NATSA FAMILY TRUST
versus
EDWARD MASHIRINGWANI
and
NICOLA KRIENKE

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 15 September, 2021 and 19 January, 2022

OPPOSED MATTER

A. Masango, for the applicant
J. Dondo, for the respondent

MANGOTA J: I heard this matter on 15 September 2021. I delivered an *ex tempore* judgement in terms of which I granted the applicant's prayer as contained in the latter's draft order.

On the following day, the respondents addressed a letter to me. They advised that they have appealed my decision. They requested what they termed a full written judgement to enable them to appeal. This is it:

On 6 June 2020, the applicant, a Trust, purchased from the first respondent one Edward Mashiringwani ("Edward") an undivided 4.81 share being share number 13 in certain piece of land situated in the District of Salisbury called Lot 1 of Stand 1720 Salisbury Township measuring 1478 square metres ("the property").

The property which is commonly known as flat number 13 Gainsborough is at the corner of Leopold Takawira and Josiah Chinamano Avenue. It was, at the time of the sale, held under deed of transfer number 4140/20. Staying at the same was Edward's customary law wife who is the second respondent in *casu*.

The selling price of the property was US$25 000 and the terms of payment were that the applicant would pay:

a) the sum of US$5 000 upon the parties signing of the agreement;
b) a further sum of US$5 000 on or before 12 June 2000; and
c) the outstanding balance of US$15 000 on or before 31 June 2020.

The applicant paid full purchase price for the property and, on 22 October 2020, Edward transferred title in the property to the applicant as a result of which the latter applied, on 7 December 2020, to evict from the property the respondents, their tenants, assignees and all those who claim occupation through them.

The current is, therefore, an application for vindication. The applicant, in an application for vindication, must allege and prove, on a balance of probabilities, that:

i. he is the owner of the property which is the subject of the application;
ii. the property is in the possession of the respondent at the commencement of the suit; and
iii. the possession of the property by the respondent is without the authority and/or consent of the applicant.

The action *rei vindicatio*, as it is commonly referred to, is premised on the principle that an owner cannot be deprived of his property against his will. The principle was aptly enunciated in *Zavaza* v *Tenderere & Ors*, HH 740/15 which stressed that an owner is entitled to recover his property from any person who is in the possession of it without his consent.

The right of an owner to vindicate his property from whosoever is holding it against his will is, by and large, absolute. It is not open to debate. The court spelt out the stated right in *Alspite Investments (Pvt) Ltd* v *Westerhoff* 2009 (2) ZLR 226 (H) at 237 C-D wherein it remarked that:

> "There are no equities in the application for *rei vindication*. Thus, in applying the principle, the court may not accept and grant pleas of mercy or for extension of possession of the property by the defendant against an order for the convenience or comfort of the possessor once it is accepted that the plaintiff is the owner of the property and does not consent to the defendant holding it. It is a rule or principle of law that admits no discretion on the part of the court. It is a legal principle heavily weighted in favour of property owners against the whole world and is used ruthlessly to protect ownership."

Annexures B, C and G which respectively appear at pages 7, 12 and 41 show, in clear and unambiguous terms, that the applicant purchased the property which Edward transferred into its name after it had paid purchase price for the same. The applicant has, therefore, the requisite *locus* to sue and vindicate its property from the respondents.

Because the applicant proved its *locus*, on a balance of probabilities, the *onus* shifts onto the respondents to rebut the assertions of the applicant. They, in other words, should prove a right

of retention: *Jolly* v *Asharon & Anor* 1998 (2) ZRL 78 (H) at 88 A-B, *Chetty* v *Naidoo* 1974 (3) SA 13 (A) at 20 A-C and *Stanbic Finance Zimbabwe Ltd* v *Chivhungwa* 1999 (1) ZLR 262 (H).

The defences which are available to a defendant or respondent who faces a suit under the remedy of *rei vindicatio* were enunciated in *African Sun Zimbabwe (Pvt) Ltd* v *Mlongoni* ZWHHC 332/15 wherein it was remarked that:

> "The respondent…must establish a claim of right in respect of the property sought to be vindicated. *In Introduction to Law*, C.G. Van der Merwe & Je Du Plessis summarises (sic) defences available to a claim for vindication as follows:
>
> a) the defendant had acquired the property by prescription;
> b) the third party is the owner;
> c) the property was alienated and destroyed; or
> d) the defendant has a superior contractual right to possess."

That the second respondent is in occupation of the property of the applicant requires little, if any, debate. The affidavit, Annexure C, which she filed in opposition to the application confirms the observed matter. That she remains in occupation of the property against the authority and/or consent of the applicant requires no debate at all. She is, in fact, resisting the application for eviction. She states, in paragraphs 2 and 6 of her affidavit, page 27 of the record, that:

> "2. I was never told that the flat had been sold by my husband…..
> 3. …….
> 4. …….
> 5. …….
> 6. I never agreed to vacate the flat permanently. I have only expressed to Applicant utter surprise and disbelief upon it being indicated that the place I call home for myself and my minor children had been apparently sold without my knowledge and/or consent."

The attitude of the second respondent, as is captured in her above cited words, creates an issue between the applicant, on the one hand, and the respondents, on the other. The second respondent is at the property with the knowledge, authority, if not encouragement, of Edward who sold the same to the applicant and transferred title to it. The presence of the second respondent at the property constitutes the applicant's cause of action against both respondents. Her apparent resistance to vacate the property justifies the present application. The applicant has no remedy which is available to it other than to apply as it did. Its suit against both respondents is therefore not without merit.

The defence which the respondents raise to the application is outside the traditionally recognised defences which are available to a defendant or respondent against whom a suit for vindication is filed. The defence is not only unique. It is also different from, and additional to, the recognised four defences which have been mentioned in the foregoing part of this judgement.

The respondents challenge the efficacy of the contract which Edward concluded with the applicant. They insist that the contract is null and void *ab initio*. The nullity of the contract, they claim, is born out of the allegation that Edward was not of a sound mind at the time that he entered into the contract with the applicant. The transfer of the property from Edward to the applicant is fatally defective, according to them. They, in short, challenge the validity of the contract of the parties as well as the title deed in terms of which Edward transferred his rights and interests in the property to the applicant.

At the centre of the respondents' defence is HC 1764/17. They attached this to their notice of opposition. They called it Annexure A. It appears at page 24 of the record. It is in the same that the court appointed one Eprem Whingwiri ("Eprem"), who deposed to the respondents' opposing affidavit, as curator *ad litem* in the matter. The order in terms of which Eprem was appointed curator reads as follows:

"IT IS ORDERED THAT:

1. Eprem Whingwiri be and is hereby appointed curator *ad litem in this matter*."

The order, it is observed, does not state or define the *matter* in respect of which Eprem was appointed curator. However, a reading of the affidavit which one Jonas Dondo, counsel for Edward, deposed to on 17 February 2017 under HC 1764/17, shows that the *matter* for which Eprem was appointed curator was/is HC 3679/16. Reference is made in the mentioned regard to para 10 of counsel's affidavit. This appears at page 39 of the record. It reads:

> "10. For EDWARD MASHIRINGWANI'S interests to be adequately protected as per case number HC 3679/16 and other threatened lawsuits, it is imperative that a curator *ad litem* be appointed to step into Edward's shoes."

The intention of the application which counsel filed for, and on behalf of, Edward under HC 1764/17 was clear. Its import was to appoint Eprem as curator for Edward's estate as well as his affairs. Eprem was, according to the application, to step into the shoes of Edward and manage the latter's estate and/or his affairs without any exception or limitation.

It is unfortunate that the order which the court issued under HC 1764/17 does not reflect the intention of the application. If it did, Eprem's appointment as a curator would have been *in sync* with the definition of the word. A curator is, according to Thesaurus Learner's Dictionary, a guardian of a minor, lunatic or other incompetent person, especially with regard to the latter's property.

The order which the court issued under HC 1764/17 was not of a general nature. It was specific to HC 3679/16. It is for the mentioned reason, if for no other, that the court allowed it to read in the form and substance that it appears. The curatorship of Eprem was not, therefore, for all purposes. He was appointed curator to assist Edward in the latter's prosecution or defence under HC 3679/16 and no more than that.

The respondents cannot therefore be allowed to hide behind HC 1764/17 and move to challenge the contract which Edward concluded with the applicant on 6 June, 2020. The contract was properly concluded between the two of them. It, accordingly, remains not only valid but also enforceable as between both of them. Equally valid are the payment of the purchase price by the applicant and Edward's transfer of title in the property to the applicant.

HC 1764/17 was premised on a report which one Dr Walter Mangezi, a psychiatrist, prepared on 13 August 2016. The report related to Edward's mental condition as at the mentioned date. It states that Edward had been a patient of his since 25 June 2015. I quote *in extensor* what the doctor told of his patient on 13 August 2016. He said:

> "I interviewed Jane Mashiringwani, Passport number BN 832053, on 26 August 2016 and examined Edward Mashiringwani on 25 June 2015, 11 February 2016, 25 July 2016 and *26 August 2016"*

The psychiatrist's conclusion was that, in his opinion, Edward was not able to manage his estates and affairs as a result of mental disorder.

The report of the doctor, in my view, was either hurriedly or negligently prepared. It did not pay attention to necessary detail. It was, for instance, written on *13 August 2016*. Its statement which is to the effect that the doctor examined Edward *on 26 August 2016 cannot possibly* be correct. He could not have examined Edward on 26 August 2016 when he prepared his report on 13 August 2016. The statement is untrue and it defies simple logic. It is devoid of sense as well as a merit.

Apart from the alleged examination of Edward on 26 August 2016 as is contained in para 2 of the report, Annexure B, which the respondents attached to their notice of opposition and the medicines which the doctor prescribed to Edward on the mentioned date, there is no evidence which shows that Edward:

a) continued to suffer organic mental disorder after 26 August 2016;
b) continued to take the medicines which the doctor prescribed to him after 26 August 2016; and /or that
c) was of an unsound mind when he concluded the contract with the applicant.

Edward, in fact, appears to have enjoyed a lull of his mental condition from 26 August 2016 to 7 December 2020 when the doctor examined him for the second time and concluded that Edward still had impairment of what he termed short memory. There is no report of Edward's mental condition for the four years that he appears to have enjoyed a lull i.e. from 13 August 2016 to 7 December, 2020, when the doctor filed yet another report apparently in reaction to the application for vindication which had been filed.

The report and the affidavit which the doctor prepared on 7 December 2020, Annexure B2 of the respondent's notice of opposition, do not appear to have been prepared with the professionalism of a psychiatrist. They appear to have been used as a cover-up to what was totally missing in the narrative of Edward's mental condition.

If Edward was of an unsound mind during the period which extended from 13 August 2016 to December 2020, as Edward would have the applicant and me believe, he would have filed evidence of his continuous examination by the doctor as well as the medicines which the latter prescribed for him to take with a view to improving his mental condition. The fact that he was neither examined by the doctor nor had medicines prescribed for him to take during the stated period points to the probability that Edward was not suffering from any mental challenges during the period of the lull.

My views in the abovementioned regard find support from the below-mentioned observations. These are that Edward:

i) deposed to an affidavit in respect of his lost title deed;
ii) accepted purchase price from the applicant;
iii) demanded balance of the purchase price from the applicant- and

iv) sold his number 155 Groombridge Township 2 of Lot 89 A, Mount Pleasant to one Fidelis Mawena in September 2020.

Annexure B1 is the affidavit of Dr Mangezi. It appears at page 25 of the record. It is to effect that he (the doctor) interviewed Jane Mashiringwani's on 13 August 2016. It is also to the effect that he, at about the mentioned date, examined Edward to whom he prescribed some medicines after he formed the opinion that Edward was not able to manage his estates and affairs.

The above findings of the doctor place Jane Mashiringwani who is Edward's wife at the centre of Edward's mental condition. She, it would appear, knew as far back as 13 August 2016 that her husband, Edward, was not of a sound mind. She also knew, as at the time, that he could not manage his estates and/or affairs. She, in all probability, was aware of HC 1764/17 in terms of which Eprem was appointed Edward's curator.

Annexure J which the applicant attached to its answering affidavit is an agreement of sale of Edward's Mount Pleasant property to one Fidelis Mawena. The annexure appears at page 45 of the record. It is dated December 2020. The sellers of the mentioned property are Edward Mashiringwani and Jane Mashiringwani.

One is left to wonder why Jane who knew of her husband's mental condition as well as the fact that Eprem had been appointed curator to Edward's estate and affairs proceeded to sell the Mount Pleasant home without the knowledge and /or consent of Eprem. She was, at all material times, in her very sober senses. No evidence is led to justify Jane Mashiringwani's involvement in the sale of the Mount Pleasant property.

It is when such matters as have been observed in the forgoing paragraphs of this judgement are taken account of that I cannot fail to associate myself with the remarks which DE VILLIERS JP was pleased to make in *Piennar v Piennar's* Curator, 1930 OPD 171 at 174-175 wherein he said:

> "there mere fact that such a person has been declared insane or incapable of managing his affairs, and that a curator is appointed to such person, does not deprive him of the right of administering his own property and entering into contracts and other legal dispositions to the extent of which he may *de facto* be capable, mentally and physically, of doing. Such mental or physical capacity may vary from day to day, but at all times it remains a question of fact. The object of appointing a curator is merely to assist the person in question in performing legal acts to the extent of which such assistance is from day to day, in varying degrees necessary. Thus even a person who has been declared insane and to whose estate a curator has been appointed can dispose of his property and enter into contract whenever he is mentally capable of doing so"

Pienaar v *Pienaar* is not from this jurisdiction. It, accordingly, has no binding effect on me. It is only of persuasive value. However, the wisdom which is contained in the above cited *dictum* cannot be wished away. The wisdom depicts a real situation which, more often than not, occurs with persons who are alleged to be of unsound mind. Their mental state, judicial notice is taken, tends to vary from day to day. They can therefore enter into valid contracts even in a situation where a curator is appointed for them.

Edward, it has been observed, enjoyed a lull of his mental state for a considerable duration. He was in that lull state when he concluded the contract with the applicant and transferred title in the property to the applicant. He cannot therefore be allowed to hide behind HC 1764/17 which did not apply to him in general, but only in specific, terms. He cannot, in short, successfully challenge the contract which he entered into with the applicant. Nor can he challenge the applicant's title in the property.

The applicant proved its case on a balance of probabilities. The application is, therefore, granted as prayed.

Muronda Malinga Legal Practice, applicant's legal practitioners
Dondo & Partners, 1st and 2nd respondents' legal practitioners