

REPORTABLE (40)

CHIPO GOTO

v

(1) SHADRECK TSURO N.O (In his Capacity as Executor Dative of the estate of the late Edith Shope Goto) **(2) PHILDA CHIKEREMA (3) MONICAH CHIVIYA (4) TABITA CHANGONDA (5) MASTER OF THE HIGH COURT N.O**

**SUPREME COURT OF ZIMBABWE
MAVANGIRA JA, MAKONI JA & MUSAKWA JA
HARARE: 09 FEBRUARY 2024**

D. Sanhanga, for the appellant

R. Mabwe, for the first, third and fourth respondents

The second respondent in person

MAKONI JA:

1. This is an appeal against the whole judgment of the High Court of Zimbabwe (“the court *a quo*”) sitting at Harare dated 30 August 2023. After hearing submissions from both counsel, we allowed the appeal and made the following order:

1. The appeal be and is hereby allowed with each party bearing its own costs.
2. The judgment of the court *a quo* in HH 504/23 be and is hereby set aside and substituted with the following:

- “(i) The application be and is hereby granted.
- (ii) The first and final distribution account dated 26 April 2022 be and is hereby set aside.
- (iii) The matter is remitted to the Master of the High Court for the first respondent to do all things necessary in terms of the Administration of Estates Act [*Chapter 6:01*] and any other relevant law in order to give effect to the

donation agreement entered into between the late Edith Shope Goto and the applicant.
(iv) Each party shall bear its own costs.”

2. We indicated that reasons would be given in due course. These are they:

BACKGROUND FACTS

3. The appellant is the daughter of the late Edith Shope Goto (“the deceased”), who died on 8 May 2021, and is also a beneficiary of the Estate Late Edith Shope Goto (“the estate”). According to the appellant, the deceased donated her sole immovable property, namely Stand 1207, Mabelreign Township, held under deed of transfer number 3031/91 (“the property”) to her. On 22 July 2016, in the presence of Peter Makonza, Haggai Makonza and Rudo Makonza-Goto, the donation was executed by the deceased through a deed of donation. On the same date, the deceased executed a declaration stating that she donated the property to the appellant and that the value of the said property was US\$100 00.00. The deceased also declared that she did not receive nor was to receive any value as consideration on account of the donation of the property.
4. On the same date the appellant signed the deed of donation to signify her acceptance of the donation. She also signed a declaration that a donation had been made to her and that the deceased was not going to be paid nor was she to pay any value as consideration for the acquisition of the property. The process of transfer was instituted and the deceased appointed Jonathan Samukange of Messrs Venturas and Samukange to be her lawful attorney and agent in her place and stead, to appear before the Registrar of Deeds.

5. A Capital Gains Tax Exemption Certificate for the transfer of the property was obtained and approved on 18 August 2018. Thereafter the appellant became financially incapacitated and failed to pay the conveyancing fees required to effect transfer of the property.
6. The deceased passed away before the transfer of the property into the appellant's name had been effected. After the passing away of the deceased, the appellant, together with the respondents, appointed their maternal uncle, Shadreck Turo, as the executor dative of the estate. The executor included the property on the inventory list and the appellant objected to that inclusion. The executor refused to recognise the donation and went on to include the property on the first and final distribution account of the estate suggesting that the property be distributed to the deceased's children in equal shares.
7. Several letters were exchanged between the Master of the High Court, the executor and the appellant seeking to resolve the dispute but to no avail. On 6 October 2022, the Master of the High Court advised the appellant to approach the High Court as the objection she raised had been rejected by the executor.
8. On 24 November 2022, the appellant filed an application for a declaratory order in terms of s 14 of the High Court Act [*Chapter 7:06*] ("the High Court Act"). The appellant sought that the first and final distribution account be declared null and void and that the first respondent, in his official capacity, be ordered to transfer and distribute the property in terms of the donation dated 22 July 2016.

9. The first, second, third and fourth respondents opposed the application. The first respondent opposed it on the basis that when he advertised for debtors and creditors no claim was filed within the 21-day period provided at law. It was also his position that the property was still registered in the name of the deceased and so it belonged to the estate of the deceased and was to be inherited in equal shares by the biological children of the deceased. The first respondent also disputed the validity of the deed of donation on the basis that the deceased was well over 90 years of age and was very advanced in years and could not have appreciated that she was donating the house. It was also his position that the donation was not perfected because transfer to the appellant had not taken place by the date of deceased's death.

10. The second and third respondents opposed the application on the basis that it was not the deceased's wish that the appellant be the sole owner of the property. They averred that they, together with the fourth respondent, are the ones that purchased the property for the deceased when she moved back home from Zambia in 1983. They also contended that the deceased did not have the mental capacity to understand what she was being asked to do when she signed the deed of donation. The fourth respondent associated herself with the third respondent's opposing affidavit.

SUBMISSIONS BEFORE THE COURT A QUO

11. Before the court *a quo* counsel for the appellant argued that a donation is perfected once there has been an offer which is accepted. The transfer itself, she argued, is but a juristic act while the donation, materially, is evinced by the intention of the donor. Counsel further argued that the fact that title was not issued did not invalidate the actions of the donor since

obtaining title is the very last step of transfer and postulated that it is an administrative step, the intention of the donor being always paramount.

12. Counsel for the appellant drew the court's attention to a Kenyan case of *Paul Kathuni Gichunge v Victor Polycarp Ntwiga & 2 Ors* [2016] eKLR where it was emphasised that a person can deal with their property as they choose during their lifetime and that any person wishing to query the fairness or otherwise of the person's actions should do so during that person's lifetime. Counsel further argued that there are three requirements of a donation *inter-vivos* which are intention to make the gift, acceptance of the gift and delivery of the subject matter to the donee. The court's attention was also drawn to another Kenyan case *Reginah Nyambura Waitashu v Tarcision Kagunda Waithatu & 3 Ors* [2016] eKLR for a discussion and an example of the application of these principles.

13. Counsel for the first, third and fourth respondents, Mr Kuhuni, argued that in light of the donation having been made to compensate the appellant for looking after a relative's children and her not owning property in Zimbabwe, remunerative and reciprocal donations are not true donations. He further argued that the donation was a discharge of moral obligation which the deceased felt she had towards the appellant. The document said to embody the donation was not done out of liberality but merely to discharge an obligation. Further, he emphasised that a donation *inter vivos* cannot be transferred after the death of the donor and it cannot transmute itself into a testamentary disposition. He also argued that only the intention to donate was expressed but there was no indication of acceptance.

14. He stressed that the deed of donation was entered into in July 2016 and yet nothing was done by the appellant until the executor filed a liquidation and distribution account in 2022. As a result, the title remained in the name of the deceased and therefore the property belonged to her estate and was distributable in terms of intestate succession. He was steadfast that like an agreement of sale, without transfer, it only accorded personal rights. Vesting of ownership was required by an act of transfer. He cited the *Sheriff of Zimbabwe v Gambe & Anor HH 378/20*.

FINDINGS BY THE COURT A QUO

15. In determining the dispute, the court *a quo* held that from the factual spectrum in the case before it there was no doubt that the intention by the late Edith Shope Goto was to enrich the applicant and the fact that the donor may have wanted to thank her for looking after a cousin's children is neither here nor there.

16. It further found that at common law, delivery is required to perfect an *inter vivos* gift and if the property remains with the donor there can be no valid gift *inter vivos*. The court further held that to take transfer of immovable property and exercise full dominion over it, a change of ownership and title is required through the Deeds Registry. It was thus the court *a quo*'s position that the intent of the donor cannot count for the act of transfer because the law is clear, from the nature of the property, on how transfer is to be effected. Accordingly, the court dismissed the application.

17. Dissatisfied by the decision of the court *a quo*, the appellant noted this appeal on the following grounds:

GROUND OF APPEAL

- (1)“The court *a quo* erred and contradicted itself in finding that there existed a valid donation contract between the appellant and the late Edith Shope Goto and then subsequently, denying the appellant the rights and obligations naturally and legally flowing from the valid donation contract.
- (2) The court *a quo* erred and contradicted itself in finding that the late Edith Goto had completed all the necessary steps to effect transfer as is required by our abstract system of land registration, yet at the same time failing to grant the relief sought by the appellant.
- (3) The court *a quo* erred in finding that the applicant (*sic*) failed to perfect the donation by having the property in question registered in her name when in terms of our law, the donation was perfected upon its acceptance by the appellant.
- (4) The court *a quo* erred and contradicted itself in finding that the applicant (*sic*) failed to perfect the donation by having the property in question registered in her name when such a finding confirms that the act of transferring title was no longer in the control of the late Edith Goto but was purely within the control and domain of the appellant.

APPELLANT’S SUBMISSIONS BEFORE THIS COURT

18. At the hearing of the appeal, Ms *Sanhanga*, counsel for the appellant, submitted, as a preliminary point, that the second respondent was operating under a bar in the court *a quo* but that as the second respondent was a self-actor, the appellant was not opposed to having her appear before this Court. After further engagement with the court, she conceded that the second respondent was not properly before the court. Both Ms *Sanhanga* and Ms *Mabwe*

for the first, third and fourth respondents, agreed that the bar in the court *a quo* remained operational and accordingly the second respondent remained barred even before this Court.

19. On the merits, Ms *Sanhanga* submitted that the grounds of appeal addressed one issue which is whether or not immovable property can be transferred to a donee after the death of a donor. It was her submission that upon the death of a party, the executor has a duty to perform all duties to a contract entered into by the deceased before her death. She further submitted that the only exception to this principle was if the contract itself explicitly states that death extinguishes the contract. Ms *Sanhanga* also submitted that a donation is a contract like any other contract and as such, the first respondent, as the executor, had no basis to decline to transfer the property to the appellant.

20. She further submitted that a donation becomes *perfecta* upon acceptance of the donation. For this position she relied on the case of *Barrett v Executors of O'Neil* 1879 Kotze, 104. She submitted that the *Barrett* case was on all fours with the matter before the Court and that no authority had set it aside. It was also her submission that under our law, transfer of property can be done after the death of a donor. For this proposition, she relied on the position set out in *Jones: Conveyancing in South Africa*, fourth edition at p 380 that only two requirements have to be met for transfer to be effected after the death of the donor. The two requirements being that the donation has to be valid and that acceptance of the donation had to have been made during the donor's lifetime. It was thus her submission that these requirements had been met and the appellant had to be awarded her rights.

21. Ms *Sanhanga* further contended that the respondents were now raising new defences on appeal that were not raised before the court *a quo*. These were that the requirements of a *declaratur* had not been met, the agreement was a veiled *pactum successorium*, and that the claim had prescribed. Accordingly, the appellant prayed that the appeal succeeds and the decision of the court *a quo* be set aside.

FIRST, THIRD AND FOURTH RESPONDENTS' SUBMISSIONS

22. *Per contra*, Ms *Mabwe* for the first, third and fourth respondents submitted that a donation cannot be *perfecta* without delivery. It was also her submission that delivery could not be claimed by way of declaratory relief. Ms *Mabwe* further submitted that for a donation *inter vivos* to be valid, the gift must have benefitted the donee during the life of the donor. Counsel submitted that our law and specifically, the Deeds Registries Act [*Chapter 20:05*] requires ownership of land to be conveyed by registration in terms of the Act. On what she meant by “benefit”, she submitted that this referred to the enjoyment of the rights of *dominium*. She further submitted that for donation *inter vivos*, once a donor dies then the *inter vivos* nature of the donation is taken away. Accordingly, she prayed for the dismissal of the appeal.

ISSUE FOR DETERMINATION

23. Although the appellant raised four grounds of appeal only one issue commends itself for determination by this Court. The issue is:

Whether or not an immovable property donated to a donee and accepted by such donee during the donor's lifetime can be transferred to the donee after the death of a donor

APPLICATION OF THE LAW TO THE FACTS

24. At the hearing before this Court, it was common cause, between the parties, that the donation was valid as the respondents did not file a counter appeal challenging that finding by the court *a quo*. The point of departure was on when a donation becomes *perfecta*. It was the appellant's contention that the donation becomes *perfecta* upon its acceptance by the donee. On the other hand, the respondents argued that a donation becomes *perfecta* upon delivery or transfer of the donated property during the lifetime of the donor. This necessarily raises the question of what happens where a donation is accepted during the lifetime of the donor who then dies before transfer is affected.

25. It might be prudent to define what a donation is at the outset. In *The Commissioner for the South African Revenue Service v Marx NO 2006 (4) SA 195 (C)* at p 8 – 9 and quoting from LAWSA: 5 the following was stated;

“A donation is an agreement which has been induced by pure (or disinterested) benevolence or sheer liberality, whereby a person under no legal obligation undertakes to give something ... to another person, called the 'donee', with the intention of enriching the donee, in return for which the donor receives no consideration nor expects any future advantage.”

26. The term donation was defined in MJ Lowe: *Elliot, The South African Notary* 6th ed at p 106 as follows:

“A donation has been defined as 'an agreement whereby a person without being under any legal obligation so to do gives or promises to give something to another without receiving or stipulating for anything in return'. The donor impoverishes himself out of a motive of liberality and not in return for or in contemplation of a counterpart, by giving something from his own assets to the donee who is consequently enriched. The estate of the donor must be impoverished and that of the donee correspondingly enriched, in other words the gift must be liberality at the expense of the donor. Where the estate of the donor is not impoverished there can be no donation.”

Black's Law Dictionary defines a donation as follows:

“Donation. A gift. A transfer of the title to property to one who receives it without paying for it. The act by which the owner of a thing voluntarily transfers the title and possession of the same from himself to another person, without any consideration.”

27. For a donation *inter vivos* the gift must be given between living persons.

28. The court *a quo* in coming to its decision held as follows:

“There is no doubt from the factual spectrum in the case before me that the intention by the late Edith Shope Goto was to enrich the applicant However, at common law delivery is also required to perfect an *inter vivos* gift, which simply means a gift between living persons, or, from one living person to another. ‘The delivery required in gifts *inter vivos* is usually stated to be an actual, constructive, or symbolical delivery according to the circumstances. It is commonly stated that the delivery must be as perfect as the nature of the property and the circumstances and surroundings of the parties will reasonably permit. The usual test applied to any *inter vivos* delivery is that it must be such a delivery as will most effectually divest the donor of dominion and control over the subject of the gift. In addition, the delivery must be absolute and unqualified, and it must vest the donee with, and divest the donor of, control and dominion over the property.’”

Further down the page the court stated;

“In other words, where control of the property remains with the donor then there can be no valid gift *inter vivos*. What is essential is that the gift given should immediately pass and be irrevocable by the donor. Besides preventing fraud, the purpose of delivery is to also make the donation certain and definite, especially on part of the donor. Materially, title, in its complete form must vest in the donee during the lifetime of the donor if the gift is not to be invalid.

The requirements of a gift *inter vivos* therefore boil down to:

- (a) An immediate intention to make a gift
- (b) Acceptance of the gift
- (c) Actual delivery of the gift divesting the owner of control and dominion”

29. The court *a quo* clearly accepted that the donation was valid but however it did not give effect to the donation on the basis that the appellant had failed to take transfer of the property during the lifetime of the donor. The court relied on the American case of *Begovich v*

Kruljac 38Wyo. 365, 267Pac. 426 (1928) as authority for the proposition that delivery of a donation has to be effected during the lifetime of the donor. This was the error on the part of the court *a quo*. Whilst the American law of donation has Roman law roots, our law has its roots in Roman-Dutch law. Our law of donation, as in South Africa, is governed by Roman-Dutch law principles and not Roman law principles as the two regimes differ in material respects. The position of the law with regards to transfer of immovable property after the death of a donor has been explained in a plethora of cases in South Africa.

30. Firstly, it is important to set out that the processes of donation and transfer of property are two different juristic processes. This position was explained in the case of *Mankowitz v Loewenthal* 1982 (3) SA 758 (A) as follows:

“At the outset it must be remembered that a contract of donation and the performance thereof, viz the delivery of the article donated, are two separate juristic acts: the one directed at creating an obligation and the other at transferring possession (and dominium).”

31. A donation thus creates an obligation on the part of the donor to do something, which in this case would be donating the property. The next juristic act would be to pass transfer of possession or dominium to the donee. Thus, a donation falls into the category of executory contracts. An executory donation contract was explained in the case of *Commissioner, South African Revenue Services v Marx NO* 2006 (4) SA 195 (C) at p 202 as follows:

“An executory donation is so-called because it still requires to be effected or perfected, in the sense that something is required to be done before it can be regarded as completely performed.”

32. The learned author RH Christie & GB Bradfield *Christie's The law of Contract in South Africa* 6 ed (2011) at pp 129 – 130 explained what an executory contract of donation is in the following terms:

“The second question raised by the section is what is, and what an executory contract of donation is not. The section obviously requires that a distinction should be drawn, as in *Barrett v Executors of O’Neil* 1879 K 104 109, between an accepted promise to donate, giving the promisee a personal right of action against the donor to compel him to fulfil his promise by delivery or the passing of transfer, and a donation completed by delivery or transfer, which gives the donee a right *in rem*. The latter, the completed donation, cannot be described as an “executory contract of donation” and therefore falls outside the section.....”

33.A donation of immovable property is thus treated in a manner similar to that of a sale agreement in that it creates a personal right of action in favour of the donee who can compel the donor to pass transfer. See *Jones: Conveyancing in South Africa* 4 ed (1991)379 – 380.

34.The fact that a donation creates a personal right of action was reaffirmed in *Commissioner, South African Revenue Services v Marx NO supra* at p 202 – 203 where it was stated that:

“It is clear from these authorities that the contract of donation, which came into existence when the donees accepted the donation contained in the deed of donation, created personal rights in terms of which the donees could claim transfer of the donation when the donor died. Only when transfer had effectively taken place, would they acquire ownership in the respective amounts donated to each of them. The vesting of a personal right in a donee in circumstances such as the present cannot be equated with transfer of ownership of, or of any other right in, the donation.” (my emphasis)

35.Where the donor dies before transfer there are only two requirements that need to be satisfied for transfer to be compelled and these were set out in *Jones: Conveyancing in South Africa* 4 ed (1991) 380 as follows:

“Thus, if made prior to 19 October 1982, dependent on whether the donation is claimed to have been made before or after 22 June 1956, where the donor has died before transfer is registered the registrar will require proof that:

1. The donation was valid or confirmed in the donor’s will;
2. Acceptance was made during the donor’s lifetime or that the will confirms the donation.” [*Emphasis added*]

36. In the present case, as pointed out above, it is a common cause fact that the donation is valid.

The donor signed the deed of donation indicating her intention to donate whilst the donee signed the same, signifying her acceptance of the donation. In *Morewane N.O v Rampoto N.O & Ors* (2022) ZAGPJHC 625 at p 7, para 17 it was held that there is no authority that a donation is aimed at transferring ownership forthwith. The donation was therefore binding on the donor to effect transfer of the property to the donee.

37. In *The Commissioner for the South African Revenue Service v Marx NO supra* at p 8 – 9 it was held as follows:

“It must be borne in mind that a donation made during the lifetime of the donor (*donatio inter vivos*) becomes contractually and legally binding from the moment the donee accepts the donation. It creates rights and obligations just like any other consensual contract, as appears from the following definition and elucidation in LAWSA: 5 A donation is an agreement which has been induced by pure (or disinterested) benevolence or sheer liberality, whereby a person under no legal obligation undertakes to give something ... to another person, called the "donee", with the intention of enriching the donee, in return for which the donor receives no consideration nor expects any future advantage.

[24] The donor's intention to make a donation (*animus donandi*) must arise from generosity (*liberalitas*) or liberality (*munificentia*) and be expressed as a promise (offer) to donate, which promise (offer) must be accepted by the donee before a binding contract of donation comes into existence. Once this happens the donation is perfected and it may be revoked only under certain circumstances.”(My emphasis)

38. The point is also made in the case of *Barret v Executors of O'Neil 1879 Koetze*, 104, which is on all fours with the facts of this matter, where it was held at p 109 as follows:

“When once a donation has been accepted, the donee has a right of action against the donor to compel him to make tradition, or to give transfer of the subject matter of the donation, even although there has been no registration, as in the present case. There is a decision of the Supreme Court of the Cape Colony which is directly in point. I allude to the case of *Melcle vs. David*, 3 Menz. 468. There it was held that a donation of land by a master to his servant, by an unregistered deed, was good and valid, so as to bind the donor's executor to effect transfer in favour of the donee.” (my emphasis)

39. *Jones: Conveyancing in South Africa* 4 ed (1991)380 goes further in setting out the position that the death of the donor does not extinguish the obligation of transferring the property.

The position is set out as follows:

“Where a donee has died before he can accept a donation his executor may do so on behalf of his estate.” – if an executor can accept a donation on behalf of a donee, an executor can complete the donation process on behalf of a donor.”

40. It is thus the duty of the executor of an estate to represent the deceased in all the legal obligations he/she had during their lifetime. This position was explained in the case of

Chiangwa v Katerere & Ors SC 61/21 at p 15 as follows:

“In *Nyandoro & Anor v Nyandoro & Ors* 2008 (2) ZLR 219(H) at 222H-223C KUDYA J aptly restated the legal position as follows: -

In *Clarke v Barnacle NO & Ors* 1958 R&N 358 (SR) at 349B -350A MORTON J stated the legal position that still obtains to this day in Zimbabwe. It is that “whether testate or intestate, an executor, either testamentary or dative, must be appointed.....so that the executor and he alone is looked upon as the person to represent the estate of the deceased person.” He left no doubt that towards the rest of the world the executor occupies the position of legal representative of the deceased with all the rights and obligations attaching to that position.”

41. From the above analysis it becomes clear that the donation *inter vivos* came into being upon the acceptance of the donation by the appellant. The juristic act of donation was complete. What was left was to effect transfer, which is a separate juristic act. The death of the donor did not extinguish the obligation, on the part of the donor, through the executor, to perform the second juristic act of passing transfer. Clearly the court a quo misdirected itself when it made the findings at p 6 of the cyclostyled judgment as quoted in para 28 above.

42. The third requirement as listed by the court *a quo*, relating to actual delivery of the gift divesting the owner of control and dominion, is not part of our law. There is no requirement that there be delivery forthwith for there to be a valid donation *inter vivos*.

43. As indicated in para 29, the Roman law and the Roman Dutch law principles regarding donations are different in material respects. With regard to law on *inter vivos* donations, the court in *Begovich supra* declared that “the primary intent and purpose of gifts *inter vivos* is to give immediate control of and dominion over the property to the donee.” However, no such stipulation exists in our law. In *Morewane N.O supra* at para 17 thereto, the court held that there “is no authority that a donation is aimed at transferring ownership “forthwith”. In fact, the authorities are to the opposite effect, that one may make a donation which will only take effect far into the future”. The finding therefore by the court *a quo* that the donee must obtain immediate control and dominion of the property donated to him or her is incorrect.

44. Further, in *Begovich supra* the court held that for a donation to be valid, there must be the intention to donate as well as delivery of the property. In our law, the donation agreement and the subsequent delivery of the donated property are two separate juristic acts. The validity of a donation is not reliant upon its delivery or registration. A donation is valid and perfected purely upon its acceptance. Legal rights and obligations are created upon the creation of the donation agreement. Such rights are enforceable and cannot be taken away without lawful basis. Delivery of the donated property can occur at any time after the contract of donation has been entered into. Delivery does not affect the validity of the donation but simply completes the transaction.

45. We therefore found that the court *a quo* erred in not giving effect to the donation. The donation was valid and the property had to be transferred to the donee in terms of the deed of donation.

The appeal had merit hence the order made by this Court.

MAVANGIRA JA : I agree

MUSAKWA JA : I agree

Rungwandi & Company, appellant's legal practitioners.

Messrs C. Kuhuni Attorneys, 1st, 3rd, and 4th respondents' legal practitioners.