ESTATE LATE PARTSON REUBEN MAGAYA
and
NORIWE GOREDEMA
versus
MINISTER OF LANDS, AGRICULTURE, WATER, CLIMATE AND RURAL RESETTLEMENT (N.O.)
and
VHENGANI NDOU
and
ZIMBABWE LANDS COMMISSION

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 1 February 2023 & 27 April 2023

Opposed Matter

Mr *T Magorimbo with* Mr *M Ndlovu,* for the applicant
Mr *P Chibanda* for the respondent

MANGOTA J: At the center of this application is Subdivision 2 of Nswala ("the farm"). It is in the District of Zvimba under Mashonaland West Province. It is 158.6 hectares in extent.

In June, 2002 the Land Acquiring and Allocating Authority ('the authority") who is the first respondent herein allocated the farm to one Partson Reuben Magaya ("Partson"). He did so in terms of an offer letter which he issued to Partson on 11 June 2002. In July 2003, the authority allocated the same farm to one Vengani Ndou who is the second respondent in this application.

Partson, it would appear, remained on the farm from 2002 to 18 May 2007 which is the date that he passed on. Following his death, one Noriwe Goredema ("Noriwe"), his wife who survived him, was appointed executrix dative of the estate of the late Partson ("the deceased"). Her appointment took place on 9 November 2017.

The appointment of Noriwe to the position of executrix dative of the deceased's estate signaled the birth of the first applicant which, together with Noriwe, the second applicant, are suing

the authority, Mr Ndou and the Zimbabwe Land Commission whom they respectively cite as the first, second and third respondents in this application. The applicants move for a declaratur and an interdict. They claim that the first applicant was/is a Zimbabwean citizen to whom the authority allocated the farm. They complain that the issuance of the second offer letter to the second, by the first, respondent is irregular, invalid and therefore a legal nullity. They move that the offer letter which the authority issued to the first applicant be declare to be valid and the one which the authority issued a year later in favour of Mr Ndou be declared to be invalid as well as null and void *ab initio*. They interdict Mr Ndou from interfering with their activities at the farm.

The application cannot succeed. It is a serious miss-statement for the applicants to suggest that the authority allocated the farm to the first applicant. There is a world of difference which exists between the estate of the late Partson Reuben Magaya, the first applicant *in casu*, and the deceased himself.

The first applicant is the estate of Mr Magaya who died on 18 May 2007. The estate, according to M.J. de Waal's *Law of Succession*, 5th edition, page 3, consists of assets and liabilities of the dead person. Sir David Hughes Parry describes matters which pertain to administration of the estate of a deceased person. The learned author states in his *Law of Succession*, 5th edition page 1 that the law of succession on death is the law which governs the transmission of property vested in a person at his death to some other person or persons. Transmission, according to the learned author, occurs in two stages, namely a passing by operation of law to one or more representatives of the deceased person for the purposes of administration and then a transference usually by the act of the representatives to the persons who are entitled to the beneficial enjoyment of the property. The transmission to a representative for the purposes of administration has three advantages. First, it facilitates the protection and preservation of any property vested in him pending distribution. Second, it affords an opportunity to creditors and debtors of the deceased to have their respective rights and duties properly adjusted. Third, it provides the machinery for the proper distribution of the balance among those who are beneficially entitled thereto.

What the learned author, Sir David Hughes Parry, states has everything which is to do with the first applicant. It came into existence after the death of Partson. The appointment of Noriwe, by operation of law, as the executrix dative of the estate of her late husband constitutes the first

stage of the administration of the estate of the deceased. She, by virtue of her appointment, does have all the deceased's assets and liabilities transferred to her. The transfer in question is the first set of acts in a series of acts which she will perform in her onerous task of administering the estate of her late husband. She will deal with creditors and debtors whose respective claims and dues she will properly adjust by giving to Caesar what belongs to him and taking from Octavian what is due to the estate of the deceased and placing that into the same. When she has completed that task, she will distribute the residue of the estate of the deceased to beneficiaries who are entitled to the same. The moment she completes that task, the estate of the deceased is properly wound up and it ceases to exist.

The first applicant is therefore a temporary feature which the law put into place for purposes of administration of the deceased's assets and liabilities. It has its lifespan which is prescribed in the law. It is not synonymous with the deceased person who, during his life-time, was a natural person. He is different from his estate which the law gives birth to at his death.

The authority did not allocate the farm to the first applicant which is the estate of the deceased. It allocated it to Partson who, during his life-time, was a natural person. Reference is made in the mentioned regard to Annexure PM2 which the applicants attached to their application. The annexure appears at p 12 of the record. It is the letter of offer of the farm which the authority extended to the deceased, a natural person, at the time that he was living.

Partson is not synonymous with his estate. He, as a natural person, is completely different from his estate which came into being at his death.

It follows from the above-stated set of matters, therefore, that, at his death, Partson's assets and liabilities were transferred to Noriwe. The transfer was by virtue of letters of administration in terms of which she was appointed to the position of executrix dative of the estate of her late husband. The transfer was/is by operation of law.

Noriwe stands in the shoes of the deceased in so far as the latter's estate is concerned. Her primary duty is to administer the first applicant which is the estate of Partson. That estate does not include the contract which Partson concluded with the authority in respect of the farm. Nor is the farm an asset in the estate of Partson. It belongs to the State.

Reference is made in the above-mentioned regard to condition 1 (c) (ii) of conditions which apply to offer of land under Zimbabwe's Land Reform and Resettlement Programme. It reads that "in the event of death of the lessee, the rightful heir shall apply for succession". The clause shows in clear and categorical terms that the offer which the authority extended to Partson ripened into a contract of lease which terminated at the death of the lessee, namely Partson Reuben Magaya. It shows that, at the death of Partson, the farm reverted to the State and, in the process, the contract of lease which existed between the authority and Partson came to an end.

The statement of the first applicant and Noriwe which is to the effect that the authority offered the farm to the first applicant is misplaced. Noriwe herself is well alive to the misleading statement which the makes. She betrays her knowledge of this matter in para 13 of her founding affidavit wherein she states that, at the death of Partson, she applied to succeed to her husband's offer letter in terms of condition 1 (c) (ii) of the conditions applying to the offer of land under the Zimbabwe Land Reform Programme (Phase 11, Model A 2 Scheme). She would not have applied if the authority offered the farm to the first applicant which is the estate of her late husband. She would have had no reason to apply as she did. The application which she made supports the view that the contract which existed between the authority and the deceased had terminated at the latter's death.

At the death of Partson, neither the first applicant nor Noriwe retained any right in the farm. Their application for a declaration of a non-existent right is therefore misplaced. Noriwe's right to the farm would only have accrued to her if the authority had considered her application in her favour. Noriwe, unfortunately for her, became a clever half, so to speak. She lacked the patience to have the authority consider her case at its own pace.

The authority and the Zimbabwe Land Commission state, correctly in my view, that Noriwe approached the court prematurely. They insist that she should have allowed the third respondent which is established and mandated by the constitution of the country to resolve disputes which relate to agricultural land to exercise its jurisdiction first in terms of the relevant law. They remain of the view that the applicants should have allowed the third respondent to resolve the dispute and, if they were aggrieved by its determination, they would have reviewed or appealed the same. I agree.

The first applicant and Noriwe approached me for a declaratur and an interdict. In doing so, they forgot to realize that it is not my duty to allocate and/or unallocate land to persons who are in need of it. That duty, they should have known, rests with no one else but the first respondent who, through the third respondent, was ready and willing to resolve their apparent dispute with the second respondent.

An application for a declaratur and/or an interdict presupposes the existence of a right which operates in favour of the applicant. The right may be clear or prima facie: *Setlogelo* v *Setlogelo*, 1914 AD 221 at 227. Where, as *in casu*, no such right exists, an application for a declaratur or an interdict cannot succeed. I cannot declare a non-existent right to be existing. I have, in short, nothing to declare and the applicant has nothing to protect in the absence of a right which operates in his favour: *MacFoy* v *United Africa Co Ltd*, (1961) 3 ALL ER 1169 (PC) at 1172.

The applicants, I am satisfied, failed to prove their application on a balance of probabilities. The application is, in the result, dismissed with costs.

Mutamangira & Associates, applicant's legal practitioners
Civil Division of the Attorney General's Office, respondent's legal practitioners