THABANI LIHLE SIZIBA N.O.
versus
MEMORY CHADA
and
ZIBUSISO SAMUEL MOYO N.O.
and
MASTER OF THE HIGH COURT
and
REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 28 February 2024 & 26 September 2024

Court Application for a declaratur

N. Ndlovu for the applicant
S. Chingarande for the 1st and 2nd respondents

DUBE-BANDA J:

[1] This is a court application for a *declaratur.* The applicant seeks an order couched in the following terms:

> i. A declaratur be and is hereby granted that the property known as Lot 5 Sunninghill of Willlsgrove measuring 8, 6321 hectares held under deeds of transfer 332/2021 and 2770/1985 is registered and owned by the Estate Late Simon Kubvoruno Nhema.
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> ii. A declaratur be and is hereby granted that the agreement of sale entered into between the first and second respondents over Lot 11 Sunninghill of Willsgrove is unlawful and void *ab initio*.
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> iii. The first respondent and anyone claiming occupation of Lot 11 Sunninghill of Willsgrove through him be and is hereby ordered to vacate the property within five directed to evict any person in occupation of the property.
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> iv. The first and second respondents be and are hereby ordered to pay costs of suit at an attorney and client scale one paying the other being (*sic*) absolved.

[2] The application is opposed by the first and the second respondents. The third respondent filed a report, which suggests that it pitches tent in the applicant's conner. See *Machine v The*

Sheriff of Zimbabwe & Ors CCZ08/23. The third respondent is an officer of court, his duty is limited in stating the facts, not to make submissions in support of the case of a litigant while casting aspersions on the other litigant. This is impermissible. I flag this issue to bring to the fore the principle stated in *Machine* and to alert court officers of their duty in litigation. They need not take sides and advance the case of a litigant, but just state the facts. However, in *casu* nothing much turns on the submissions made by the third respondent as they simply mirror the submissions already taken by the applicant.

BACKGROUND FACTS

[3] This application will be better understood against the background that follows. During their life time, Simon Kubvaruno Nhema and his wife Lizie Nhema were the registered owners of an immovable property known as Lot 5 Sunninghill of Willsgrove, measuring 8,6321 hectares ("property"). The property is registered under Deeds of Transfer numbers 2770/85 and 03321/21. Lizzie Nhema died in 2005 and Simon Nhema died in 2008. The deaths of Simon Nhema and Lizzie Nhema ignited a wave of appointment of executors, which appointments are the underlying cause of this litigation. On 27 June 2019, the second respondent was appointed the executor in the estate of Lizie Nhema under DRB 648/18. As the executor in the estate of Lizie Nhema, the second respondent awarded the 50% share in the property to the estate of the late Simon Nhema. The Master confirmed the distribution account in the estate of Lizi Nhema on 10 February 2020.

[4] The estate of Simon Nhema was registered on 15 August 2014 at the Master' s office, and three years later the applicant was on 17 October 2017 appointed the executrix dative to the estate. On 4 April 2018 she was given letters of administration. On 4 January 2018 the estate of Lizie Nhema and Simon Nhema were registered at the Magistrate's Court under DRB 20/18, and the second respondent was appointed the executor of both estates. He was given letters of administration on 22 January 2018.

[5] Armed with Letters of Administration, on 19 July 2018 the second respondent applied for a subdivision permit of the property. A subdivision was approved and a permit under SDC 39/18 was issued on 4 September 2018. Pursuant to the issuance of the subdivision permit, and on 5 September 2018 the second respondent sold Lot 11 Sunninghill of Willlsgrove measuring 4201 square meters to the first respondent. This is the agreement that the applicant seeks to be declared unlawful and void *ab initio.* It is against this background that applicant launched this application seeking the relief mentioned above.

AMENDMENT OF THE DRAFT ORDER

[6] At the commencement of the hearing, Mr *Ndlovu* counsel for the applicant made an application for an amendment seeking to add two paragraphs to the original draft order. In support of the amendment, counsel argued that the applicant filed this application as the executor of the estate of Simon Nhema seeking an order that the actions of the second respondent to sell estate property were unlawful and a nullity. In the opposing affidavit, the second respondent averred that he was the executor of the estate of Simon Nhema which he registered in 2018. Counsel argued that this issue was not addressed in the founding affidavit because it was unknown to the applicant. In turn the applicant has addressed this issue in the answering affidavit. Counsel further argued that this is the issue that prompted the seeking of the amendment so that the draft order speak to the issue that has arisen. According to counsel, the second respondent would suffer no prejudice should the amendment be granted because he is the one who raised the issue that has prompted the seeking of the amendment.

[7] Mr *Chingarande* counsel for the first and second respondent opposed the amendment. It was contended that the factual basis necessitating the amendment does not appear in the founding affidavit, and is taken for first time in the answering affidavit. Counsel submitted that the applicant seeks to obtain an order in respect of a case not made in the founding affidavit and as such it would be prejudicial to the first and second respondent should the amendment be granted.

[8] The applicant seeks an amendment to include the following two paragraphs in the draft order, that:

> "The second registration of the estate late Simon Kubvaruno Nhema at the Additional Assistant Master under DRBY20/18 was unlawful and a nullity.
> Consequently:
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> 2. The Letters of Administration issued to the second respondent under DRBY 20/18 be and are hereby revoked."

[9] In the founding affidavit it is averred that the second respondent sold property in the estate of Simon Nhema. He sold estate property without authority, and without the Master's consent in s 120 of the Administration of Estates Act [*Chapter 6:01*]. In the opposing papers it is averred that the second respondent was appointed executor dative of both the states of Simon Nhema and Lizzie Nhema. It was further averred that the appointment of applicant as the executor of the state of Simon Nhema was a nullity, because the estate had already had an executor. In the answering affidavit it is averred that the estate of Simon Nhema was registered in 2014 under

DRB 458/14, and the applicant was appointed executor of the estate on 17 October 2017. It is further averred that the registration of the same estate at the Magistrates Court in 2018 is a nullity because an estate cannot be registered twice, and therefore the Letters of Administration issued on 5 January 2018 to the second respondent are a nullity.

[10] The law on amendments to pleadings is well-known and trite. An application for an amendment will always be allowed unless it is *mala fide* or would cause prejudice to the other party which cannot be compensated for by an order for costs or by some other suitable order such as a postponement. See *Angeline Enterprises (Pvt) Ltd* v *Albco (Pvt) Ltd* 1990 (1) at p 8 ZLR 6; *Ruesen* v *Mmeyes* 1957 R & N 616 at 620; *Mashonaland Turf Club v Peters & Anor* 2019 (3) ZLR 928 (H). In *UDC Ltd* v *Shamva Gora (Pvt) Ltd* 2000(2) ZLR 210H at 216, the court remarked that:

> "The approach of our courts has been to allow amendments to pleadings quite liberally in order to avoid an exercise that may lead to a wrong decision and also to ensure that the real issue between the parties may be fairly tried."

[11] The applicant's case as pleaded in the founding affidavit is that the second respondent had no authority to sell estate property. Authority to sell estate property is predicated on the seller being an executor with Letters of Administration, meaning the nub of the applicant's case is that the second respondent was not the executor of the estate of Simon Nhema. A closer scrutiny of the whole spectrum of the applicant's case shows that it is anchored on the second respondent's lack of authority to sell estate property. This is the case that the second respondent had to answer to, and he answered it by contending that he was the executor of the estate of Simon Nhema and he had Letters of Administration. Now that in the opposing affidavit, the second respondent had disclosed that indeed he had Letters of Administration, it became necessary for the applicant to seek that such Letters of Administration be declared a nullity. The amendment sought by the applicant must be seen in the context of the whole case, and the amendment sought flows naturally from the totality of the applicant's case. It is for these reasons that I take the view that the amendment sought is not *mala fide* and will not cause prejudice to the second respondent.

[12] I agree that it is futile for an applicant to seek to amend a draft order in the absence of averments in the founding affidavit that support the amendments sought to be made. The amendments sought to be made in the draft order should be in tandem with the applicant's case as pleaded in the founding affidavit. See *CRG Quarries (Pvt) Ltd V The Provincial Mining Director Mashonaland East Province N.O* HH 700/20. In the circumstances of the case, as

alluded above, the amendment sought is in tandem with the whole spectrum of the applicant's case. Furthermore, what is sought to be amended is a draft order. If amended, it still remains a draft order. It is in this context that I do not see what prejudice the respondents will suffer if the amendment is granted. In fact, the amendment will ensure the resolution of real issues between the parties. In the circumstances, the application to amend the draft order has merit and is granted.

MERITS

[13] The succinct issues in this matter are: whether the registration of the estate late Simon Nhema at the additional assistant master and the appointment of the second respondent as the executor of the estate was in terms of the requirements of the law; and whether the agreement of sale between first and second respondent is valid. I deal with these issues seriatim.

[14] The applicant seeks a declaratory order which is a remedy provided for in s14 of the High Court Act [*Chapter 7:06*] in terms of which this court may, at the instance of any interested party, inquire into and determine any existing, future or contingent right or obligation. In interpreting s14 of the Act GUBBAY CJ stated as follows in *Munn Publishing (Pvt) Ltd* v *ZBC* 1994 (1) ZLR 337 (S) 343G -344 A-E:

> "The condition precedent to the grant of a declaratory order is that the applicant must be an interested person, in the sense of having a direct and substantial interest in the subject matter of the suit which could be prejudicially affected by the judgment of the court. See *United Watch and Diamond Co (Pty) Ltd and Others* v *Disa Hotels and Another* 1972 (4) SA 409 (C) at 415 *in fine*; *Milani and Another* v *South Africa Medical and Dental Council and Another* 1990 (1) SA 899 (T) at 902 G-H. The interest must relate to an existing, future or contingent right. The court will not decide abstract, academic or hypothetical questions unrelated to such interest. See *Anglo-Transvaal Collieries Ltd* v *SA Mutual Life Assurance Soc* 1977 (3) SA 631 (T) at 635 G-H. But the existence of an actual dispute between persons interested is not a statutory requirement to an exercise by the court of jurisdiction. See *Exp Nell* 1963 (1) SA 754 (A) at 759 H- 760A. Nor does the availability of another remedy render the grant of a declaratory order incompetent. See *Gelcon Investments (Pvt) Ltd* v *Adair Properties (Pvt) Ltd* 1969 (2) RLR 120 (G) at 128 A –B; 1969 (3) SA 142 (R) at 144 D-F. This, then, is the first stage in the determination by the court. At the second stage of the inquiry, it is incumbent upon the court to decide whether or not the case in question is a proper one for the exercise of its discretion under s14. What constitutes a proper case was considered by WILLIAMSON J in *Adbro Investment Co Ltd* v *Minister of the Interior and others* 1961 (3) SA 283 (T) at 285 B –C to be one which, generally speaking, showed that –
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> > "despite the fact that no consequential relief is being claimed or perhaps could be claimed in the proceedings, yet nevertheless justice or convenience demands that a declaration be made, for instance as to the existence of or as to the nature of a legal right claimed by the applicant or of a legal obligation said to be due by a respondent. I think that a proper case for a purely declaratory order is not made out if the result is merely a decision on a matter which is really of merely academic interest to the applicant. I feel that some tangible and justifiable advantage in relation to the

> applicant's position with reference to an existing, future or contingent legal right or obligation must appear to flow from the grant of the declaratory order sought'. See also *Reinecke* v *Incorporated General Insurance Ltd* 1974 (2) SA 84 (A) at 93 D-H."

See *Zomatsayi & Ors v Chitekwe No & Anor* 2019 (3) ZLR 990 (H)

[15] It is important to set out the time line regarding the registrations of the estate of Simon Nhema. I have already stated that it was registered at the office of the Master on15 August 2014 in DRB 458/14. On 17 October 2017 the applicant was appointed the executrix dative to this estate, and was on 4 April 2018 she was given Letters of Administration. Again, on 5 January 2018 the estate of Simon Nhema was registered at the Magistrates Court under DRBY 20/18. The second respondent was appointed the executor of the estate and on 22 January 2018 he was given Letters of Administration.

[16] The applicant has now approached this court *inter alia* seeking a declaratur that the second registration of the estate of Simon Nhema at Additional Assistant Master on 5 January 2018 is unlawful and a nullity, and consequently that the Letters of Administration issued to the second respondent under DRBY 20/18 be revoked. It is clear that when the second respondent on 5 January 2018 purported to registerer the estate of Simon Nhema he was engaging in futility. This is so because the estate had already been registered on 15 August 2014. The purported registration of the estate, the issuance of Letters of Administration in favour of the second respondent was a nullity because it flowed from a nullity. There was no longer an estate to be registered. An estate can only be registered once. See *Taruhla & Ors v Taruhla & Anor* HH 43/19. Furthermore, whatever the second respondent did or purported to do on the strength of the Letters of Administration issued to him on 22 January 2018 is a nullity. See *Gama N.O. v Mpofu & Ors* (HB 84 of 2016; HC 1152 of 2015) [2016] ZWBHC 84 (18 March 2016). In the circumstances a case for the revocation of the DRBY 20/18 has merit.

[17] Mr *Ndlovu* submitted that to the extent that the agreement of sale involving the first and second respondent was entered into without the consent of the Master and therefore in breach of s120 of the Administration of Estates Act [*Chapter 6:01*] it was a nullity. It is common cause that the property in issue is estate property and was sold without the consent of the Master. Mr *Chingaranda* submitted that the failure to comply with s 120 does not render the agreement *void ab initio,* it simply means that the agreement was conditional upon the master granting the statutory consent. Counsel submitted further that transfer of the property to the seller would also be conditional upon the issuance of a s 120 authority. I do not agree. This is so because a reading of the agreement of sale shows that the sale and transfer of the property was not made conditional to the granting of s 120 authority. The stubborn point that Mr *Chingarande* has to

contend with is that the second respondent sold estate property without a s 120 authority. The jurisprudence is that such a sale is a nullity. In *Chinogura* v *Chiseko and Another* HH 201-12 it was held that if s 120 has not been complied with, any sale is a legal nullity. See The *Deputy Master v Lunga NO.* HB 2/2020; *Mutsure v Muringisi* HB 20/2009.

[18] Mr *Chingarande* submitted further that the first respondent is a *bona fide* purchaser, in that he purchased the property through an estate agent and a legal practitioner. He was shown letters of administration, and was assured that a s 120 authority would be procured. He paid the purchase price in full and built a very expensive properties. This might well be so, but that does not turn a non-sale into a valid sale. See Chirau Mugomba and Makwaiba "*The Law of Succession in Zimbabwe* (University of Zimbabwe Press) 133. In *Dondo NO v Muganhiri and Others* HH -15 a case involving the sale of immovable property, a seller obtained letters of administration through misrepresentation and it was held that she could not validly pass title even to an innocent purchaser. In the circumstances, the fact that the first respondent is an innocent purchaser, is of no moment. It is inconsequential. The agreement of sale between the first and the second respondent is of no consequence, it is a nullity.

[19] For completeness, I deal with the submission by Mr *Ndlovu* that the sale is invalid because the property was sold without a subdivision permit. I do not think that anything material turns on this issue. It is so because in the first instance the second respondent had no authority to sell the property, because he was not the executor of the estate of Simon Nhema. Anywhere the papers show that the subdivision was approved and a permit under SDC 39/18 was issued on 4 September 2018. On 5 September 2018 the first and second respondent signed an agreement in respect of Lot 11 Sunninghill of Willlsgrove measuring 4201 square meters. On the facts it is incorrect to say at the time of the sale there was no subdivision permit. The second respondent had been issued with a subdivision permit. However, this issue is not dispositive of this matter, because in the first instance he had no authority to sell the property.

COSTS

[20] The applicant seeks costs against the first and second respondents on an attorney and client scale. In *Kangai v Netone Cellular (Pvt) Limited* 2020 (1) ZLR 660 (H) it was held that costs of suit on a legal practitioner and client scale are not merely for the asking. Something more underlies the practice of awarding costs as between legal practitioner and client than the mere punishment of the losing party. The operative principle in determining whether to award punitive costs is whether a litigant's conduct is frivolous, vexatious or manifestly inappropriate. The scale of legal practitioner is an extraordinary one which should be reserved for cases where

it can be found that a litigant conducted itself in a clear and indubitably vexatious and reprehensible manner. Such an award is exceptional and is intended to be very punitive and indicative of extreme opprobrium.

[21] The first respondent got herself entangled in a scheme designed and executed by the second respondent. She was shown Letters of Administration in the name of the second respondent as the executor of the estate of Simon Nhema. She was informed that the property was being sold to defray estate expenses. She did a due diligence by checking at the Deeds Office and confirmed that indeed it was an estate property registered in the name of Simon Nhema. She avers that she believed the explanation of the legal practitioner that the sale was above board, and purchase price was paid in full. My view is that the first respondent has done no more than to exercise her right to vindicate her rights. In the circumstances of this case to punish her with costs on a legal practitioner and client scale, and even on a party and party scale would be in the interest of justice and unjustifiable.

[22] It is the conduct of the second respondent requires closer scrutiny. He knew or must have known that the estate of Simon Nhema was registered in 2014. Despite this knowledge, on 4 January 2018 he purported to register the estates of Simon Nhema and Lizzie Nhema at the Additional Master. He was nominated and appointed executor and on 22 January 2018 he was issued with Letters of Administration under DRBY 20/18. Again, on 26 June 2019 he was issued with Letters of Administration in the estate Lizzie Nhema in DRB 648/18. On 10 February 2020 the Master confirmed the final distribution account in the estate of Lizzie Nhema. In essence at some point, he was armed with two Letters of Administration, i.e., for the estate of Lizzie Nhema and Simon Nhema in DRBY 20/18 issued at the Additional Master and the estate of Lizzie Nhema in DRB 648/18 issued at the Master's Office. He applied for a subdivision permit, which was granted on 4 September 2018, and the following day on 5 September 2018 he signed an agreement of sale with the first respondent in which he sold the property. An objective view of the circumstances of this case shows that the conduct of the second respondent is extremely scandalous and objectionable in the extreme. Furthermore, his conduct was frivolous, vexatious and manifestly inappropriate. I have not a shadow of doubt in my mind that if there are cases in which the court must – not may – mulct the errant party with costs on the scale as between attorney and client, the present case is the one. It is for these reasons that the second respondent cannot escape costs on a legal practitioner and client scale.

DISPOSITION

[23] In the circumstances, the applicant has made a case for the relief she is seeking in this case.

In the result, it is ordered as follows:

i. It is declared that the property known as Lot 5 Sunninghill of Willlsgrove measuring 8, 6321 hectares held under deeds of transfer 332/2021 and 2770/1985 is registered and owned by the Estate Late Simon Kubvoruno Nhema.

ii. It is declared that the second registration of the estate late Simon Kubvaruno Nhema at the Additional Assistant Master under DRBY20/18 is unlawful and therefore null and void.

iii. The Letters of Administration issued to the second respondent under DRBY 20/18 be and are hereby revoked.

iv. It is declared that the agreement of sale entered into between the first and second respondents over Lot 11 Sunninghill of Willsgrove is unlawful and therefore null and void.

v. The first respondent and/or anyone claiming occupation through him at Lot 11 Sunninghill of Willsgrove be and is hereby ordered to vacate the property within thirty days of this order, failing which the Sheriff be and is hereby directed to evict in terms of the requirements of the law.

vi. The second respondent be and are hereby ordered to pay costs of suit at an attorney and client scale.

DUBE BANDA J: .....

Cheda & Cheda Associates, applicant's legal practitioners
Sansole & Senda, first and second respondent's legal practitioners