REF CASES HC 1088/11
HC 7123/15
HC 1767/16
HC 7476/16
HC 8611/16
HC 106620/16
HC 1714/17
HC 5305/17
HC 5449/17
HC 9539/17
HC 237/18
HC 3424/18
HC 9814/18
HC 10022/18
HC 11519/18
HC 11520/18
HC 11521/18
HC 11522/18
HC 11523/18
HC 11526/18
HC 11527/18
HC 11528/18
HC 11529/18
HC 11530/18
HC 1279/19
HC 2512/19
HC 2513/19
HC 8915/19
HC 9283/19
HC 1000/20
HC 1001/20
HC 7146/20
HC 7147/20
HC 611/21

MAXWELL MASOSE
versus
FORTUNE MUTEMERI
(In his capacity as the Executor Dative in the Estate of
The late Never Vambe Mutemeri DR 1768/11)
and
TESLAT INVESTMENTS (PVT) LTD
and

THE MASTER OF THE HIGH COURT
and
TETRAD HOLDINGS

HIGH COURT OF ZIMBABWE
MUCHAWA J
HARARE, 22 July, 31 August & 29 September 2022

Opposed Matter

Mr *S Mugadza,* for the applicant
Mr *F F Nyamayaro*, for 1st and 2nd respondents
No appearance for 3rd respondent
Ms F Chinyama, for 4th respondent

MUCHAWA J: In this court application, the applicant seeks the following order;

"IT IS HEREBY ORDERED THAT:

1. 3rd respondent be and is hereby ordered to reopen the Estate Late Never Vambe Mutemeri DR 1768/11 to enable applicant to lodge his claim for the property to be transferred to his name.
2. The 1st respondent be and is hereby removed as the executor of the estate of the late Never Vambe Mutemeri.
3. The 3rd respondent be and is hereby ordered to appoint a neutral executor to the estate of the late Never Vambe Mutemeri.
4. The 1st respondent in his personal capacity should bear the costs of this application if he opposes the application on an attorney and client scale."

The brief background to this matter is as follows;

The late Never Vambe Mutemeri owned a certain piece of land situate in the district of Goromonzi measuring 43, 1055 Hectares called subdivision A of Chito of Sebastopol. A subdivision permit had been applied for and obtained through the Ruwa Local Board for the said piece of land. Never Vambe Mutemeri used a company called Teslat Investments (Private) Limited, the second respondent herein to develop the subdivided residential stands and dispose of the same to some of the applicants in the cross referenced cases. It was second respondent which advertised the sale of the stands and some were sold by first respondent whilst others were sold by the second respondent. In the case of the stands purchased through the second respondent, it was the late Never Vambe Mutemeri as its managing director who allegedly represented the first respondent.

The applicant is a male adult based in the United Kingdom who claims to have bought stand No. 20930 of subdivision A of Chito of Sebastopol measuring 840 square metres on 25 April 2005 from the second respondent for Z$ 67 200 000.00 (sixty seven million two hundred thousand dollars) which amount was fully paid. The agreement of sale is attached. According to the applicant, the late Never Vambe Mutemeri, at all material times represented the second respondent and signed the agreement of sale on its behalf, thus impliedly warranting that the second respondent was authorized to sell the stands on his behalf as the stands were registered in his personal name.

The first respondent is cited in his official capacity as the executor dative of the estate of the late Never Vambe Mutemeri. The second respondent, a duly incorporated company is cited as the one with which the applicant contracted. The third respondent is cited in his official capacity as the one responsible for the administration of deceased estates. The fourth respondent is a duly incorporated company which is cited herein as it is the beneficiary of stand 20930 Elizabeth Park, Ruwa, in terms of the distribution account authorized by the third respondent. This is the same stand which applicant also claims to have bought.

In his application, the applicant's case as submitted by Mr *Mugadza i*s that the second respondent acted as first respondent's alter ego when it sold the stand to him and since Never Vambe Mutemeri died before passing transfer to him, he should be given an opportunity to lodge his claim for transfer of the property which he purchased and is registered in the name of Never Vambe Mutemeri. In addition it is averred that the first respondent be divested of his role of executor dative of the estate of the late Never Vambe Mutemeri and an independent executor be appointed by the third respondent as he is not acting in the best interests of the creditors but his own. It is moved that a neutral executor be appointed.

The first and second respondents are opposed to the granting of the relief sought. Two points *in limine* are raised being that there are material disputes of fact which cannot be resolved on the papers and also that the applicant has no *locus standi* to interfere with the distribution of the estate of the late Never Vambe Mutemeri as he did not buy the property from first respondent but from second respondent which is a separate legal persona. The application is also opposed on the merits. The third respondent did not oppose the matter, presumably waiting for the court decision to guide it. A Master's report was however filed upon follow up. The fourth respondent also

joins issue with first and second respondent's point *in limine* on material disputes of fact and additionally opposes the application on the merits.

I heard the parties on both the points *in limine* and the merits and reserved my judgment. This is it, starting with points *in limine*.

Whether the applicant has *locus standi* to bring this application

Mr *Nyamayaro* submitted that the applicant has no *locus standi* to seek the relief prayed for as he has no direct and substantial interest in the right which is the subject matter of the cause of action. For this contention, reference was made to the case of *Ndlovu* v *Marufu* HH 480/ 15 and *Allied Bank Ltd* v *Dengu & Anor* SC 52/16. It was contended that the applicant has no *locus standi* to interfere with the administration of the estate late Never Vambe Mutemeri under DR 1768/11 as he never entered into a contract with the first respondent but with second respondent which is a separate legal persona. In that case, it was argued that there is no nexus between the first respondent and the applicant and thus no privity of contract entitling the applicant to sue the first respondent. See *Ashanti Goldfields Zimbabwe Limited* v *Mdala* SC 60/17. It was concluded that there is therefore no basis for the relief sought by the applicant and his recourse lies with the second respondent and does not involve interference with the estate of the late Never Vambe Mutemeri. The reopening of the estate is alleged to be prejudicial to the interests of the estate as it will delay the winding up of the same.

Furthermore, if the court were to reopen the estate, it is argued that this would be akin to creating a new contract for the parties rather than simply interpreting existing contracts and would create confusion in the administration of estates. The fact that the agreement of sale was allegedly signed by the late Never Vambe Mutemeri on behalf of the second respondent is said not to advance the applicant's case as the second respondent is a separate legal persona and the late Never Vambe Mutemeri was acting in his capacity as director of the second respondent and not in his personal capacity. As a director, it was argued that the first respondent existed behind a veil which separated him from liability for the actions of the company. For this I was referred to the cases of *Salomon* v *Salomon* 1897 AC 22, *Dadoo Ltd and Other* v *Krugersdorp Municipal Council* 1920 AD 530 and *Chikwavira* v *Mutonhora & Anor* HH 22/ 16.

The piercing of the corporate veil in order to find the directors or shareholders personally liable was argued to be permissible only where there is proof of fraud, dishonesty and improper

conduct. In this case, it was contended that the applicant has only made a bald assertion that the second respondent was an alter ego of Never Vambe Mutemeri without any further proof to show fraud, dishonesty or improper conduct.

Mr *Mugadza* referred the court to the case of *Ndhlovu* v *Marufu* HH 480/15 in support of the fact that the applicant has a direct and substantial interest in the right which is the subject matter of the litigation and the outcome thereof. The relief sought was said to be limited only to the reopening of the estate late Never Vambe Mutemeri to enable the applicant to lodge his claim. It does not require that the stand be transferred to him yet. This is to give an opportunity to the first and third respondents to consider the validity of his claim. This claim is allegedly backed by the agreement of sale entered into between the applicant and second respondent wherein the first respondent represented the second respondent as a director. It was argued that the fact that the first respondent acted in this manner well knowing that the property was in fact registered in his name should be enough to sway the court to lean in favour of the applicant having *locus standi.*

The law on the subject of *locus standi* was fully set out in the case of *Stevenson* v *Minister of Local Government and National Housing & Ors* SC 38/02 wherein it was held as follows;

> "Whilst it is well established that a party who initiates legal proceedings, whether by application or summons, should indicate in the commencing papers that he has the *locus standi* to bring such proceedings, what he has to show in order to satisfy that requirement is that he has an interest or special reason which entitles him to bring such proceedings.
>
> Thus, in Herbstein and Van Winsen *The Civil Practice of the Supreme Court of South Africa* 4 ed at p 401, the learned authors have this to say on the issue of *locus standi* to institute legal proceedings by means of a summons:
>
> "It must appear from the summons that the plaintiff has an interest or special reason entitling him to sue, i.e. that he has *locus standi* in the matter."
>
> Similarly, on the issue of *locus standi* to file an application, the learned authors say the following at p 364:
>
> "As in the case of a summons, it must appear from the application that the applicant has an interest or special reason entitling him to bring the application – that he has *locus standi* in the matter."

In many cases the requisite interest or special reason entitling a party to bring legal proceedings has been described as "a real and substantial interest" or as "a direct and substantial interest". See, for example, *United Watch & Diamond Co (Pty) Ltd and Ors* v *Disa Hotels Ltd and Anor* 1972 (4) SA 409 (C) at 415; *P E Bosman Transport Works Committee & Ors* v *Piet Bosman Transport (Pty) Ltd* 1980 (4) SA 801 (T) at 804B; *Zimbabwe Teachers Association & Ors*

v *Minister of Education and Culture* 1990 (2) ZLR 48 (HC); and *Jacobs En 'n Ander v Waks En Andere* 1992 (1) SA 521 (A)."

The applicant has stated that the special reason entitling him to bring this application is the agreement of sale for stand 20930 Elizabeth Park Ruwa which he entered into with the second respondent and which he fully paid for. Such sale agreement was executed with the first respondent who was managing director of the second respondent who, despite knowledge that the land was registered in his name, went ahead to make the second respondent the seller, a company in which he was a managing director. Should the first respondent escape liability in such a case on the basis that the company is a separate legal entity and the deceased estate has no business being dragged into this? Would this be creating a new contract for the parties? Where, as in this case the same stand has been dealt with in the administration of the deceased estate and awarded to the forth respondent, would it be proper to shut the applicant out and say that he has no *locus standi*? I think not.

The first special reason entitling the applicant to bring this application is simply that the same stand which he allegedly bought has been dealt with under the estate late Never Vambe Mutemeri and has been awarded to the fourth respondent. He has an agreement of sale too for the same stand pointing to a possible double sale. He has proof of payment for the stand on record. If this does not constitute a real and substantial interest, I do not know what would.

The case of *Eddies Pfugari (Pvt) Ltd & Anor* v *Knowe Residents & Ratepayers Association & Anor* SC 2/21 is almost on all fours with this one and it dealt with the question of piercing the corporate veil as follows,

> "In *Mkombachoto* v *CBZ Ltd & Anor* 2002 (1) ZLR 21 (H), at 22B-C, it was observed that the courts may lift the corporate veil and disregard the separate legal personality of a company in limited circumstances, for instance, so as to avoid manifest injustice. Again, in *Cape Pacific Ltd* v *Lubner Controlling Investments (Pty) Ltd* 1995 (4) SA 790 (A), at 802, it was held that a court would be justified in certain circumstances in disregarding a company's separate personality and lifting or piercing the corporate veil. The focus then shifts from the company to the natural person behind it or in control of its activities. Personal liability is then attributed to someone who misuses or abuses the principle of corporate personality. Each case involves a process of enquiring into the facts which may be of decisive importance. However, at 803-804, it was cautioned that the courts should not lightly disregard a company's separate personality but should strive to give effect to and uphold it. But where fraud, dishonesty or other improper conduct is found to be present, the need to preserve the separate corporate identity would in such circumstances have to be balanced against policy considerations which arise in favour of piercing the corporate veil. A court would then be entitled to look to substance rather than form in order to arrive at the true facts and, if there has been a misuse of corporate personality, to disregard it and attribute liability where it should

rightly lie.----------

> "Each case involves a process of enquiring into the facts which, once determined, may be of decisive importance. And in determining whether or not it is legally appropriate in given circumstances to disregard corporate personality, one must bear in mind 'the fundamental doctrine that the law regards the substance rather than the form of things'. ……..".

In *casu* the applicant simply alleged that the second respondent was first respondent's *alter ego*. No records from the companies' registry were supplied to show that the company was first respondent's one man band. This case however still involves a process of inquiring into the facts and establishing what might be of decisive importance and the fundamental doctrine that the law regards the substance rather than the form of things. This case requires the lifting of the corporate veil in order to avoid manifest injustice precisely because the late Never Vambe Mutemeri who was the registered owner of the stand in issue personally represented the second respondent for which he was a managing director as the seller of a stand which he knew second respondent did not own. The facts are compounded by having him allegedly sell the same stand to the fourth respondent. This must qualify as one of those exceptional cases in which the separate corporate personality is pierced in the interests of justice.

It is therefore my finding that the applicant has the requisite substantial and real interest to bring this application. In other words, he has the *locus standi*.

Whether there are material disputes of fact which cannot be resolved on the papers on record

Ms *Chinyama* submitted that there are material disputes of fact in this matter which cannot be resolved on affidavit evidence and therefore incapable of being resolved on affidavit evidence through application proceedings.

In this jurisdiction, in *Supa Plant Investments (Pvt) Ltd* v *Chidavaenzi* 2009 (2) ZLR 132 (H), MAKARAU J (as she then was) provides an interesting guidance on how to identify whether or not a material dispute of facts exists in these terms:

> "A material dispute of fact arises when material facts alleged by the applicant are disputed and traversed by the respondent in such a manner as to leave the court with no ready answer to the dispute between the parties in the absence of further evidence."

In *Room Hire Co.* v *Jeppe Street Mansions* 1949 (3) SA 1155 it was held that a material dispute of fact exists where a real issue of fact cannot be satisfactorily resolved without the aid of oral evidence . An applicant must not make a bare denial or merely allege a dispute.

Ms *Chinyama* listed the following as the emerging material disputes of fact in this matter;

i. The parties to the agreement on which the applicant bases its claim as a determination has to be made as to whether the second respondent had authority to sell on behalf of the first respondent which fact the first respondent denies and that fact cannot be resolved on the papers.
ii. The authenticity of the agreement of sale between the first and fourth respondent for which handwriting experts may need to be engaged.
iii. The inquiry into whose rights are stronger between those of the applicant and fourth respondent.

In addition to the above, Ms *Chinyama* moved the court to dismiss this application as the applicant was aware of these when this application was launched as he had been informed of same in case HC 1451/21 which was subsequently withdrawn but had still persisted with a similar application. See *Savanhu* v *Marere N.O & Ors* 2009 (1) 320 (S)

Mr *Nyamayaro* made similar submissions to those of Ms *Chinyama* on this issue and also moved for the dismissal of the application.

Mr *Mugadza* also relied on the case of *Supa Plant Investments (Pvt) Ltd supra* on the guidance regarding how to identify whether a material dispute of fact exists. He submitted that there are no material disputes of fact in *casu.* It is alleged that there is an agreement of sale which properly lays out that the applicant bought the stand in issue from the second respondent and first respondent who was both the registered owner of the stand and managing director of the second respondent signed the agreement of sale. The agreement of sale and proof of payment are said to be on record and all the applicant wants is an opportunity to lodge his claim. Once that is done, he will then prove his case regarding the authenticity of his agreement whilst the forth respondent also proves the authenticity of its agreement. The court was urged to look closely at the relief sought and juxtapose that with the alleged facts. It is then that the determination of whose rights take precedence would be determined too. This was said not to be the right forum for him to prove his claim in that respect.

Reference was made to the case of *Musevenzo* v *Beji & Anor* HH 26/13 regarding the options to be taken if the court finds that there are indeed some material disputes of fact. MAFUSIRE J enumerated the options available to the court where there are material disputes of fact. The court can take a robust approach and resolve the dispute on the papers, permit the leading of oral evidence in terms of r 229 B of the rules of court, refer the matter to trial or dismiss the application altogether if the applicant ought to have foreseen that such dispute would arise.

The starting point is to consider whether there is a genuine dispute of fact. I start off with the relief sought by the applicant so as to see the facts he needs to prove in order to succeed on this. All he is asking the court to do is to reopen the estate late Never Vambe Mutemeri so that he can lodge his claim for the property to be transferred into his name. He is not asking this court to order that the property be transferred into his name at this stage. On the issue before me he needs to show that he has a real and substantial interest in the estate of the late Never Vambe Mutemeri. I already dealt with this in resolving the point *in limine* on applicant's *locus standi*. It is my finding that the agreement of sale, the proof of payment for the stand, the cross referenced files and the respondents' opposing affidavits do not necessarily traverse and dispute these facts so as to leave the court with no ready answer on the facts so as to establish a material dispute of fact. There is also the evidence of the same stand having been sold to the fourth respondent.

The other relief sought of the removal of the executor and appointment of a neutral executor was not attacked on the basis of there being material disputes of fact.

It is my finding therefore that there are no material disputes of fact and I dismiss this point *in limine.*

The Merits of the Application

I propose to deal with the merits of this application at two levels. The first is whether the reopening of the estate late Never Vambe Mutemeri DR 1768/11 is merited. The second would be whether the first respondent should be removed as executor of this estate and be replaced by a neutral executor.

Whether the Estate Late Never Vambe Mutemeri DR 1768/11 should be reopened to enable the applicant to lodge his claim

Mr *Mugadza* submitted that the applicant has been able to show that he is entitled to the reopening of the Estate of the Late Never Vambe Mutemeri as he bought a stand which was dealt

with in the administration of the estate and the same stand was awarded to the fourth respondent yet he has an agreement of sale and proof of full payment for same which was done through the second respondent, which company was represented in such transactions, by the first respondent who was the registered owner of the stand. The applicant's claim is contended to be justifiable on the basis of the second respondent having been first respondent' alter ego as per *Gonye* v *Gonye* SC 15/09.

It is also averred that the applicant has given a reasonable explanation for the non -timeous lodging of his claim against the estate as he is resident in the United Kingdom and did not see the advertisement calling on debtors and creditors to lodge their claims. It is explained that Never Vambe Mutemeri passed on sometime in 2011 before transfer could be passed to him and applicant became aware that there were problems with the estate. Before the death of Never Vambe Mutemeri a matter had been lodged under case number HC 1088/11 which matter is still pending in which applicant and the other purchasers of stands from the first and second respondents were seeking an order that the whole land be transferred to the association of purchasers to enable them to develop the land themselves.

In support of his entitlement to the stand in issue, the applicant points to certain inconsistencies in the fourth's respondent's claim to the stand. The first is that the agreement of sale for the stand which appears on pp 18 to 25 of the record shows that the stand was sold on 15 September 2003 yet the permit for subdivision was only issued in late 2004. Mr *Mugadza* contended that the sale is therefore a nullity as land cannot be sold before the issuing of a subdivision permit. On the basis of the above, Mr *Mugadza* argued that the agreement of sale can only be considered as cooked up for the convenience of the first, second and fourth respondents.

The court was also referred to an alleged original list of the purchasers of land from the first and second respondents which was part of case HC 1088/11 in which the first respondent is said to have pleaded that all the stands had been sold and did not challenge the list of stands. That list is said to only reflect only 11 stands as having been bought by the fourth respondent and not the 19 stands now reflected in the distribution account. That list is said not to have reflected the fourth respondent as purchaser of stand No. 20930 Elizabeth Park Ruwa which stand was reflected as belonging to the applicant.

Furthermore, the applicant said he believed that the estate was still to be wound up when he instructed his legal practitioners to approach the first respondent to register his claim against the estate. When there was no favourable response the applicant's legal practitioners are said to have perused the record at the Master's office and the discovered that there was a distribution account which was approved in August 2013 but there were a lot of cases in the file showing that the deceased had not conducted his business properly regarding how he sold the stands with instances of double sales in some cases.

It was pointed out that there can be no prejudice suffered as a result of the reopening of the estate as there are already up to 32 other cases against the first and second respondent whose case numbers have been cross referenced.

Mr *Mugadza* further averred that the first respondent had failed to make a material disclosure to the third respondent regarding the pendency of Case HC 1088/11 in which Justice MATANDA MOYO had directed the first respondent to do reconciliations and resolve all double sales. Applicant stated that he believed the issue of his stand would be resolved through the negotiations directed by the judge.

Case HC 1279/19 in which one Collin Muchemwa sought the reopening of the estate late Never Vambe Mutemeri was pointed to as an indicator of the possibility of reopening the estate. The case of *Tapfuma Chirisa* v *Mugadzaweta &2 Ors* HH 323/14 was pointed to in arguing that our law allows the reopening of an estate even at an advanced stage to enable the lodging of a claim for the smooth administration of justice.

Mr *Nyamayaro* submitted that there is no basis for the reopening of the estate as the applicant has no right arising from either contract or common law to proceed against the estate. His recourse was said to lie against the second respondent. His *locus standi* was questioned but I have already resolved that issue. The applicant was further called upon to produce a mandate given to the second respondent by the first respondent during his lifetime, authorizing second respondent to sell his land.

In his opposing affidavit, the first respondent on p 75 in para 10 (i) makes the averment that the subdivision permit was applied for by D Planning Consultancy and was then granted on 1 October 2004. The same evidence is given with greater detail in the opposing affidavit deposed

by first respondent under case HC 1088/11. This appears on page 48 of record in paragraph 6 where first respondent states;

> "6. It is clear that the applicant is ill advised and has not bothered to check the facts.
>
> 6.1 In 2004 the then owner of Stephen Paul Martin applied for subdivision of a land being Subdivision A Chito of Sebastopol held under Deed of Transfer 10954/98. The subdivision permit was issued with certain conditions which included that certain development had to be made before the subdivision could be transferred."

Despite the above clear evidence, Mr *Nyamayaro* made the submission that it is not correct that the subdivision permit was granted in 2004. The court was referred to the permit number on p 27 which shows that it is Mash East 15/2002, to argue that the permit was granted in 2002.

Regarding the list on pp 51 to 57 of record, it was averred that this is not a correct list as it was not reflective of the parties who had joined the matter as several parties dissociated themselves with the application, particularly all juristic persons. In particular, the fourth respondent is alleged not to have filed a supporting affidavit to the matter.

Furthermore, Mr *Nyamayaro* submitted that the estate will not be reopened just by the mere asking but that the applicant has to satisfy the court on the basis of the documents lodged, that he has a lodgeable claim. In his case it was contended that as there is no sale agreement with the first respondent, there is no merit in his claim as the first respondent has no interest in the private agreement which he was not a part of. Reference was made to the case of *Muzungu* v *Muzungu & 2 Ors* HH 172/15, in which an estate was reopened and the executor removed as fraud had been established. Also see *Van der Merwe N.O &ors* v *Moodliar* 2020 (1) ALL SA 558 where though it was the reopening of liquidation account sought, the court refused this as there was no basis for it.

Regarding the applicant's explanation for the delay, it was submitted that it is unreasonable as the applicant who is resident in the United Kingdom was represented in the sale agreement by one Mark Mutandwa, could also have been represented by another person in lodging his claim

Ms *Chinyama* submitted that what the applicant seeks is essentially an application for rescission of judgment and he needs to show that he has prospects of success in the main matter. *In casu* he must show that he has a logical claim, an interest in the estate. His agreement of sale is impugned for failing to show the estate as the seller of the stand in issue to him. The court was

urged not to lightly interfere with the finalization of the estate without good cause having been shown.

The report from the Master confirms that the estate was procedurally wound up as no objections were filed and the Master authorized the distribution of the account. It was also confirmed that the estate has been saddled with disputes and the estate record now has 11 volumes and most disputes have resulted in litigation. This is borne out by the cross referenced files. Furthermore, it was noted that the applicant is out of time in lodging his claim and he needs to be condoned by a competent court in order to do so. That is precisely what Mr *Mugadza* is seeking for his client.

I am satisfied that the applicant has provided a reasonable explanation for his failure to timeously lodge his claim and any objections to the distribution claim. He is not resident in Zimbabwe and had not kept a lookout for this as he assumed the pending matter under HC 1088/11 would resolve the issues of concern to him.

The prospects of success in the applicant's claim are high. The evidence on record shows that the fourth respondent relies on an agreement of sale which was concluded on 15 September 2003 yet the subdivision permit is dated 14 October 2004. This aspect is borne out by the first respondent's evidence in his opposing affidavit and also in case HC 1088/11. There could not have been a valid agreement before the subdivision permit was out. This would be contrary to the provisions of the Regional, Town and Country Planning Act [*Chapter 29:12*], s 39 which stipulates as follows;

> "**No subdivision or consolidation without permit**
> (1) Subject to subsection (2), no person shall—
> (*a*) subdivide any property; or
> (*b*) enter into any agreement—
> (i) for the change of ownership of any portion of a property; or
> (ii) for the lease of any portion of a property for a period of ten years or more or for the lifetime of the lessee; or
> (iii) conferring on any person a right to occupy any portion of a property for a period of ten years or more or for his lifetime; or
> (iv) for the renewal of the lease of, or right to occupy, any portion of a property where the aggregate period of such lease or right to occupy, including the period of the renewal, is ten years or more; or
> (*c*) consolidate two or more properties into one property; except in accordance with a permit granted in terms of section *forty:"*

I will repeat what I already covered under the first point *in limine* wherein I concluded as follows;

> "This case requires the lifting of the corporate veil in order to avoid manifest injustice precisely because the late Never Vambe Mutemeri who was the registered owner of the stand in issue personally represented the second respondent for which he was a managing director as the seller of a stand which he knew second respondent did not own. The facts are compounded by having him allegedly sell the same stand to the fourth respondent. This must qualify as one of those exceptional cases in which the separate corporate personality is pierced in the interests of justice."

It is my finding therefore that the Estate Late Never Vambe Mutemeri DR 1768/11 should be reopened to enable the applicant to lodge his claim**.**

Whether the First Respondent Should Be Removed As Executor of This Estate And Be Replaced By A Neutral Executor

Mr *Mugadza* cited the case of *Bellodi & Anor* v *Motsi & Anor* HB 51/20 for the contention that the court will not lightly interfere with the duties of an executor nor order the removal of an executor except in circumstances where it is clearly established that the executor is grossly negligent in the execution of his duties to the extent that his conduct is detrimental to the effects of the estate. The conduct complained of must be such that it is of a serious degree that if the executor is allowed to continue with the administration of the estate, the estate would not be protected and there would be prejudice to the interests of the beneficiaries.

The applicant's averments are that the first respondent failed to disclose to the Master that case No. HC 1088/11 was still pending and that Justice MATANDA MOYO had tasked the parties to do reconciliations to ensure that all double sales were resolved. This is alleged to be fraudulent conduct. The fact that there are 32 listed and cross-referenced cases in which the first respondent has been dragged to court is said to point to the first respondent's failure to wind up the estate and to be serving his own interests rather than all the beneficiaries. It is alleged that it was fraudulent on the part of the first respondent not to have disclosed to the Master that the stands sold by the second respondent had not been transferred but were part of the estate.

Mr *Nyamayaro* submitted that the applicant has failed to prove any hint of impropriety against the executor except that he failed to lodge his claim. The first respondent is said to have followed all the prescribed steps in the winding up of an estate as set out in the Administration of Estates Act. The case of *Katirawu* v *Katirawu & Ors* HH 58/07 was pointed to, to argue that an

executor can only be removed where the court is satisfied that the continuance of the executor in that office will be detrimental to either the estate or the beneficiaries, or both.

Furthermore it was submitted that the Master is charged with supervision of executors in order to safeguard the assets of the estate and that before the removal of an executor, the Master should carry out an investigation of the conduct complained of. In this case, it was averred that there was no complaint lodged with the Master and therefore no investigation. The facts in this matter are said not to point to any impropriety at all. Reliance on case HC 1088/11 is said to be foolhardy on the part of the applicant as he was never a party to the litigation in which it was sought to transfer the entire property to the Elizabeth Park Residents Association. It was argued that the order sought therein was incapable of being granted as it would affect other parties who properly lodged their claims and are not part of HC 1088/11. That matter is alleged to have been regarded as abandoned by operation of law in terms of Practice Direction 3 of 2013, s 10 thereof as it is now well over three months since the matter was postponed sine die or removed from the roll.

Ms *Chinyama* submitted too that the removal of the executor has not been properly justified at law as outlined above. She too relied on the case of *Bellodi & Anor* v *Motsi & Anor supra*.

The Master's report pointed the court to the case of *Matsinde* v *Nyamukapa* HH 102/06 wherein it was stated that the removal of an executor is the prerogative of the Master on good grounds shown. Indeed that is true in terms of the Administration of Estates Act. Under common law, the High Court can still remove an executor from office on good grounds shown. See *Bellodi & Anor* v *Motsi & Anor supra*.

In *casu*, it appears to me that the applicant's complaint amounts to a disgruntlement of the state of affairs left by the late Never Vambe Mutemeri which state has generated the numerous litigation around this deceased estate. That does not speak to any form of misconduct on the part of the first respondent.

Reliance on case HC 1088/11 which the applicant was never a part of, does not take the applicant's case anywhere as that matter stands abandoned or has lapsed. The relief which was sought therein could not be granted and could not have assisted the applicant.

The Master's report does not point to any impropriety in the part of the first respondent. I am inclined to agree with the Honorable MAKONESE J's position in *Bellodi & Anor* v *Motsi & Anor* supra wherein he held as follows;

> "The court will not lightly interfere with the duties of an executor nor order the removal of an executor, except in situations where it is clearly established that the executor is grossly negligent in the execution of his duties. To my mind, the removal of an executor should be ordered where there is not only a dereliction of duty, but where the conduct of the executor is detrimental to the effects of the estate. In other words, the conduct complained of must be of such serious degree that if the executor is allowed to continue with the administration of the estate, the estate would not be protected and further, there would be prejudice to the interests of the beneficiaries."

He went on further to list the factors to be considered in case of this nature in assessing the propriety of the conduct of the executor as follows;

(a) "The explanation for the delay in winding up the estate.
(b) The size and complexity of the estate.
(c) The steps taken to date in winding the estate.
(d) The relationship between the executor and the beneficiaries
(e) Whether the executor has taken adequate steps to protect the estate.
(f) The report by the Master and his/recommendations.
(g) Generally whether the executor has acted diligently in the protection of the assets of estates."

In *casu*, this is undoubtedly a very complex estate reflective of the state of affairs left by the deceased, which was saddled with disputes, some of which have spilled into the courts with close to 32 such cases. The Master says the estate record now has 11 volumes comprising of numerous correspondence exchanged between parties. It is confirmed that the estate was procedurally wound up with all statutory provisions being duly observed. The executor seems to have taken steps to protect the estate by responding to the litigation against the estate. It appears to me that the executor cannot be accused for having not acted diligently in the protection of the assets of the estate.

It is my finding that the applicant has not made a case for the removal of the executor.

Costs

As the claim has only partly succeeded, each party will bear its own costs.

Accordingly I order as follows;

1. This application partly succeeds.
2. The third respondent be and is hereby ordered to reopen the Estate Late Never Vambe Mutemeri DR 1768/11 to enable the applicant to lodge his claim in relation to stand 20930 of Subdivision A of Chito of Sebastopol, otherwise known as Stand No. 20930, Elizabeth Park, Ruwa.
3. Each party bears its own costs.

Madanhi, Mugadza & Co. Attorneys, applicant's legal practitioners
Nyamayaro Bakasa Attorneys, first & second respondents' legal practitioners
Mushoriwa Pasi Corporate Attorneys, fourth respondent's legal practitioners