She further states that she proceeded to have the property attached in security to a debt which she got for Coresearch P/L which company, upon her failure to pay, sold the house to Phillip Dengeza who is now the lawful owner, she has attached the suretyship agreement and the agreement of sale between Coresearch P/L and the said Phillip Dengeza.

The applicant rubbishes the seventh respondent's claim that the title to the property was transferred to her and a letter from the sixth respondent of 12 December 2023 is availed. In that letter it is confirmed that the records show that in 2004, the property was transferred from Stanislaus Chogugudza to the now late Tongai Katsande by way of cession. In 2011 letters of administration to the estate of the late Tongai M Katsande were filed showing Fadzai Katsande as the executrix dative. By that date, 12 December 2023, it was recorded that no beneficiaries had approached the council for cession.

The above ties up with the applicant's assertion that a perusal at the Master's office shows that the final distribution account was not confirmed by the Master of the High Court and there is no Master's consent to have the property transferred from the name of Tongai Maxwell Katsande.

The seventh respondent could not have lawfully entered into a loan agreement and encumbered the estate property without the Master's consent in terms of s 120 of the Administration of Estates Act [*Chapter 6:01*]. See also *Dondo N.O* v *Muganhiri & 3 Ors* HH 77/15 and *Mamutse & Anor* v *Tichareva N.O & 4 Ors* HH 258/18.

The alleged sale agreement tendered by the seventh respondent which purportedly was between Coresearch (Pvt) Ltd Phillip Dengedza was only executed on 4 March 2023 when these

proceedings were fully under way. This is an attempt to defeat the course of justice and is unacceptable. The Master's consent is missing in this sale agreement's execution.

It is clear from the evidence at hand that the property is still in the name of the late Tongai Maxwell Katsande. I have already found that Tongai Maxwell Katsande was never the lawful holder of the rights title and interests in the property in issue. The seventh respondent therefore never acquired rights in the property.

In the celebrated words of Lord Denning in *MacFoy* v *United Africa Company Limited*.

> "If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

In this case the cession of the property to the late Tongai Maxwell Katsande by the second respondent was a nullity as there was no agreement of sale between them. It was the applicant who held the agreement of sale with the second respondent. As per *Madzima v Mate supra*, a cession is a method by which personal rights are transferred by agreement between a cedant and cessionary.

The late Tongai Maxwell Katsande's purported title to the property is a nullity. Every other proceeding which is founded on this nullity is also bad, null and void. It cannot stand.

What this means is that the alleged distribution of the property to the seventh respondent is a nullity. She cannot rely on being the "owner" of the property to justify her alleged transactions with Coresearch (Pvt) Ltd and subsequently with Phillip Dengedza. She could not give what she did not lawfully have rights to.

It is my considered view that the applicant has discharged the onus to prove his case on a balance of probabilities.

Costs

The applicant prayed for costs on a higher scale on account of having been put out of pocket in a dishonest and vexatious manner.

Mr *Mugiya* opposed the granting of costs on a higher scale on account of the first respondent having duly followed the law in the winding up of the estate.

In *Mahembe* v *Matambo* 2003(1) ZLR 149 @ 150C it was held that costs on a higher scale are a drastic measure which the courts will not lightly resort to as a person has a right to obtain

judicial decision against a genuine complaint. These costs will be awarded where it is clear that the losing litigant was not genuine in the pursuance of a stand in the litigation process. Some of the grounds which justify an award of costs as between attorney and client are:

(i) Dishonest conduct either in the transaction giving rise to the proceedings or in the proceedings
(ii) Malicious conduct
(iii) Vexations proceedings
(iv) Reckless proceedings
(v) Frivolous proceedings

In this case I have already pointed out the dishonesty in the first and seventh respondents' pleadings. Despite the clear knowledge that the late Tongai Maxwell Katsande never bought the property, not so well thought out lies were spun which entangled the deponent exposing that she is not so clever after all. She knew all the time that the applicant was entitled to the property but she thought she could pull wool over the court's eyes. All the material averments in her affidavits have been shown to be false.

Furthermore, the first and seventh respondent's counsel acted in a highly unacceptable manner by raising endless points *in limine* just to avoid going to the merits of the matter. *In casu,* this matter was initially set down for hearing on 18 October 2023. A point *in limine* on nonjoinder of Chitungwiza Municipality was raised leading to its joinder as sixth respondent.

Another point raised was that the application is contrary to the provisions of s 14 of the High Court Act as the applicant seeks a *declaratur* and consequential relief which is contrary to the said proviso. I dismissed this point on the ground that Mr *Mugiya*'s interpretation of s 14 of the High Court Act was erroneous. It simply meant that the High Court may, in its discretion at the instance of any interested party, inquire into and determine any existing, future, or contingent right or obligation, despite that such person cannot claim any relief consequential upon such determination. This interpretation accords with the many superior court judgments which have granted declaratory orders coupled with consequential relief.

It was also alleged that the applicant should have exhausted local remedies by approaching the Master of the High Court. Mr *Mugiya* was saying that the applicant should not have approached this court but the Master. I distinguished that before me was a matter in which the

applicant was raising a dispute over the existence of some legal right or obligation, in particular, who the holder of rights, title, and interests in the property in issue is. I found that the matter was properly before me as the Master had no authority to pronounce himself on the questions posed before me. I disposed of the points *in limine* and postponed the matter to 10 November 2013.

Once again Mr *Mugiya* raised another point of law on the fatal non joinder of the seventh respondent in her personal capacity. That was disposed of too by ordering her joinder. Mr *Mugiya* was not done yet. Amongst other issues raised *in limine* was that of there being material disputes of fact, the application being fatally defective and whether the applicant is seeking an impossible cause and relief.

I can do no better than reproduce what was said by MATHONSI J, as he then was, in *Telecel Zimbabwe (Pvt) Ltd* v *Portraz & Ors* HH 446/15. He said;

> "Legal practitioners should be reminded that it is an exercise in futility to raise points in limine simply as a matter of fashion. A preliminary point should only be taken where, firstly it is meritable and secondly it is likely to dispose of the matter. The time has come to discourage such waste of court time by the making of endless points in limine by litigants afraid of the merits of the matter or legal practitioners who have no confidence in their client's defence viz-a-viz the substance of the dispute, in the hope that by change the court may find in their favour. If an opposition has no merit it should not be made at all. As points *in limine* are usually raised on points of law and procedure, they are the product of the ingenuity of legal practitioners. In future, it may be necessary to rein in the legal practitioners who abuse the court in that way by ordering them to pay costs *de bonis propiis*.

This matter is fitting for this admonishing in all respects. Other that the dishonesty in the proceedings the mounting of endless points in limine amounts to vexatious proceedings. This is a clear abuse of our legal system and our courts.

In order to show my disapproval, I must order costs on a higher scale.

Disposition

IT IS DECLARED AND ORDERED THAT:

1. The applicant Fungai Bryan Katsande is the holder of rights, title and interests in stand 14478 Zengeza 3 Extension, Chitungwiza.
2. The second respondent and the sixth respondent are ordered to correct the cession papers and cede rights in stand number 14478 Zengeza 3, Chitungwiza to the applicant within thirty days of this order.

3. In the event that the second respondent does not sign the relevant documents, the fifth respondent is hereby ordered to attend to the transfer of rights from the second respondent to the applicant.
4. The first and seventh respondents are ordered to pay costs of suit on a higher scale of legal practitioner and client.

Muvirimi Law Chambers, applicant's legal practitioners
Mugiya Law Chambers, first and seventh respondent's legal practitioners