HB 81/17
HC 1597/15

VIGILTER MOYO

Versus

EDWIN SIBANDA

And

SIZIWE MBANGWA

And

ADDITIONAL ASSISTANT MASTER

And

REGISTRAR OF DEEDS

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 31 OCTOBER 2016 & 30 MARCH 2017

Opposed Application

M. Ndlovu for the applicant
No appearance for the 1st, 3rd and 4th respondents
G. Nyathi for 2nd respondent

TAKUVA J: This is an application for a declaratory order couched in the following terms:

> "1. The registration of the Estate of the Late Patrick Sibanda under DRBY 90/14 is declared null and void.
> 2. The sales and subsequent transfer of the house number 16172 Nkulumane under DT 480/15 into 2nd respondent's name is declared null and void.
> 3. The 3rd respondent re-register the Estate of the Late Patrick Sibanda
> 4. The 1st respondent pays costs of suit on an attorney client scale."

The facts as captured in the affidavits are as follows:

The 2nd respondent purchased immovable property known as house number 16172 Nkulumane from Estate Late Patrick Sibanda DRBY 90/14 represented by 1st respondent on 16

July 2014. The 1st respondent was the duly appointed executor dative, son and beneficiary of the house. First respondent had been awarded the aforementioned immovable property after the First and Final Liquidation and Distribution Account of the late estate Patrick Sibanda had been wound up in terms of the Deceased Estate Act Chapter 6:02. The estate was advertised to give those with objections an opportunity to lodge their claims or objections with the executor or additional Master. It is common cause that the applicant did not lodge her objections when the estate was being wound up.

After the property had been advertised for sale, the 2nd respondent viewed the house and Letters of Administration certifying that 1st respondent had been appointed Executor Dative on 24th February 2014. The 2nd respondent paid the full purchase price of US$20 000,00 in October 2014 and commenced collecting rentals from the tenants in November 2014 until February 2015. The property is currently registered in 2nd respondent's name in the Deeds Office.

On 9 June 2015, 2nd respondent filed an application for eviction of the tenants occupying house number 16172 Nkulumane, Bulawayo. One of the tenants Fredrick Mangena, then notified the applicant of this development. The applicant claims to be the surviving spouse of the late Patrick Sibanda. Their marriage was blessed with one daughter, a minor, Portia Sibanda born on 22nd May 2003. When Patrick Sibanda died on 31st August 2004, the applicant went to South Africa where she remained until June 2015 when she returned to Zimbabwe to challenge the registration of the estate and the sale of the property to the 2nd respondent.

She subsequently filed this application on 15 February 2016 praying for the order referred to *supra.*

In a nutshell her claim is anchored on the following grounds:

1. that she was customarily married to the late Patrick Sibanda, making her the sole surviving spouse of the late Patrick Sibanda.
2. that she is the mother of Portia Sibanda, who is the late Patrick Sibanda's daughter and beneficiary of the estate of the late Patrick Sibanda.

3. that the estate was irregularly registered in that 1st respondent left her and the other two children out when the late Patrick Sibanda's death certificate shows that he was customarily married.
4. that the 2nd respondent is not an innocent purchaser because when the agreement of sale was entered into, the authority of the Master had not yet been issued and she transferred the house into her name despite being informed by Mangena that there were other beneficiaries.

The 2nd respondent opposed the application on the following grounds:

***In limi*ne**

(a) The applicant adopted the wrong procedure in that it did not specify under what rule it makes its application in violation of O 32 r 226 of the High Court Rules 1971.
(b) Applicant has no *locus standi* to bring these proceedings in that she is not the surviving spouse of the late Patrick Sibanda. She has not attached any proof that she is the surviving spouse.
(c) The matter of the estate of the late Patrick Sibanda is *res judicata* in that the estate has been properly wound up in terms of the law and all interested parties were given an opportunity to raise their objections when the estate was advertised. There must be finality in litigation.
(d) The failure to cite the estate is fatal to applicant's case.

On the merits

(a) The 2nd respondent is an innocent third party purchaser who has acquired real rights in the property after ownership was transferred into her name.
(b) The sale of the property to the 2nd respondent was not illegal in that all the requirements of the Deceased Estates Act Chapter 6:06 were complied with.
(c) The 2nd respondent never met Mangena and Ntuta before transfer was effected.

I turn first to the points *in limine* and in this regard it is necessary to repeat the warning by MATHONSI J in *Telecel Zimbabwe (Pvt) Ltd* v *POTRAZ & Others* HC 3975/15, when the learned Judge remarked as follows:

> "We are spending a lot of time determining points in limine which do not have the remote chance of success at the expense of the substance of a dispute.
>
> Legal practitioners should be reminded that it is an exercise in futility to raise points *in limine* simply as a matter of fashion. A preliminary point should only be taken where firstly it is meritable and secondly it is likely to dispose of the matter … In future, it may be necessary to reign in the legal practitioners who abuse the court in that way, by ordering them to pay costs *de bonis propriis*."

In casu, all the points *in limine* raised by the 2nd respondent are not meritable and cannot dispose of the matter. I proceed to show why. As regards the 1st point, if 2nd respondent's legal practitioner had read Rule 229C of this Court's rules, this point *in limine* would not have been raised at all. The rule states:

> "229 C Adoption of incorrect form of application
>
> Without derogation from rule 4c but subject to any other enactment, the fact that an applicant has instituted-
> (a) a court application when he should have proceeded by way of a chamber application; or
> (b) a chamber application when he should have proceeded by way of a court application;
> shall not in itself be a ground for dismissing the application unless the court or judge as the case may be, considers that-
> (i) some interested party has or may have been prejudiced by the applicant's failure to institute the application in proper form; and
> (ii) such prejudice cannot be remedied by directions for the service of the application on that party with or without an appropriate order of costs." (my emphasis)

In the present case no prejudice has been alleged and the complaint is solely centered on the wrong format. In my view, despite the wrong format the substance of the application has not been affected in any way. The application was served on the 2nd respondent who filed her opposing papers.

See also *Rabeka* v *Stockil & Others* HC 518/09.

Secondly, as regards applicant's *locus standi*, while it is in dispute that she is the surviving spouse, *ex facie*, it has been established that she is the biological mother of the minor child Portia Sibanda whom she sired with the late Patrick Sibanda. I take the view that by virtue of being the mother of a minor child who has a direct interest to the estate of the late Patrick Sibanda she has the *locus standi* to bring the action in order to protect the interests of the minor. On this basis, the point *in limine* has no merit and it is hereby dismissed.

The 3rd point relates to the plea of *res judicata*. In *Mwanyisa* v *Jumbo and Others* HC 374/08 MAKARAU JP (as she then was) held that:

> "with respect, the issue of the applicant's rights in property was never adjudicated upon in the main matter as she was not cited as a party in that matter. It is trite that the plea of *res judicata* applies inter parties where the same issue between the same parties has already been resolved." (my emphasis)

In casu, it is common cause that the applicant was not a party to the proceedings of registration of Estate late Patrick Sibanda. Accordingly, the defence of *res judicata* cannot be sustained and it is hereby dismissed.

The final point *in limine* raised by the 2nd respondent is the non-joinder of the estate. Order 13 Rule 87 is quite explicit on issues of mis-joinder or non-joinder, it provides:-

"No cause or matter shall be defeated by reason of the mis-joinder of any party."

In view of the above rule, the 2nd respondent's contention that the application is fatally defective for failure to cite the estate late Patrick Sibanda is unmeritorious. In any case, there is no prejudice in that even if the estate late Patrick Sibanda had been cited, the 1st respondent was the one who was going to be served in his capacity as the Executor. Consequently, the point *in limine* is dismissed.

On the merits, my view is that the real issue is whether or not the property *in casu* can be vindicated from a *bona fide* purchaser who had received transfer of the property.

The Law

Silberberg and Schoeman's *The Law of Property* 2nd edition at p 321 states:

> "Property sold at judicial sales cannot after delivery in the case of movables or registration in the case of immovables, be vindicated from a *bona fide* purchaser. Even where an article is sold by mistake as belonging to a judgment debtor, the true owner cannot vindicate it from a *bona fide* purchaser …".

In *Crundall Brothers (Pvt) Ltd* v *Lazarous NO & Anor* 1991 (2) ZLR 125 (SC) it was stated that:

> "The real issue is whether in a case of double sale where the second purchaser takes transfer with notice of the 1st purchaser's rights, the court must order specific performance in favour of the first purchaser, or whether it has a discretion or whether it is limited to an award of damages … When the second purchaser is entirely ignorant of the claims of the 1st purchaser, and takes transfer in good faith and for value, his real right cannot be disturbed. *Per contra*, when the second purchaser knowingly and with intent to defraud the 1st purchaser takes transfer, his real right can and normally will be overturned subject to consideration of practicality." See also *Madan* v *Macebo Heirs & Anor* 1991 (1) ZLR 295 (SC)

The matter is put more crisply by Prof McKerron in (1935) 4 *SA Law Times* 178 and repeated with approval by Prof Burhell in (1974) 91 SACJ 40 as follows:

> "It is submitted that where A sells a piece of land first to B and then to C – and the position is the same *mutatis mutandis* in the case of a sale of a movable of which the court would decree specific performance – the rights of the parties are as follows:
>
> (1) …
> (2) Where transfer has been passed to C, C acquires an indefeasible right if he had no knowledge, either at the time of the sale or at the time he took transfer, of the prior sale to B and B's only remedy is an action for damages against A.
>
> If however, C had knowledge at either of these dates, B in the absence of special circumstances affecting the balance of equities, can recover the land from him, and in that event C's only remedy is an action for damages against A."

Turning to the facts of this case, it should be noted that while this case is not about double sales, the same principles apply in that the applicant has laid a claim to immovable property that has already been sold and transferred to a purchaser. The applicant seeks to rely on

a personal right or the right of inheritance that she might or might not have. A sub-issue which the parties argued extensively in their heads is whether or not the 2nd respondent can be categorized and an "innocent purchaser or *bona fide* purchaser for value without notice." Put differently, whether the 2nd respondent had no knowledge, either at the time of sale or at the time she took transfer, of the prior claim by the applicant.

In my view, at either these dates, the 2nd respondent did not have such knowledge I say so for the following reasons:

(i) the 2nd respondent purchased the property from the 1st respondent who had been appointed Executor Dative in terms of the Deceased Estates Act Chapter 6:02.

(ii) the Estate late Patrick Sibanda was advertised and applicant failed to lodge any claim or objections.

(iii) it is highly improbable that 2nd respondent was informed by Mangena and Zenzo Thomas Ntuta of applicant's claim to the property in that if such a meeting had taken place, the applicant should have been advised of the eviction process. Instead, nothing was done to place a caveat over the house at the 1st respondent's offices to block transfer.

(iv) further, it has not been denied that 2nd respondent received rentals from the property in issue for the period November 2014 to February 2015. The question is why did the applicant allow this to occur over her property without taking action?

(v) the 3rd respondent authorized the 1st respondent to sell by private treaty the immovable property on 30 October 2014. It is neither here nor there that the authority was granted after the agreement of sale had been crafted. What is critical is that it was granted before transfer.

(vi) while according to the doctrine of notice it is not necessary to prove *mala fides* or fraud, *in casu*, the facts show that the 2nd respondent acquired the property for value without any misrepresentation.

As regards applicant's status, my view is that the resolution of whether or not she is the surviving spouse of the Late Patrick Sibanda is irrelevant to the issue at hand in that even assuming she was, it would have no bearing on the real rights acquired by the 2nd respondent. Equally irrelevant is whether or not 1st respondent left out either beneficiaries in the process of being appointed executor dative as long as the 2nd respondent was ignorant of such machinations. Perhaps this could have been relevant in an application for review of the Additional Master and or executor's decision in terms of section 52 (a) of the Administration of Estates Act Chapter 6:01. Assuming applicant's title to the afore-mentioned property is established, she is not without a remedy as she can still pursue the 1st respondent. See *B P Southern Africa (Pty) Ltd* v *Desden Properties (Pvt) Ltd* 1964 RLR (&) (G) and *Vosal Investments (Pty) Ltd* v *City of Johannesburg* 2010 (1) SA 595 (GSJ).

The 2nd respondent in my view, took reasonable steps to ensure that the property had no claims against it by carrying out a deed search where the results showed that the property belonged to the seller i.e. Estate Patrick Sibanda. Further, all interested parties were given an opportunity to raise their objections when the estate was advertised. Applicant, who was not even the informant on the death of Patrick Sibanda, left the country shortly after Patrick Sibanda's death and lived in South Africa for more than ten years.

Accordingly, the application is without merit and is hereby dismissed with costs.

Mlweli Ndlovu & Associates, applicant's legal practitioners
Sansole & Senda, 2nd respondent's legal practitioners