

Judgment No. SC 4/10  
Civil Appeal No. 44/09

SUPER WHOLESALERS (PVT) LTD v (1) WILSON TATENDA  
MANASE (2) FRANK MAISIRI (3) MASTER OF THE HIGH  
COURT (4) CITY OF HARARE

SUPREME COURT OF ZIMBABWE  
CHIDYAUSIKU CJ, SANDURA JA & ZIYAMBI JA  
HARARE, SEPTEMBER 7, 2009

*U Sakhe*, for the appellant

*W T Pasipanodya*, for the first respondent

No appearance for the second, third & fourth respondents

ZIYAMBI JA: After hearing the appellant we dismissed the appeal with costs without hearing the respondents. The following are our reasons for so doing.

The late Sandra Jane Faith Maisiri (“Maisiri”) died on 3 January 2002. The first respondent was on 6 May 2002 appointed Executor Dative of the estate.

Among the properties listed in the First and Final Liquidation and Distribution Account filed by the first respondent in respect of the estate is a property known as Stand 274 Willowvale Township otherwise known as Stand No. 274 Indigenous Way, Willowvale Park, Harare (“the property”), the subject of the present dispute.

It is common cause that according to the records of the City of Harare, the property was held by Maisiri in the name of an unincorporated entity called Maisiri Bus Service (“the bus service”) a business owned by Maisiri and that after her death, the second respondent, (“Frank”) sold the property to the appellant and “authorized” the fourth respondent to cede title in the property to the appellant. Frank is the son of Maisiri and

runs the bus service. On 3 March 2004, the fourth respondent wrote to Frank advising that it had instructed its legal practitioners to transfer the stand to the appellant.

It is not clear on the record what took place immediately thereafter but on 17 August 2004, the appellant, in an effort to obtain vacant possession of the property, sought, and obtained, a provisional order which was confirmed on 23 February 2005, prohibiting Frank from alienating his rights, title and interest in the property and ordering him to sign all papers necessary to effect cession of the property to the appellant. The parties to this application were Frank and the Director of Housing, Harare City Council. The fourth respondent was directed to facilitate the transfer.

Meanwhile in September 2005, the appellant, through its managing director one Tobias Matika (“Tobias”), was advised by the first respondent that Frank had illegally sold to him property belonging to a deceased estate and that he should recover his money from Frank. Notwithstanding this intimation by the first respondent, the appellant, on the basis of the order of 23 February 2005, sought and obtained an order of eviction (“the order of 26 February 2007”) against Frank and one Madzimure who was then a lessee of the property.

These events led the first respondent to apply, successfully, in the High Court, for the setting aside of the order of 26 February 2007, for a declaration that the property belongs to the Estate of the late Maisiri and for an order directing the fourth respondent to reverse the cession to the appellant of the property.

A perusal of the orders shows that neither the first respondent as executor of the estate nor the Master of the High Court was party to either of the applications made by the appellant. The court *a quo* found that the appellant through Tobias, aware of the fraud committed by Frank, “snatched at the order of 26 February 2007”. The learned Judge concluded that both orders were made in error and set them aside.

The appellant, on appeal, maintained its stance that the property belonged to the bus service and that Frank, as its representative, was authorized to sell it. This contention flies in the face of the evidence as well as the uncontroverted allegation made by Frank in his affidavit that:

“...the first respondent knew that the property in question is a deceased estate (*sic*) and he advised me that he was going to find some way and means of circumventing that position to get transfer into his names (*sic*). Upon experiencing some hardships in changing ownership I tendered to the first respondent the whole amount he paid to me through his legal representative but he refused to accept it.”

Since the property belongs to the estate, only the Executor is authorized to deal with it. It would therefore, follow that Frank lacked both the capacity and the authority to dispose of it. Had the High Court been aware that it was dealing with property belonging to a deceased estate, it would not have granted the orders sought without allowing the Executor an opportunity to be heard. In any event, the bus service, not being a *persona*, could not own the property.

Accordingly, the order for eviction obtained by the appellant against Frank and the occupier of the property was wrongfully and improperly obtained and therefore correctly set aside by the court *a quo*.

CHIDYAUSIKU CJ: I agree

SANDURA JA: I agree

*Kantor & Immerman*, appellant’s legal practitioners

*Manase & Manase*, first respondent’s legal practitioners