

(1) FOLLY CORNISHE (PRIVATE) LIMITED (2) JOHN
HAMPHREYS

v

(1) SHINGIRAYI TAPOMWA N.O. (2) ESTATE LATE
MISHECK TAPOMWA (3) T.E. MUDAMBANUKI, practising in
partnership with Mudambanuki & Associates (4) MANSTEBO &
COMPANY, represented by Calvin Tichaona Manstebo, Tapiwa Givemore
Kausuo, Stewart Nyamushaya and Admire Rubaya, practising in partnership
as Manstebo & Company (5) ADMIRE RUBAYA (6) THE
REGISTRAR OF DEEDS

SUPREME COURT OF ZIMBABWE
ZIYAMBI JA, GARWE JA & OMERJEE AJA
HARARE, NOVEMBER 12, 2012 & MARCH 28, 2014

R Fitches, for the appellants

T Mpofu, for the first to the fifth respondents

GARWE JA: This is an appeal against the judgment of the High Court dismissing with costs an application filed by the appellants (applicants in the court *a quo*) seeking the cancellation of a deed of transfer in respect of Stand 2558, Glen Lorne, Harare, registered in the name of the second respondent and the simultaneous revival of the original deed of transfer registered in the name of the first appellant.

The facts of this case are these. The first appellant was the owner and registered title holder of Stand 2558 Glen Lorne (“the stand in question”). The second appellant is a director of the first appellant. The late Misheck Tapomwa, whose relationship with the second appellant was the subject of dispute in the court *a quo*, was allowed to build, on the stand in question, some accommodation for himself and his family. The first respondent is a son of the late Misheck Tapomwa. When Misheck Tapomwa died in

November 2000, his family continued to reside at the stand in question. In October 2008 the first respondent, acting in his capacity as executor dative of his late father's estate, filed an application in the Magistrates' Court in which he sought and was granted an order declaring the stand in question to be part of the estate of the late Misheck Tapomwa and directing the directors of the first appellant and the second appellant to sign all necessary papers to effect the transfer of the stand into the name of the deceased estate, failing which the messenger of court was given authority to sign all such papers. The basis of the order sought was that the second appellant had "pledged" the stand in question to the late Misheck Tapomwa "as remuneration and pension". The first respondent further sought an order in the same court interdicting both appellants from alienating, selling, encumbering or in any way disposing of the property in question. Following this development, title in the stand in question was transferred to the deceased estate. On discovery that the property had now been transferred to the second respondent, the appellants then filed a court application seeking an order interdicting the sale of the stand in question pending the determination of an application to cancel the registration of the stand in the name of the deceased estate. Following the grant of the order, the appellants then filed an application seeking an order in terms of s 8 of the Deeds Registry Act [Cap 20:05] setting aside the deed of transfer registered in the name of the deceased estate and the revival of the original deed of transfer in the name of the first appellant. It is the order given in respect of this application that forms the basis of the present appeal.

In his founding affidavit filed with the court *a quo*, the second appellant deposed to the fact that the stand in question is owned by the first appellant and that he is a director of the first appellant, whose shareholding is wholly owned by the Cornishe Trust. The first appellant continues to hold the original title deed for the property in question. At no stage has the first appellant or himself alienated the stand in question. The stand was a

consolidation of four stands and such consolidation took place in 2006. He admitted knowing the late Misheck Tapomwa as a building contractor. For the reason that most of his building work was in the Glen Lorne area, he permitted the late Misheck Tapomwa to build temporary accommodation on the property on what is currently known as the Folly John Estate. When that section of the land was developed, the late Misheck was then moved to a portion of the stand in question in 1998. The deceased had nothing more than a personal right of *precarium*. Owing to the depressed economic situation in the country, no new development took place on the stand in question and he himself left the country in 1999. He has not been back since then. In 2009 he was advised by an estate agent that the stand in question had been put on the market for sale at US\$300 000. He denied that the address at which the court application in the Magistrates' Court was served, namely 25 Meath Road, Avondale West, Harare, was known to either appellant or that either appellant had ever used or operated from that address. He denied knowing anyone by the name Gabriel (on whom service was effected) at that address. In his opinion the alleged "pledge", or any rights arising therefrom would have prescribed, considering that such pledge was allegedly given in 2000 at the funeral of the late Misheck Tapomwa and the court application in the Magistrates' Court was only filed in 2008.

On why it became necessary to cite the respondents' then and current legal practitioners, he explained that this was to enable them to account for their improper handling of the matter. The juristic form of the alleged pledge or allocation on the basis of which an order was given in the Magistrates' Court was never clarified.

He averred that the order given by the Magistrates' Court was void for want of jurisdiction given the size and value of the property in question and, secondly, owing to the

fraudulent nature of those proceedings. He attached a supporting affidavit by a property consultant, one Dereck Madzikanda, to the effect that he had been advised by a prospective buyer of the stand in question that the property had been advertised in the Herald for sale at a price of three hundred thousand United States Dollars (U.S\$300 000.00).

In his opposing papers before the court *a quo*, the first respondent took the following points; firstly that the order made by the Magistrates' Court was a default judgment which remained extant and could not therefore be interfered with as no rescission of that order had been applied for or granted and that the High Court had no authority to review a default judgment; secondly, that when the Magistrates' Court made the order that resulted in the transfer of the property in question, it did so in its capacity as Assistant Master of the High Court in order to facilitate the registration and winding up of the deceased estate. Therefore the value of the stand in question was irrelevant. He denied that the transfer was fraudulent and further stated, without elaboration, that the address at which service was effected was "the address provided at the Registrar of Companies as the last known address." He admitted that the second appellant has been out of the country for a long time. He also averred that the allocation of the stand in question was in recognition of unpaid salaries to his late father and that this was a proper case for the corporate veil to be lifted so that the undertaking made by the second appellant would have a binding effect on the first appellant which owned the property. In his view the Magistrates' Court had jurisdiction since it was handling the matter as a deceased estate and "even if the property was valued at \$2 million USD, the estate could be registered with the Magistrates Court ..." He denied that the transfer was fraudulent or that his erstwhile and current legal practitioners were properly cited.

The third, fourth and fifth respondents' former and current legal practitioners all opposed their joinder. The fifth respondent, Admire Rubaya, in particular, submitted that since the issue was one of registration of a deceased estate, the Magistrates' Court had jurisdiction and it was on that basis he filed the application in the Magistrates' Court.

In his answering affidavit in the court *a quo*, the second appellant disputed the averment that when the Magistrates' Court granted the default judgment, it did so in its capacity as an Assistant Master. Further, he submitted that since the first respondent had always known that the second appellant was absent from Zimbabwe, he should have known that service of the court application at an address in Avondale was improper and, further, that the order granted against the first appellant, the owner of the property in question, was never properly explained as the "pledge" or "allocation" was allegedly made by himself and not the company. Further he denied that he would ever have contemplated transferring such a valuable piece of residential property, with rights to develop, to any one and that a gift of this value would, if respondents' claim were to be accepted, be completely disproportionate to any claim of unpaid salaries.

At the hearing of the matter before the court *a quo*, the first and second respondents took two points *in limine*. The first was that the High Court had no jurisdiction to grant the order sought in the face of the default judgment granted by the Magistrates' Court which remained extant. The second was that there were material disputes of fact which could not be resolved on the papers.

In considering whether it was competent to set aside a transfer, made pursuant to an order of court in terms of s 8 of the Deeds Registry Act [*Cap 20:05*], the court *a quo*

was of the view that s 8 was intended to guard against a situation where the Registrar, on his own and without a court order, cancels a deed of registration and not where the transfer is processed pursuant to an order of court. Since the appellant had not sought a review of, or appealed against, the order of the Magistrates' Court, there was no basis upon which the court could interfere with that order. On that basis, the court *a quo* upheld the first point *in limine* and consequently dismissed the application with costs. It is this determination which forms the subject of the present appeal.

In their grounds of appeal, the appellants have contended that the court *a quo* misdirected itself in a number of respects. Firstly the court *a quo* erred in dismissing the application as the order of the Magistrates Court was a nullity. Secondly that the dispute between the parties centred on the title to the property and that the court *a quo* failed to appreciate that the appellants' case was vindicatory in nature and that by failing to cancel the improperly obtained deed of transfer, the court allowed a situation where two title deeds remained extant.

The first and second respondents have argued that the issues for determination are firstly whether or not the registration of title pursuant to a court order can be said to be a registration in error as would justify cancellation in terms of s 8 of the Deeds Registry Act; secondly, the nature of the cause of action on which the appellants approached the court *a quo* and whether the procedure adopted was the correct one.

On a careful perusal of the issues raised by both parties to this appeal, it seems to me that the first issue that falls for determination is whether the order granted by the

Magistrates' Court is a valid order or not. If the order was not, then any transfer pursuant thereto would have been null and void.

Section 11 of the Magistrates Court Act, [*Cap 7:10*] provides, in relevant part, as follows:-

- “11 Jurisdiction in civil cases.
- (1) Every court shall have in all civil cases, whether determinable by the general law of Zimbabwe or by customary law, the following jurisdiction
- (a) ...
 - (b) with regards to causes of action-
 - (i) ...
 - (ii) in actions in which is claimed the delivery or transfer of any property, movable or immovable, where the value of such property does not exceed such amount as may be prescribed in rules ...
 - (iii) ...”

In the Magistrates Court (Civil Jurisdiction) (Monetary limits) Rules, Statutory Instrument 142/08 gazetted on 3 October, 2008, the Minister of Justice, Legal and Parliamentary Affairs fixed the monetary jurisdiction of the Magistrates Court in respect of actions for delivery or transfer of movable or immovable property at Z\$500 000.00. Following the introduction of the multiple currency system, statutory instrument 142/08 was repealed and replaced by Statutory Instrument 21/09 which fixed the maximum monetary jurisdiction of the Magistrates' Court at US\$2 000.00. Statutory Instrument 21/09 was in turn repealed by Statutory Instrument 163/12 which fixed the maximum monetary jurisdiction in actions for transfer of immovable property at US\$10 000.00 which is the current monetary limit.

It is clear from the foregoing that in October 2008, the Magistrates' Court had no jurisdiction to order transfer of immovable property whose value exceeded Z\$500.000 and that currently the monetary limit stands at US\$10 000.00

It is common cause that the stand in question, which has development rights, is 18, 2024 hectares in extent and is situated in Glen Lorne, one of the prime suburbs in Harare. The appellants have alleged, and this has not been disputed, that at the time of filing the court application they had received an offer of US\$2 million for the stand in question. It was also the second appellant's case that he had been advised of attempts by the second respondent to dispose of the property to one Max Benhura for the sum of US\$300 000.00. The first and second respondents' stance was that the value of the property in question is irrelevant since the Magistrates' Court related to the matter in the capacity of Assistant Master. The second respondent even added in his opposing affidavit that "even if the property was valued at \$2 million US Dollars the estate could be registered with the Magistrates' Court."

The question that arises from the foregoing is whether the Magistrates' Court had jurisdiction to register the property as part of the deceased estate and thereafter transfer it to the deceased estate. It is correct that in terms of s 15 of the Administration of Estates Act [*Cap 6:01*] any inventory made by the person required by the law to do so shall be delivered, if such person resides in a district other than Harare or Bulawayo, to the Magistrate. In terms of subs 3 the Magistrate is required to have the inventory examined and, if need be, corrected before authenticating the same and transmitting the original to the Master of High Court. In terms of s 17, the inventory shall include a specified list of all immovable property wherein the deceased had an interest at the time of his death and a reference to the title under which

the deceased held such interest. In respect of the estates of persons subject to customary law, any magistrate or class of magistrates may be designated by the Minister as persons entitled to perform all or any of the functions of the Master. Lastly in terms of s 130 a meeting may be advertised to be held before a magistrate.

It is apparent from the above provisions that a magistrate may be called upon to assume the functions of the Master and to preside over meetings related to deceased estates. When he does so, he acts in the capacity of Master and not a judicial officer. Whilst the Master has the responsibility to administer deceased estates, it is clear that the Master has no judicial powers. In other words the Master cannot, as is alleged by the first and second respondents in this case, make an order to transfer an immovable property into the name of a deceased estate. Such an order can only competently be made by a court with the jurisdiction to do so.

On a perusal of the court application filed in the Magistrates' Court in which the transfer of the property in question was ordered, it is clear that these were court proceedings and not proceedings before an assistant Master in terms of the Administration of Estates Act. In a second application the Magistrates' Court issued an order interdicting the sale or encumbrance of the property. Clearly neither the Master nor an Assistant Master would have the jurisdiction to issue such an order. The suggestion by the first and second respondents that this was a mere registration of the property with the office of the Master is clearly untenable and must therefore be rejected.

In the result I reach the conclusion that, for the reasons given, the Magistrates' Court had no jurisdiction to order the transfer of the property in question into the name of the

deceased estate as its value clearly exceeded the monetary jurisdiction of the court. The order by the Magistrates Court was therefore null and void.

In coming to court the appellants sought the cancellation of the deed of transfer issued in favour of the first respondent on two bases. The first was that the order of the Magistrates' Court had been obtained through fraud. The second was that the order was a nullity because the Court had no jurisdiction to grant such an order.

Having established that the Court had no jurisdiction, the fact that the appellants did not apply for the rescission of the default judgment as provided in the Magistrates Court (Civil) Rules is clearly irrelevant. This is because in the words of KORSAH JA in *Muchakata v Nertherburn Mine* 1996 (2) ZLR 153(S), 157 B-C:

“If the order was void *ab in initio* it was void at all times and for all purposes. It does not matter when and by whom the issue of its validity is raised; nothing can depend on it. As Lord Denning MR so exquisitely put it in *MacFoy v United Africa Co Ltd* (1961) 3 All ER 1169 at 1172 I

“If an act is void then it is in law a nullity. It is not only bad but incurably bad ... and every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

To the above remarks by KORSAH JA that it does not matter when and by whom the issue of validity is raised, I would add that it matters not how the issue is raised or what procedure is adopted. If it is clear upon a consideration of all the circumstances, that an act is void, then everything that is predicated on that act would be equally void.

In dealing with the question of nullity the court *a quo* remarked at p 4 of the cyclostyled judgment:-

“Mr *Fitches* argued that the procedure adopted by the applicants is correct based on superior court precedent and is the only way to cancel a deed. The section exists for just such a situation. He referred to *Matanhire v BP Shell Marketing Services (Pvt) Ltd* 2005 (1) ZLR 140 (S) at 147 G-H where the Supreme Court pronounced that the first ground of appeal could not succeed as it was predicated on a court order that was patently incompetent and irregular. The order being referred to is that of MAVANGIRA J whereby she issued directions in a matter that was pending before the Labour Court. This was held to be incompetent.

My view is that the Supreme Court’s pronouncement did not have the effect of setting aside the judgment of MAVANGIRA J or declare it a nullity as there was no appeal against that judgment before it.”

In my view the court *a quo* was clearly incorrect in its understanding of the effect of the judgment of this Court in the *Matanhire* case. In that case CHIDYAUSIKU CJ made it clear that once the court order granted by MAVANGIRA J was found to be patently wrong and irregular, such order was void and nothing could depend on it. Although CHIDYAUSIKU CJ did not declare the order a nullity, that was the effect of his finding. Had the judge in the court *a quo* properly applied her mind to the facts of the case before her, she would no doubt have concluded that the Magistrates’ Court had no jurisdiction to order transfer of the stand in question and consequently that the order issued by that court was a nullity.

The fact that the appellants did not apply for the rescission of the default judgment issued by the Magistrates’ Court is, in the circumstances, irrelevant.

Having found that the order of the Magistrates’ Court was null and void, that really should be the end of the matter. Clearly the transfer to the second respondent was based on an order that was a nullity. I find no basis upon which the order sought in the High Court could be refused. Section 8 empowers the Registrar to cancel a deed of transfer upon an order of court. I have no difficulty in issuing such an order. In any event this is a proper

case for this Court, in the exercise of its review powers, to set aside the transfer. Indeed the court *a quo* could have done the same.

The question of fraud was raised by the appellants in their papers. I consider it desirable to deal with this allegation as it clearly has a bearing on the question of costs. The suggestion that the respondents have conducted themselves improperly appears to have substance. Firstly the cause of action of the respondents was never established. In his founding affidavit, the first respondent alleged that the second appellant had “pledged” the stand to his father “as remuneration and pension”. How such a pledge gave rise to a cause of action in which transfer was sought was never substantiated. Upon realising that the property in question was not owned by the second appellant but by the first appellant, the first respondent then alleged that “the property in question is registered in Folly Cornishe (Pvt) Ltd which is largely owned and controlled by the second respondent. The pledge given to my father by the second respondent cannot be separated from the first respondent and the first respondent is bound by the actions of the second respondent in these circumstances.” No further details justifying the piercing of the corporate veil were given. On the basis of this bald allegation an order was then granted in favour of the first and second respondents for the transfer of the stand in question.

Further the court application was served at 25 Meath Road Avondale West, Harare upon one Gabriel on 22 October 2008. In their founding papers the appellants demonstrated that this address was unknown to them. They attached to their papers Form No CR.6 executed in 2007, i.e. before the filing of the application in the Magistrates’ Court. Form CR.6 is a record of the company’s physical address and postal address. That form confirms that the physical address of the first appellant had been Suite 1, Westgate House

West, Westgate Shopping Mall, Lorraine Drive, Bluffhill, Harare and with effect from 30 January 2007 its new physical address was 7A Aurora Terrace, Meyrick Park, Mabelreign, Harare. Despite the fact that the appellants had taken the trouble to demonstrate that the address at which the court application was served was unknown to them, the first and the second respondents' response was that "the address 25 Meath Road, Avondale West Harare was obtained from the Registrar of Companies as the last known address of the first applicant." No documentation from the Registrar of Companies to this effect was filed and the claim remained a bald one. The same bald claim was repeated in the heads of argument filed before this Court.

Coupled with the admission by the first respondent that he had been aware that the second appellant, a director of the first appellant, had not been resident in Zimbabwe for a very long time, the totality of the circumstances suggest impropriety on the part of the first and the second respondents. The two respondents relied on a cause of action which was not properly grounded in law and further caused the court application to be served on an address unknown to the appellants. That the Magistrates' Court had no jurisdiction to order the transfer of the property in question must have been apparent.

On the question of the joinder of the third to fifth respondents, I am satisfied that no proper basis has been established for their citation. Whilst the fifth respondent, as the legal practitioner seized with the matter, did not display the level of competence expected of a legal practitioner, it is clear he was acting on instructions from the first and second respondents, and no clear evidence of impropriety on his part has been established. He was initially a professional assistant with the third respondent at the time he prepared the court application in the Magistrates Court. He thereafter left the employ of Mudambanuki &

Associates and joined Manstebo & Company legal practitioners, the fourth respondent. The firm of Manstebo & Company was not involved at all in the application filed in the Magistrates Court. All in all I am satisfied that the need to cite the fifth respondent and the two law firms was never established.

On the question of costs, I am satisfied that owing to the conduct of the first and the second respondents to which reference has already been made, the appellants are entitled to an award of costs on the higher scale.

In the result, the following order is made.

1. The appeal succeeds with costs on the legal practitioner and client scale.
2. The order of the Court *a quo* is set aside and in its place the following is substituted:

“It be and is hereby ordered that:-

1. Deed of Transfer (Registered No. 8361/2008) pertaining to Stand 2558 Glen Lorne Township measuring 18, 2024 hectares registered in the name of the Estate Late Misheck Tapomwa (DRH 641/01), the second respondent, be and is hereby cancelled.
2. Deed of Transfer (Registered No. 6050/2006) dated 23rd August, 2006 pertaining to stand 2558 Glen Lorne Township measuring 18, 2024 hectares registered in the name of Folly Cornishe (Private) Limited, the first applicant, be and is hereby revived in terms of section 8 (2) (a) of the Deeds Registry Act [Chapter 20:05].
3. The sixth respondent, the Registrar of Deeds, be and is hereby ordered and authorised to attend to the cancellation of Deed of Transfer (Registered No. 8361/2008) in the name of second respondent and the

revival of Deed of Transfer (Registered No. 6050/2006) in the name of first applicant and to make the appropriate endorsements on the relevant deeds and entries in the registers in terms of section 8(2) (b) of the Deeds Registry Act [Chapter 20:05].

4. The sixth respondent be and is hereby empowered and ordered to do all acts necessary to reinstate first applicant as the lawful owner of Stand 2558 of Glen Lorne Township measuring 18,2024 hectares.
5. All the costs of the applicants are to be paid by first and second respondents on a legal practitioner and client scale, jointly and severally, the one paying the others being absolved.
6. The application against the third, fourth and fifth respondents is dismissed with costs.”

ZIYAMBI JA: I agree

OMERJEE AJA: I agree

Linda Chipato Legal Practitioners, appellant’s legal practitioners

Antonio, Mlotshwa & Company, first & second, respondent’s legal practitioners

Manase & Manase, third, fourth & fifth respondent’s legal practitioners