ESTATE OF LATE MOSES MASESE
(Represented by Oliver Masomera in his capacity
As the Executor Dative of the Estate Late Moses Masese)
versus
LUKE MAPAKO
and
FIDELIS MASESE
and
MASTER OF HIGH COURT N.O
and
REGISTRAR OF DEEDS N.O

HIGH COURT OF ZIMBABWE
MUZOFA J
HARARE, 20 July 2018 and 20 September 2018

Civil Trial

V. Dzingirai, for the plaintiff
J. Mutonono, for the 1st defendant

MUZOFA J: The plaintiff issued summons out of this court on 21 March 2016 against the first and second defendants for the cancellation of an agreement of sale entered into by the first and second defendants for the sale of an immovable property known as stand number 972 Tshovani, Chiredzi 'the property' , eviction of the first defendant, payment of rentals in the sum of $25 800 collected by the first defendant, holding over damages from 1 April 2016 to the date of eviction of the first defendant at the rate of $300 a month and costs of suit on a legal practitioner client scale. The third and fourth defendants were sued in their official capacities.

The first defendant had issued summons out of this court on 10 March 2016 for an order that the plaintiff herein sign all documents through Oliver Masomera for the transfer of title in the property and that in the event of the plaintiff failing to sign, the Sheriff of Zimbabwe should sign all the necessary documents to effect transfer.

The two matters were consolidated into one action by an order of this court HC 12963/16. At the pre-trial conference parties agreed that the following the issues would determine the two matters;

1. Whether or not the first defendant purchased the property known as stand 972 Tshovani Light Industrial Area, Chiredzi, from the deceased Moses Masese?
2. Whether or not the first defendant should pay to the plaintiff any rentals and / or holding over damages in respect of that property?
3. The quantum of damages and or rentals if any to be paid by the first defendant to the plaintiff.
4. What order should be made as to costs?

At the inception of the trial a default order was granted against the second defendant who did not oppose the claim.

The plaintiff's evidence

Plaintiff led evidence from one witness Oliver Masomera "Mr Masomera". His evidence was that he was appointed an administrator of the plaintiff estate. The death certificate, of the late Moses Masese 'the deceased' was produced as an exhibit together with the Letters of Administration for his appointment as Executor Dative were produced as exhibits. He said the estate had seven beneficiaries, two surviving spouses and five children (four from the first marriage and one from the second marriage). Both wives were married in terms of the customary law. The estate had two immovable properties, a half share in stand C318 Tshovani Township and stand 972 Tshovani Township (the property) wholly owned by the deceased and movable property a motor vehicle and a scrap tractor. A due diligence made at the deeds office revealed that stand 972 Tshovani was registered in the name of the deceased, the deed of Grant was produced as an exhibit.

He said he was told by the second wife that the property had been sold by the deceased's son the second defendant after the death of the deceased for ZW$200 000 000 (200 million).The agreement of sale was produced as an exhibit. The terms of payment were set out in the agreement.

After finding out about the sale, he said he called for a family meeting. In the meeting the first wife was represented by Guriro and Associates and the second wife was represented by Chinawa Law Chambers. The parties agreed that the written agreement of sale was illegal and they entered into a redistribution account, the plan was that the property be awarded to the second

wife and the half share in stand C318 together with the rest of the movable property be awarded to the first wife and her children. He did not receive any claim from anyone.

The minutes of the meeting were produced as an exhibit. In the meeting parties agreed that the executor should evict the first defendant "Mr. Mapako" and claim rentals for the period he was in occupation of the property. He then wrote a letter to Mr. Mapako demanding the property; the letter was produced as an exhibit. Instead of responding Mr. Mapako issued summons seeking transfer of the property. According to him Mr. Mapako should have proceeded in terms of s 47 of the Administration of Estates Act [*Chapter 6:01*] 'the Act' to lodge a claim together with evidence for the executor to determine if this claim was genuine. Alternatively Mr. Mapako should have registered the estate as a creditor in terms of s 5 of the Administration of Estates Act to secure his interests in the property. Since these alternatives were available to Mr. Mapako, but he chose to issue summons out of this court he should pay costs on a higher scale. Mr. Masomera also said he inquired in the surrounding areas and from the occupants of the property who advised that they were paying $300 as rentals for the property.

Under cross examination Mr. Masomera insisted that the property belonged to the plaintiff estate. He confirmed that the deed of grant was issued after the deceased's death that Mr. Mapako's occupation of the property was illegal since the sale between him and second defendant was illegal. If Mr. Mapako had bought the property from the deceased he should have lodged a claim after the estate was advertised, he did not present any evidence that he bought the property from the deceased. He denied knowledge of a verbal agreement of sale between the deceased and Mr. Mapako. He also indicated that he discovered that Mr. Mapako occupied the property from 2005. However the claim for rentals was from 2009 to avoid a claim based on the Zimbabwe dollar. The plaintiff then closed its case.

<u>The defendant's case</u>

The first defendant "Mr. Mapako" called two witnesses. Mr. Mapako gave his evidence first. He knew the deceased as a business associate for about five years. In January 2005 he bought the property from the deceased. The agreement was not reduced into writing. They agreed to reduce the agreement into writing after the full payment. He also bought some peri- loaders from the deceased. The property was sold for ZW$200 million, he paid $100 million in the presence of the deceased's wife, Fidelis Masese the second defendant deceased's son and Mr. Mapako's

brother. He said he trusted the deceased that is why he entered into such an arrangement. The balance was paid after the deceased's death to the deceased's wife who approached him for the balance. He then suggested that the agreement be reduced into writing. The agreement of sale was drawn by a legal practitioner and signed by the second defendant as the seller. He said the intention was to reduce the verbal agreement he entered into with the deceased into writing. He realized this was not reflected .He did not bother because he did not anticipate any problems. He took occupation of the property in 2005. He did not pay any rentals; he paid City Council and electricity bills. From the time he occupied the place he was not questioned by any member of the Masese family about the occupation. The property had one structure, he built two structures on it; nobody asked him why he improved the property. He said the claim that he should pay rentals is misplaced because he is the owner of the property he bought it from the deceased in 2005. He did not see the advertisement of the estate plaintiff.

He said if the property is declared estate property he would suffer prejudice in that it would be difficult to quantify the council bills and the payments he made to the caretaker of the property. At the time of the sale there were no title deeds hence he did not take transfer.

Under cross examination, Mr. Mapako denied that the agreement of sale produced as an exhibit before this court was the one he signed. He said the terms were that the balance was to be paid in August, September and October 2005. He however confirmed that he entered into a written agreement of sale with second defendant. He said that when he paid the $100 million he was given a receipt but he no longer had the receipt in his possession. He said the legal practitioner who drafted the agreement of sale was aware that the property belonged to the deceased. He further said that the Chiredzi Council was aware of the sale .When asked whether he responded to the letters from the executor, he said there were responses from his legal representatives. He did not know why they were not produced before the court.

The second witness was Mrs. Masese. Her testimony was that she was married to the deceased in terms of customary law. During the subsistence of their marriage, they acquired movable and immovable properties. The immovable properties were stand 972 Tshovani Township Chiredzi registered in the deceased's name and another property known as stand C328 Tshovani Township registered in both their names.

She knew Mr. Mapako as the deceased's friend. She said the deceased sold stand the property to Mr. Mapako. She was present when the deceased and Mr. Mapako entered into the sale agreement. They agreed on a purchase price of $200 million. She saw Mr. Mapako hand over $100 million to her late husband. This was in the presence of Fidelis Masese the second defendant. The deceased died in February 2005.

After purchasing the property Mr. Mapako improved the property by building a structure. She said Mr. Mapako did not pay any rentals for the property because he had purchased it.The balance of $100 million was paid to her in instalments of $34 million, $33 million and $33 million in 2005 she could not remember the months. She used the money to pay off outstanding debts.

When the executor was appointed in 2015, she advised the executor that the property was sold by the deceased. However the executor insisted that there was no proof. In January 2016 a meeting was held with all the beneficiaries. She confirmed that at the meeting the property was given to the second wife Chipo Pagiwa and she was given stand number 328 Tshovani. She said she objected to the redistribution of the property because she knew that stand 972 Tshovani had been sold. The executor said there was no proof to that effect. She said she advised her lawyers who represented her then about the sale but they said if the property was sold it had nothing to do with the estate. In the end she signed the document.

In respect of the agreement of sale, she said it was made to confirm that the deceased sold the property to Mr. Mapako. However she said if the agreement reflected that second defendant sold the property it would not be telling the truth. She said Mr. Mapako bought the property in 2005; therefore he should not pay rentals and the property should be transferred to him.

Under cross examination she said the agreement of sale did not reflect the parties' intention. The property was not owned or sold by second defendant. The deceased sold the property. Initially she said she did not know Chipo Pagiwa the second wife. She later said she was introduced to her by her brother in law at a family meeting. She did not know who registered the estate but suspected his brother in law. Generally she said both legal practitioners Mr *Ganyani* and Mr *Madanhi* did not properly represent her interests when drafting the agreement of sale and at the family meeting where parties agreed on a redistribution plan. She signed the redistribution plan. The executor also did not properly do his work since he refused to accept that the property had been sold.

I turn to determine each issue that was referred to trial.

1. **Whether or not the first defendant Mr Mapako purchased stand 972 Tshovani from the deceased Moses Masese?**

It is not in dispute that the property in question is registered in the name of the late Moses Masese. At law there was nothing to stop him from disposing of the property if he so wished. However now that he is late, he cannot confirm or deny that he sold the property. There must be proof that he sold the property. Parties agreed that the onus is on the first defendant to prove that he purchased the property from the deceased.

Mr Mapako relied on the verbal agreement he claimed he entered into with the deceased. He said when he paid the first $100 million it was in the presence of his brother, the deceased's wife and the second defendant Fidelis Masese. He also relied on the agreement of sale made between him and Fidelis Masese. However he said the agreement of sale did not reflect the parties' intention it was supposed to show that it was a sale by the deceased. Without further ado, clearly the agreement of sale is invalid for the simple reasons that the purported seller and his representative were not the owners of the property and the property was part of the deceased estate that could not be disposed without due process being followed.

Having found that the agreement of sale is invalid, the issue is whether Mr. Mapako proved the oral agreement. Mr. Mapako said he was issued with a receipt when he made the first payment of $100 million, the receipt was lost it therefore could not be produced .Not much can be inferred from the non-production of the alleged receipt because it is known that documents can be lost especially considering the time frames in this matter. Mr. Mapako's evidence that he was a friend to the deceased was not disputed but that on its own does not confirm the sale. That the first payment of $100 million was made to the deceased was disputed by Mr. Masomera on the basis that the agreement of sale did not state so and that money therefore was paid on the date of signing the agreement. Mr. Mapako's evidence was corroborated by Mrs. Masese that the property was sold for $200 million and a down payment of $100 million was made to the deceased in her presence. It was not disputed that she was present when the $100 million was paid to the deceased naturally because no one knows what transpired. Mr. Mapako's evidence and Mrs. Masese's evidence differs as to who was present when money was paid to the deceased if it ever was paid. Mr Mapako indicated his brother was present. There was no explanation why the other witnesses were not called. In his declaration Mr Mapako said Elizabeth Masese was the only witness when

payment was made. In court he said his brother, Mrs. Masese and second defendant were present, on the other hand Mrs. Masese said she and the second defendant witnessed the payment of the first installment. Between the two witnesses it is unclear who was present when the payment was made. So was there such an event at all? The evidence adduced actually left more questions than answers as to whether there was a verbal agreement. I look to the other evidence to assist me in the determination of the case. If indeed there was a verbal agreement to sell the conduct by Mr Mapako and Mrs. Masese thereafter does not confirm that position.

Mr Mapako referred to evidence *aliunde* that could have strengthened his case but that evidence was not placed before the Court. The first piece is the receipt he said he received from the deceased it was not produced he said it was lost; I may give him the benefit of doubt because it is common that documents maybe lost. However he also said there was evidence at the Chiredzi Council that he bought the property. That evidence was not placed before the Court. Mr Masomera said he went to the Chiredzi Council offices he retrieved some information but there was no information that the property had been sold ,with that l can only accept Mr Masomera's evidence on that aspect.

Mrs. Masese and Mr Mapako thereafter sought to enter into an agreement of sale to sanitize the sale by the deceased. The agreement was drafted by a legal practitioner. Mrs. Masese said they told the legal practitioner that the property belonged to the deceased. At that time they had to their disposal someone who could advise them on how to proceed. Nothing was said on why they did not seek advice. The effect of the evidence is that the legal practitioner drafted the agreement of sale despite his knowledge that the property belonged to the deceased. Such conduct by the legal practitioner would be inappropriate however the Court cannot just accept the besmirchment of court officials without proof. Legal practitioners are expected to advise their clients in line with the law and not assist them to circumvent the law. I can only accept that the parties did not disclose that the property belonged to the deceased and that the deceased had sold the property because the truth was that the deceased did not sale the property at all. Why did Mrs. Masese, Fidelis Masese and Mr Mapako not set out the truth of the matter in the invalid agreement? Why did they sign a document that was a lie? Mr Mapako is a business man who is expected to know basic business ethics. I do not believe Mr Mapako's evidence that he actually read the agreement, noted the misrepresentation and just ignored it because he did not anticipate any future problems. The

document did not lie about the owner of the property only it also did not state that the $100 million was paid to the deceased. So even if the parties wanted to regularize the oral agreement at least it should have indicated the payment of the first installment. That document did not at all relate to the deceased it related to the parties who were alive and had decided to sell the property. In my view Mr Mapako signed the document because it reflected the truth of what the parties agreed to, that Fidelis Masese sold the property and payment was to be made to the sellers.

The witness Mrs. Masese was not candid with the court. Initially she said she did not know the second wife. Naturally she was not happy that the second wife gets any of the property. At the family meeting, where all family members gathered to redistribute the property she was represented by a legal practitioner Mr *Madanhi*. Mr *Madanhi* confirmed that the property in question was part of the deceased estate. Mrs. Masese cast aspersions on the legal practitioner again, she said she advised the meeting that the property was sold by the deceased. A legal practitioner is the agent of the litigant and is expected to guard her interests. The meeting was attended by twelve people and the minutes show that they agreed to the facts as set out.

In that meeting it was agreed that the executor was directed to evict Mr Mapako and claim rentals. Nowhere in the document is it indicated that the deceased sold the property. The only sale referred to was that made by Mrs. Masese and Fidelis which parties correctly agreed was illegal.

If indeed Mrs. Masese was witness to the sale of the property by the deceased why did she not indicate so at the re-distribution meeting? This casts doubt on whether there was a verbal agreement of sale at all.

At every stage of estate administration there are checks and balances to ensure that the estate is distributed to the rightful persons. In terms of s 52 (8) of the Act Mrs. Masese could have objected to the redistribution plan if indeed she was muzzled during the redistribution planning meeting as she alleged. She had legal representation by the then. The only conclusion that can be drawn is that she did not object because she agreed with the re-distribution plan. It cannot be possible that on the two occasions that Mrs. Masese could have indicated that the deceased sold the property she was muzzled in the presence of her legal practioners, when the invalid agreement was drafted and at the redistribution meeting.

If indeed Mr Mapako had entered into the verbal agreement with the deceased, he had a vested interest in the property. Firstly he did not lodge any claim against the plaintiff estate. He

indicated that he did not see the advertisement. Even if he is given the benefit of doubt, the executor wrote two letters in 2015 addressed to the tenants occupying the property. Mr Mapako confirmed that he saw those letters. He said he gave them to his legal practitioners. No response was made to the executor. What is of concern is that by March 2015 Mr Mapako knew that the property was part of the estate of the late Moses Masese, he did not file any objections, but he opted to issue out summons for transfer of the property. He did not seek to engage the executor with his evidence that he bought the property from the deceased.

The legislature put in place mechanism to address Mr Mapako's situation through the Deceased Estate Administration Act (Chapter 6:01). He was not vigilant enough to protect his rights, the law does not protect the sluggard but it protects the vigilant. An objection would have opened the door for his claim to be considered.

Taking into account all the evidence placed before the court, I do not believe the late Moses Masese sold the property to Mr Mapako. In my mind, Mrs Masese sold the property as reflected in the invalid agreement of sale. The story of the verbal agreement is not corroborated by further developments. Mrs. Masese did not advise parties to the redistribution meeting about it, the only sale declared was based on the invalid agreement. Mr Mapako did not act diligently to protect his rights if indeed he had bought the property from the late Moses Masese. The verbal agreement was not proved and therefore Mr Mapako is not entitled to the transfer of the property.

It was submitted for the defendant that in terms of s 68 D (1) of the Act it is the executor's duty to draw up the inheritance plan. In this case Mr Masomera did not draw up the inheritance plan therefore the redistribution plan is invalid. I respectfully do not agree with the submission. Firstly Mr Mapako did not lodge any challenge with the Master of the High Court on the redistribution plan. Secondly this was not an issue for determination as set out the joint pretrial minute. Mr Masomera indicated that the family agreed on the distribution of the property and he just chaired the meeting.

Subsection 2 of the section relied on is relevant it provides,

> "68 (D) (2) when drawing up a plan in terms of subsection 1 an executor shall-
> (a) ……..
> (b) So far as practicable, consult the deceased person's family and the beneficiaries and endeavour to obtain the beneficiaries agreement to it."

Mr Masomera's evidence was that the family and the beneficiaries agreed on the distribution plan, and he reduced it into writing in compliance with the law. I do not read s 68 D (1) and (2) to give the executor an open cheque to distribute the property as he or she deems fit, this is done in accordance with the law and the family's input. The beneficiaries appended their signatures signalling their agreement to the plan. There is nothing out of the way in Mr Masomera's conduct.

2. Whether the first defendant should pay rentals or holding over damages in respect of the property?

I have made a finding that Mr Mapako did not buy the property from the deceased. The law is very clear as to who is supposed to represent and deal with the estate of the deceased. It is only an executor who can do so. This principle was enunciated in 1980 by *DE Villiers in Fischer* v *Liquidators of the Union Bank* 8 SC 46 and has been followed by our courts from them. See *Clarke* v *Branacle, NO and two others* 1958 Rand N 348 (SR) at 349 B and *Nyandoro and Another Nyandoro and others* HH 89/08.

In this case it is not in dispute that the first defendant paid the purchase price pursuant to the void agreement and no rights accrue from such an agreement. The legal position relating to a void agreement as distinct from a cancelled one was clearly explained in the case of *Malunga & Anor* v *Wade* 2016 (1) ZLR 397 (H) 397 at p399E as follows:

> "….the consequences of cancellation of an agreement are different from the consequences of nullification of an agreement. For the avoidance of doubt a cancelled agreement retains the rights accruing to the date of cancellation whereas an agreement that is null and void does not give rise to any rights at all and the court cannot enforce any in respect thereto.
>
> And further at 400 B-D
>
> "…..a void agreement does not create rights as between the respective parties. Where an agreement is nullified as *in casu* the position is that the parties revert to the *status quo ante* (i.e. before entering into the void contract). Where a *merx* had been delivered the one receiving the *merx* has an obligation to restore the possession of the *merx* to its lawful possessor or owner of the same and if any price or part thereof had been paid the one who received payment of the price has an obligation to refund it (restitution) as not do so would result in one of the parties being unjustly enriched. A party to a void agreement who approaches the court to enforce the right to restitution does not seek to enforce the void agreement but seeks the doing of justice between man and man.
>
> To allow a situation where one of the parties benefits at the expense of the other in such circumstances in my view would be grossly inequitable and clearly against public policy. A strict

> application of the *par delictum* rule as is being urged by the defendant would result in the defendant retaining both the property and the amount the plaintiffs had paid towards the purchase price."

In terms Section 42 of the Act Mr Mapako obliged to deliver the property to an executor in the absence of one report the particulars of the property to the Master and failure to do so the holder shall,

> ".. apart from any other liability he may incur thereby, be liable for all dues payable to the public revenue in respect of such property or asset."

In this case therefore Mr Mapako would be liable to pay rentals and holding over damages if proved. The plaintiff's claim is for rentals in the sum of $25 800 being monies collected by Mr Mapako as rentals for the premises calculated from the 1st of February 2009 to date at the rate of $300,00 per month and holding over damages calculated from the 1st of April 2016 to the date of eviction of the first defendant at the rate of US$300 per month.

The first issue for determination is whether Mr Mapako collected any rentals. In his declaration Mr Mapako said the claim is for rentals received by Mr Mapako. Mr Mapako explained that the property was not rented out, he did not receive any rentals. The property was used by his brother who has since left for South Africa. This evidence was not disputed. It was not disputed that he paid all the utility bills and that he had actually built some structures on the property. In my view without proof that Mr Mapako received any rentals the plaintiff cannot succeed in its claim there is nothing to recover.

In respect of holding over damages Mr Mapako would be liable for holding over damages if he has remained in occupation from the date of summons to the date of eviction since the verbal agreement he relied on is void and l have made a finding that there was no verbal agreement of sale.

Mr Masomera gave evidence to the effect that at the time the summons were issued Mr Mapako had not handed over the property he has actually remained in occupation. This was not disputed. Secondly he said he inquired about rentals from surrounding premises and from the feedback he received he was of the view that rentals in the sum of $300 a month would be justifiable for the property. This was not disputed by Mr Mapako and it is an acceptable principle of our law that, that which is not denied is admitted. I accept that the reasonable rental for the property is $300 a month.

Plaintiff claimed costs on a higher scale on the basis that the first defendant had at his disposal an alternative route to address his issue but opted to file summons. I agree with plaintiff the recourse set out the relevant Act provided the first defendant a way to deal with his issues instead of approaching this court.

From the forgoing the following order is made.

IT IS ORDERED THAT;

1. T he agreement of sale entered into by the first and second defendant for the sale of Stand 972 Tshovani Light Industrial Area Chiredzi be and is hereby cancelled;
2. The eviction of the first defendant, his officials , agents , assigns and all those claiming occupation through him be and is hereby granted;
3. The claim for rentals in the sum of $25 800 (twenty five thousand and eight hundred dollars) be and is hereby dismissed.
4. Holding over damages calculated from 1 April 2016 to the date of eviction at the rate of $300 a month be and is hereby granted.
5. The claim for transfer of stand 972 Tshovani light industrial Area to first defendant be and is hereby dismissed.
6. First defendant to pay costs on a legal practitioner client scale.

Messrs Chivore and Partners, plaintiff's legal practitioner
Chadyiwa & Associates, 1st defendant's legal practitioner
Messrs Guwuriro and Associates, 2nd defendant's legal practitioner