MICHAEL MADOROBA
versus
SPZ KNITTING AND TEXTILES (PRIVATE) LIMITED
(Trading as BERINA TEXTILES)
and
PETER ZHANERO
and
MRS ZHANERO

HIGH COURT OF ZIMBABWE
MTSHIYA J
HARARE, 19 September, 2013 and 18 December, 2013

O Mutero, for the applicant
AdvocateT. Mpofu, for the respondent

MTSHIYA J**:** On 28 April 2009, the applicant filed this application seeking the following relief:

"IT IS ORDERED:-

1. That 1st, 2nd and 3rd Respondents and all those persons claiming a right of occupation through them be and are hereby directed to vacate the Remainder of stand 1026 Gatooma Township commonly known as No. 1 Chimoio Road, Kadoma within 7 days of service of this Order upon them failing which the Deputy Sheriff be and is hereby authorised to evict them from the said property and to give vacant possession thereof to Applicant."

It is now common cause that the second respondent died on 25 September 2007. The third respondent, being the surviving spouse was appointed Executive Dative on 22 June 2009. It is in that capacity that she has respondent to this application.

In their apposing papers, the respondents, in terms of rule 229 A (1) of the High Court Rules 1971, counter claimed for the following relief:

"IT IS DECLARED THAT:-

1. The Deed of Title passed in favour of Michael Madoroba in respect of a certain piece of land situate in the district of Gatooma, being the remainder of Stand 1026 Gatooma Township measuring 2669 square meters is invalid, of no force or effect and is accordingly set aside."

2. The sale, by Public Auction of the property referred to in clause 1 above, to Michael Madoroba on the 16th of November 2001, which was confirmed on the 9th January 2002 is valid, of no force or effect and is accordingly set aside."

In his founding affidavit the applicant stated that, following an advertisement in the Herald of August 2001, he purchased a certain piece of land situated in the district of Gatooma being the Remainder of Stand 1026 Gatooma Township, measuring 2669 square meters (the property). The purchase was through an auction sale sanctioned by the sheriff. The sale was in execution of a Judgement granted in favour of Scotfin Limited (Scotfin) against Orthosurge (Private) Limited (Ourthosurge) and one Lancelot Machawira (Muchawira). The property, at the material time, was registered in the name of Othorsurge.

At the auction sale, which was conducted on 31 August 2001, the applicant's bid of $950 000-00 for the property was accepted as the highest. On 9 January 2002 the Sheriff confirmed the applicant's bid as the highest and declared him purchaser of the property. On 26 July 2002, upon payment of the purchase price, the property was transferred into the applicant's name

It is common cause that when the applicant purchased the property, the respondents, referred to in the order sought, were in occupation of the property. The applicant now seeks their eviction.

However, as for the relief sought in the counter claim, the third respondent (now first applicant in the counter claim) states that, through an agreement of sale, dated 18 July 2001, her late husband (then the second respondent) purchased the same property for $850 000-00. She says the property was intended for use by the family company, namely Berina Textiles (private) Limited, cited herein as first respondent under the name SPZ Knitting and Textiles (Private) Limited t/a Berina Textiles.

The property, according to the third respondent was supposed to be dealt with in terms of the Insolvency Act [*Cap* 6:04] (the Act) as Machawira had been declared insolvent. She does not tell us when Machawira was declared insolvent.

The agreement of 16 July 2001 described the Saller as "Mr Fraser in his capacity as the Trustee of the Insolvent Estate Lancelot Machawira who is the sole shareholder of Orthosurge." The agreement of sale indicates that, in disposing of the property, the Trustee acted in terms of s 96 of the Act Subsections (1) and 2 of the Act provide as follows:-

> "96 Sale of Property
>
> (1) Subject to subsection (2), the trustee shall, after the second meeting of creditors, proceed to sell all the property of the insolvent estate in such manner and such conditions as the creditors may direct or, where no such directions have been given, in such manner and on such conditions as the Master may direct.
>
> (2) If at any time before the second meeting of creditors the trustee considers it expedient that any property of the insolvent estate should be sold forthwith he may, with the authority of the Master and in such manner and upon such conditions as the Master may direct, sell such property:
>
> Provided that where the Master has notice that any property of an insolvent estate or any portion thereof is subject to a right of preference he shall not authorise the sale of such property or such portion thereof in terms of this subsection unless the person entitled to such right of preference has given his consent to the writing or the trustee has guaranteed that person against loss by such sale."

Clearly the whole process calls for the involvement of the Master of the High Court.

There is nothing in the record to show how the provisions of subsections (1) and (2) above were complied with. Furthermore there is nothing that confirms payment of the purchase price. The third respondent does not explain why transfer was never effected in favour of her late husband.

The third respondent argues that after the conclusion of the agreement of sale on 18 July 2001 and after taking occupation, the applicant (respondent in the counter claim) pitched up and claimed ownership of the property. She said the applicant claimed to have bought same in execution of a judgment of this Court on 13 March 2001.

The third respondent said her late husband then proceeded to interdict the Sheriff from transferring the property into the name of the applicant. The interdict was granted in the form of a Provisional order in HC 5256/02 on 24 June 2002.

The relevant parts of the Provisional order provided as follows:

"PROVISIONAL ORDER

TREMS OF ORDER MADE

That you show cause to this Honourable Court why a final order should not be made in the following terms:-

That the agreement between the Applicant and the Estate Late Machawira in relation to the property in annexure "A" be and is hereby declared valid and of full force and effect.

INTERIM RELIEF GRANTED
Pending the determination of this matter, Applicant is granted the following relief:

That the 2nd and 3rd respondents be and are hereby interdicted from registering the property described in annexure 'Á' into the name of the 1st respondent.

SERVICE OF PROVISIONAL ORDE
That the Deputy Sheriff serve this Provisional Order on the Respondent." (My own underlining)

The second and third respondents referred to in the interim relief were the Sherriff of Zimbabwe and the Registrar of deeds, who were both cited in HC 5256/02. The third respondent's late husband was the applicant therein.

The Provisional Order in HC5256/02 is still in place but was never confirmed.

Notwithstanding the Provisional Order quoted above and as already stated, on 26 July 2002, following confirmation of the sale by the Sherriff, the applicant took transfer of the property. It is that transfer that has led to the present application wherein he seeks the eviction of the respondents.

Prior to the hearing of the matter, the third respondent had raised a point *in limine* arguing that she, as the *Executrix Dative,* should have been cited and not her deceased husband. She was correct. However, the death certificate and letters of Administration were upon my insistence, only submitted, a week before the hearing of the matter.

At the commencement of the hearing the applicant withdrew his claim against the second respondent (the deceased) without tendering costs. The respondent then argued that, until a tender of costs was made, the withdrawal was of no legal effect.

It is true that under normal circumstances a withdrawal should be followed by a tender of costs. However, *in casu* the documents that led to the withdrawal of the claim against the second respondent were always in the custody of the third respondent and indeed they were produced through the third respondent's Legal Practitioners.

The third respondent was appointed *Executrix Dative* on 22 June 2009 and this application had already been served on her Legal Practitioners of record on 28 April 2009, (i.e. the same date this application was filed). She did not deem it necessary to immediately advise the applicant of her husband's death until 13 May 2009 when she filed her apposing papers. The opposing papers were not accompanied by her husband's death certificate and her letter of appointment as *Executrix Dative.* These were only produced through her Legal Practitioners on 12 September 2013. Under the circumstances I do not see how I can blame the applicant and order him to tender costs for the withdrawal of his claim against the deceased.

Accordingly, I accept that the withdrawal without a tender of costs was properly made and the matter should proceed on the basis that the Estate of the first respondent is now represented by the third respondent as the *Executrix Dative*.

In opposition to the relief sought by the applicant, the third respondent, in the main, proffered the following arguments:-

> **"7. <u>Ad Paragraph 4 - 6</u>**
>
> The position is actually that the late Zhanero and myself had before the period indicated that we had purchased the property through the trustee of the insolvent Estate late Machawira and had become thereby entitled to transfer. At this stage as well, the judgement creditor, Scotfin, had not registered its claim against the estate when it was wound up and could thus not, as a matter of law, offer the property for sell in execution of an order of court in respect of Machawira's or Orthosurge's indebtedness, from whatever factor arising.
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> **8. <u>Ad Paragraph 7 -8</u>**
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> As previously indicated the sale of the property was a non event, it was an incurable invalidity.
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> **9. <u>Ad Paragraph 7 – 8</u>**
>
> I contend that the sale, confirmation and attachment transfer were invalid for reasons already indicated and also the additional reasons that appear below. The court proceedings had themselves proceeded against an insolvent without the

> court's leave, the necessity of the leave having been actuated by the fact that an insolvent Estate was involved. Further the attachment of the property proceeded in breach of the High Court Rules being the rules that bear on the matter. Although we were in occupation of the property, the notice if its attachment was not served on us. Further, the property had a caveat at our instance but the process nonetheless proceeded without regard to our interests in the matter. These irregularities vitiated the entire process and one could not place something on nothing and expect it to stand."

The respondent went further to state that, notwithstanding the fact that transfer of the property in favour of the applicant took place on 26 July 2002, the applicant never did anything to assert his rights until April 2009 after the death of her husband. She therefore argued that the applicant was merely taking advantage of her husband's death. She believed this was because the applicant was aware that he obtained title fraudulently. She, however, did not produce evidence of fraud. It remained her belief.

In response to the counter-claim, the applicant said, although judgement in favour of Scotfin was against Orthosurge and Machawira, the latter was a mere guarantor. The principal debtor was the company ie. Orthosurge. The property was registered in the name of Orthosurge and the writ was served on the same company on 24 April 2001. Scotfin, he went on, had then on 4 April 2001, placed a Caveat (Caveat No 379/2001) on the property.

The applicant said as at 18 July 2001, when the respondent entered into an agreement with Fraser to purchase the property, the property was, because of the caveat already placed on it, no longer available for sale. The property was then advertised for sale and he had purchased - same at a public auction.

The applicant further pointed out that, the property, being owned by Orthosurge, did not form part of Muachawira's Estate which was insolvent and was being wound up by a Trustee. The agreement of 18 July 2001 did not involve Orthosurge. It involved the insolvent Estate of Machawira as administered by a Trustee (Fraser).

The applicant denied knowledge of the Provisional Order granted in favour of the third respondent's late husband on 24 June 2002 and also said he only came to know the Zhaneros (the family) after the property had already been transferred to him. To that end the applicant averred:

> "I wish to state that the only time I came across Peter Zhanero was after I had taken transfer i.e. when I wanted to take occupation. Prior to that, I did not know Peter Zhanero or his wife and neither had I ever spoken to them. Regarding the provisional order, I wish

to state that I was never served a copy of the urgent application which led to the provisional order. My legal practitioners of record have perused the court's file (HC 5256/02) and discovered the following:-

(a) An urgent application against "Madoroba", the Sheriff and the Registrar of Deeds was filed on the 21st of June 2002.
(b) There is no address for service for "Madoroba" in that application

(c) The urgent application was not served on any of the Respondents i.e. there is no return of service in the file indicating that the application was served on "Madoroba", the Sheriff and the Registrar of Deeds.

(d) Scotfin Limited, which was the Judgement creditor which caused the sale was not cited. Its lawyers were therefore unaware of the application.

(e) The matter was not set down for hearing and no notice of set down was served on the Respondents. ADAM J granted the application in the absence and without the knowledge of the Respondents.

From the court file, it appears that none of the Respondents were aware of the urgent application and the provisional order. I am advised that the provisional Order was supposed to take effect on the Respondents mentioned therein from the date of service upon them. Since service of the provisional order was not effected, there was nothing barring registration of the transfer in my favour from proceeding. The Transfer is therefore valid. It will be noted from annexure "E" attached hereto that the Sheriff forwarded the signed transfer documents to the conveyancers on the 1st of July 2001. If the urgent application and the provisional order had been served, he would have not done so. As things stand, the provisional order was overtaken by events."

The applicant went on to state that there was no evidence of fraud on the part of the Sheriff and the Registrar of Deeds. It was also the applicant's contention that there was no evidence that the respondent had paid the purchase price for the property under the agreement of 18 July 2001 and hence the failure on the part of the third respondent's late husband to take transfer. The applicant concluded by saying:

"There was no violating of a standing order. The provisional order was supposed to take effect upon service. As appears from the court file, the provisional order was not served, neither has it been confirmed. To the extent that both the urgent application and the provisional order were not served on any of the Respondents, the provisional order became ineffective and was overtaken by events.

> The transfer is valid and legal. The property was never part of an insolvent estate. The property was owned by a company which was solvent. Respondents have failed to appreciate the legal distinction between a company and its shareholder. They are both persons with a distinct *persona*. There were no irregularities whatsoever in the attachment and transfer. I have already given history. The notice of attachment was served on the owner of the property namely Orthosurge (Private) Limited prior to Respondents' purported agreement of sale. I am not aware of any court having authorised Respondents to place a caveat on the property and if there was a caveat, a distribution account was advertised by the Sheriff and Respondents could have placed a challenge.
>
> In the circumstances, I aver that the counter application is devoid of any merit and should be dismissed with costs."
>
> In response to the applicant's opposition to the counter –claim, the third respondent indicated that most of the issues raised by the applicant in his opposing affidavit to the counter-claim were points of law which would be argued in the Heads of Argument. She went further to state that the proceedings in HC 8525/97 were invalid because at that stage Machawira who was the sole trader in Orthosurge, was already insolvent. That being the case and the writ being based on an invalid judgement could not stand.
>
> The respondent averred that the Court order relied upon did not specifically order the sale of the immovable property. There was, according to the respondent, need for the Sheriff to first of all proceed against non movables as is generally required by law.

The third respondent proceeded to argue that the applicant bought the property "well after they had acquired it." She said the sale to the applicant was only confirmed on 9 January 2002 after they had already acquired it on 18 July 2001. The third respondents however admitted that her late husband had no title to the property.

As to the circumstances surrounding the Provisional Order of 24 June 2002, the third respondent had the following to say:

> "It is of course inconceivable that an application, which was not filed on an ex-parte basis, could be filed and determined without there having been made any service and no notice of set down delivered. This actually raises scandalous allegations against the judge who heard the matter.
>
> What is even more inconceivable is that we could file an application, to interdict transfer, get the order and sit on it. The absence of evidence, and I do not purport to know where that evidence went, is not the evidence of absence. I should be justified in assuming that something happened to the court record. The bottom line however, is that after respondent made his claims, we obtained an order of court. After that order we engaged each other and respondent resolved that he would have nothing to do with the matter. Little wonder he now talks of there having been proposals for a joint venture. Of course,

a registered owner could scarcely enter into any joint venture with anyone who had neither little or nor claim to the property. The fact of it is that respondent told us he was going away, he had carved in.

I must trust (sic) to point out that it is not the court file, which should show that none of the respondents were unaware of the court order. Even assuming that we had found any virtue in by passing respondent, there certainly would not have been any reason for not bringing the court order to the registrar's attention or the sheriff as the case may be.

As a matter of fact that order was served, that averment has been made on oath before by my late husband. I attach hereto his affidavit to that effect and mark it "A" and adopt the contents thereof as fully deposed hereto. Faced with that fact, respondent withdrew the application. The application was not withdrawn because of the citation of Berina Textiles, which entity could be sued by its trading name under provisions of the Order 2A of the rules of this court. There was no legal impediment to the application going through as brought to court, there was at law a respondent. This further explains why these claims had to await my husband's death.

I contend that all the respondents in the application had notice of the provisional order. The order took effect upon them. At any rate, the validity of an order is not determined on the basis of what one does or does not see. No order of the court can ever be overtaken by events; no events move fast enough to overtake an order of court.

I emphasise that the respondents had notice of the order; really it would have made a mockery of our efforts for us to get an order of court and then sit on it under such circumstances. Such conduct cannot be ascribed to sane persons; our sanity has never been doubted. There has accordingly always been something barring transfer, and that something was ignored and hence the process invalid.

I have not levelled allegations of fraud against the Sheriff or Registrar. I am not yet done levelling those allegations against the party that I have singled out for such attack."

The affidavit referred to as Annexure 'A' in the 4th para above was not attached to the answering affidavit. I, however, want to believe that even if it were attached its relevance would have been in relation to a matter already withdrawn by the applicant for having cited a wrong company (i.e. HC 9252/2002 – withdrawn on 14 April 2009). I make this observation because in the said paragraph the third respondent actually makes reference to the withdrawn matter.

The third respondent, without attaching any proof, maintained that her late husband had paid the full purchase price under the agreement of 18 July 2001. She challenged the applicant to prove that payment had not been made. The third respondent, however, did not explain why transfer was never taken.

Mr Mutero for the applicant started off by making three general submissions as follows:

"1. It is submitted that at the time of the sale in execution, the property in issue was owned by Orthosage (Private) Limited and not by the insolvent estate. Therefore the property could and was properly sold.

2. It is submitted that an order of a Court only comes into effect upon service thereof on the relevant parties or upon them becoming aware of the existence of such an order.

3. There are no legal grounds upon which the title deed issued in favour of Applicant should be cancelled and set aside.

Mr Mutero then went further to say:

"2. (i) It is submitted that Applicant legitimately acquired the property in issue through a High Court Sheriff Auction. It should be noted that:-

(a) The property was attached by the Deputy Sheriff for sale in execution on the 3rd of April 2001, on which date the property became encumbered and was no longer freely transferable. The purported agreement of sale between the trustee of the Insolvent estate Lancelot Machawira and 2nd Respondent was executed on the 18th of July 2001, after attachment of the property.

(b) The property was properly advertised and Applicant's bid at the auction was accepted and confirmed and transfer effected.

(ii) At the time of execution, the property was registered in the name of and owned by Orthosage (Private) Limited and not the late Machawira. To that end, the Trustee of of Insolvent Estate Machawira could not legally, sell the property since it did not form part of the estate because Orthosage (Private) Limited was and is a distinct legal *persona* from the late Machawira.

Simply put, the property belonged to Orthosage (Private) Limited and not the deceased. The Trustee could only deal with the deceased's shares in the Company. In particular, it is submitted that a Company has a separate legal *persona* and is separate and distinct from its shareholder.

See Section 9 of the Companies Act. (Chapter 24:03)"

Relying on the often quoted case of *Salomon v Salomon & Company* [1897] A.C. 22, Mr *Mutero* submitted that the corporate personality of Othosurge made it distinct from Machawira. Orthosurge, he argued, had a distinct legal personality and as such the Trustee of the insolvent Machawira could not sell the property. The property belonged to Orthosurge, which company had not been declared insolvent. The provisions of the Act did not apply to the company. It

applied to the insolvent Machawira who was a mere shareholder in the company. To that end, *Mr Mutero* argued, the agreement of 18 July 2001 was a nullity. There was no property to sell.

With respect to the Provisional Order of 24 June 2002, *Mr Mutero* said the Provisional Order was never served on the applicant as required by law. He said the Order could have taken effect on the applicant upon service of same on him. He said with the urgent application and the Provisional Order having not been served on the applicant, it was proper for the transfer to proceed. He said that position was strengthened by the fact that the respondents had not filed any certificates of service in their opposing papers. He then urged the court to take into account the following factors:

> "a) The property was acquired through a public auction. See *Car Rental Services (Private) Limited vs Director of Customs & Exercise* 1938 (1) ZLR 402.
> b) the sale which resulted in the transfer was caused by Scotfin Limited (which was the Judgement Creditor). They have not been cited as a party in respondents counter-application.
> c) The sale was conducted by the Sheriff, who signed the transfer papers. He has not been cited as party herein.
> d) the transfer was registered by the Registrar of Deeds. He is not party to these proceedings.
> e) The Trustee of Insolvent Estate Machiwa, who is alleged to have sold the property to Respondents is not party to these proceedings. All these people have interest in the matter and ought to have been cited.
> (i) The writ of Execution was properly and lawfully issued. If it had been improperly issued, Orthosurge (Private) Limited, who were legally represented at the time, would have challenged it.
>
> (ii) The fact that the Applicant has now approached this Honourable Court does not take away anything from the merits of the case. He earlier on filed an application for eviction, which was withdrawn for technical reasons. Further, he engaged in discussions with 2nd Defendant in terms of which there was a possibility of entering into a business joint venture, which was to operate from the property.

In view of the above *Mr Mutero,* urged the court to make a finding that the applicant is the lawful owner of the property and should therefore be allowed to evict the respondents.

With the preliminary issue over the citation of a deceased person having fallen out due to the citation of the *Executrix Dative, Advocate Mpofu,* for the respondents, while accepting the distinction between Orthosurge and Machawira went on to make the following submissions:

"It is clear that the property in dispute was formerly owned by Orthosurge. Orthosurge was however, fully owned by Machawira. There is of course a distinction between Orthosurge and Machawira, that cannot ground an opportunity for debate. That is however, not the issue in these proceedings. On the other hand Scotfin purported to obtain an order against both Orthosurge and Machawira in his personal capacity pursuant to which it then purported to attach the property in issue leading to the applicant purportedly buying it in execution. It is worth noting that when the order was made, at least in respect of Machawira, it is being made against an insolvent. It is worth noting that when execution was levied, it was also being levied against an insolvent in the absence of a facilitative order of court.

I will deal with issues that arise from the above first. The backbone of the argument is that the distinction between Orthosurge and Machawira had an inroad made into it once Machawira as the sole shareholder of Orthosurge was declared insolvent. That inroad was made by the principle of transmission. This is an issue I will revert to once I have dealt with the question of insolvency. This in my respectful submission is where the applicant has missed the issue. That is also where respondent's case is also premised on the contention that the transfer obtained by applicant was obtained in defiance of an order *in rem* and is for that reason invalid.

The point that I thus make at the outset is that the sale of the property to the applicant having been based on a judicial process was under the circumstances invalid (as the judicial process was also invalid), something cannot be put on nothing- *Muchakata v Netherburn Mine* 1996 (1) ZLR 153 (SC) [1]. The reasons for this suggestion are numerous. Firstly once it is accepted that Machawira was at the time of the proceedings and the issuance of the order of court insolvent (as it should be and as it has been), then that's the end of the matter. An order sequestrating a debtor's estate is one affecting status and is accordingly a judgement *in rem* and not one *in personam- Chirwa* (infra), *Tshabalala v Johannesburg City Council* 1962 (4) SA 367 (T) and also *De Jager Investments (Pty) Ltd v Mark* 1952 (3) SA 471 (W)- see also Mars- The Law of Insolvency in South Africa, 6th Edition page 143 para 4. The net effect of that is that the order operates as against all men, even those who have had no notice of it. The order sequestrating the estate also operate and did then operate against applicant- see *Registrar-General v Chirwa* 1993 (1) ZLR 291 (SC) where the Supreme Court said,

"If on the other hand, the judgement was one which determined the status of the respondent – in the sense of this legal position in or with regard to the rest if the community – then it fell into the class of being a judgement *in rem*. See *Koster Kooperatiewe Landbou Maastkappy Bpk v Wadee* 1960 (3) SA 197 (T) at 199D-F; *Tshabalala v Johannesburg City Council* 1962 (4) SA 367 (T) at 368H-369 A; *E Jouberts Law of South Africa* vol 9 at para 366; *Halsbery's Laws of England* 4 ed vol 16 at para 1537. The effect of such a judgement is that, within the limits of the country, all persons, whether party to the proceedings or not, are stopped from asserting that the status of the person is other than that which the court has, in terms of the judgement, declared to be."

To further buttress his argument, *Advocate Mpofu* went on to cite sections 23 and 89 of the Act which provide as follows:

"23. Immediate effect of sequestration order

(1) The effect of the sequestration of the estate of an insolvent shall be-

(a) to divest the insolvent of his estate and to vest it in the Master until a trustee has been appointed and, upon the appointment of a trustee, to vest the estate in the trustee;
(b) to stay until the appointment of a trustee, any civil proceedings instituted by or against the insolvent except such proceedings as may, in terms of s 35, be instituted by the insolvent for his own benefit or be instituted against the insolvent:
Provided that if any claim which formed the subject of legal proceeding against the insolvent which were so stayed has been proved and admitted against the estate of the insolvent in terms of s 57 or 92, the claimant may also prove against the estate a claim for his taxed costs incurred in connection with those proceedings before the sequestration of the estate of the insolvent;
(c) as soon as the Sheriff, Deputy Sheriff or a Messenger whose duty it is to execute any judgement against the insolvent becomes aware of the sequestration, to stay that execution unless the High Court otherwise directs, save in the case where the execution is levied on immovable property and a sale has already taken place and been confirmed by the Sheriff in terms of the rules of court, in which event the provision to paragraph (a) of subsection (2) shall apply;
(d) where the insolvent is imprisoned for debt, to entitle him to his immediate release.
[Paragraph substituted by Act 22 of 1998]

(2) For the purposes of subsection (1) and subject to any other law, the estate of an insolvent shall include-

(a) all property of the insolvent at the date of the sequestration, including property which is or the proceeds thereof which are in the hands of the Sheriff, a Deputy Sheriff or a Messenger under writ of attachment: in execution of immovable property in terms of rules of court he shall proceed to do everything necessary to complete the sale, including the transfer of the property to the purchaser, and shall proceed to pay out the proceeds thereof to the creditors whose claims may be secured thereby and, notwithstanding any other writs lodged with him, the balance only, after deduction of the costs of execution, shall vest in terms of paragraph (a) of subsection (1); and
(b) all property which the insolvent may acquire or which may accrue to him during the sequestration, execution as otherwise provided in section 35.

83. Trustee to take charge of property of estate

(1) A trustee shall, as soon as possible after his appointment but not before the deputy sheriff has made the inventory referred to in subsection (1) of section 21, take into his possession or under his control all the movable property, books and documents belonging to the insolvent estate.

(2) If a trustee has reason to believe that any movable property, book or document belonging to the insolvent estate is concealed otherwise unlawfully withheld from him, he may apply to the magistrate of the province in which the property, book, are document is believed to be for a search warrant.
(3) A magistrate to whom application in terms of subsection (2) has been made may, if it appears to him that any movable property, book or document belongs to the insolvent estate and that is being concealed or otherwise being unlawfully withheld from the trustee, issue a warrant to search for and take possession of the property, book or document concerned.
(4) A warrant issued in terms of subsection (3) shall be executed in the same manner as a search warrant issued in terms of the Criminal Procedure and Evidence Act [*Cap*: 907] is executed:
Provided that anything seized in terms of the warrant shall be delivered to the trustee.

In the main, *Advocate Mpofu* placed emphasis on the principle of transmission referred to in para 1.6 of his submissions above. He said with the sole owner of the company, Machawira, having been declared insolvent, it meant that Scotfin could not obtain a judgement against Machawira as provided for in sections 23 and 83 of the Acts quoted above.

Advocate Mpofu also submitted that the transfer of the property to the applicant was a violation of the Provisional Order of 24 June 2001. He said:

"3.7 The broad position of the law is that an order of court is valid and binding and must be obeyed until set aside- *Commissioner of Police v Commercial Farmers Union* 2000 (1) ZLR 503 (H). In *Hadkinson v Hadkinson* (1952) 2 All ER 567 @ 59 Romer "It is the plain and unqualified obligation of every person against or in respect of whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged".

Any action that is contrary to an order of court is not only contemptuous of the court and thus a criminal offence but everything done pursuant to it is valid.

3.8 I place reliance on Chirwa for the proposition that a judgment *in rem* takes effect on every person who is in the republic. It is inherent in the nature of judgement *in rem* that it cannot be served on all persons on whom it takes effect, pure legal common sense. The effect of such a judgement is according not dependant on service but on the fact that it has been made, pure and simple. An order interdicting the Registrar from passing transfer of an immovable property is beyond doubt one *in rem*, that proposition of the law cannot be debated. The transfer impugned violates that order, it is invalid without much ado.

3.9 The court can also take judicial notice of the fact that the order interdicting transfer was granted pursuant to an ordinary urgent chamber application in which all the parties are at law afforded the opportunity to be heard and in which the

> court has to satisfy itself that all the respondents have been served, not only with the application but notice of set down as well. At any rate, once an order of court is granted under such circumstances, notice is presumed. Applicant must accordingly have had notice of the order granted at least through the other respondents being the Registrar of Deeds and the Deputy Sheriff. In addition the *maxim omnia presemuntur rite esse acta* applies to decisions made by the court- Gundani v Kanyemba 1998 (1) ZLR 226 (SC) [3]. The probabilities have in this regard been dealt with in the affidavits, nothing special needs be said."

Advocate Mpofu further argued that the respondents who were in occupation of the property were not served with notice of attachment as required by s 347 of the High Court Rules 1971 and that the transfer was "clearly fraudulent and irregular." He cited the sheriff as the main actor in the sense that he must have been aware of:

a) the Sequestration Order, and

a) the interdict against transfer

He said transfer was effected by both the Sheriff and the Registrar. Given the above, *Advocate Mpofu* proceeded to say:

> "The circumstances under which transfer went through are further and as pleaded clearly fraudulent and irregular. The transfer falls on that additional basis as well, see *Mapedzamombe v Commercial Bank of Zimbabwe & Anor* 1996 (1) ZLR 257 (S) @ 260 D and *Chiwanza v Matanda & Ors* 2004 (2) ZLR 203 @ 206 D-H which are decisive on the point. It is the Sheriff that must have served the sequestration order at the beginning, see section 21 of the Insolvency Act[4]. In terms of 23 (1) (c) he could not under the circumstances execute a contrary order as he purported to do. The interdict against transfer is directed at both the sheriff and the registrar. There can be no greater evidence of impropriety bad faith and irregularity than that. The applicant himself only surfaces 7 years letter to enforce rights deriving from title taken under such murky and opaque circumstances and only after Mr Zhanero's death and the demands being made now. From that can rely be inferred the inescapable conclusion that when applicant obtained transfer, he at any rate did not have to be. The order was indeed served, a point made not rebutted by Mr Zhanero when he was still alive. The fraud involved is insufficient ground for the setting aside of title. That fraud sticks at the applicant.

A lot has been said in this case but I believe that the determination of the matter depends entirely on the answer to the question: <u>Was the transfer of the property to the applicant regularly done or</u> <u>above soard?</u>

If the answer to the above question is in the affirmative then the applicant will be entitled to the relief he seeks whilst the counter claim will fall away.

I shall start by looking at the distinction between Machawira and Orthosurge.

I must, at the outset, indicate my agreement with the applicant that the principle in *Salomon supra* informs on the general law with respect to the legal status of incorporated companies.

We are, in these papers, not told when Machawira was declared insolvent. All we can say is that by 18 July 2001 he had already been declared insolvent because the agreement between the respondents and the Trustee says so.

We are also not told why the respondents never made any efforts to take transfer for all these years i.e. 18 July 2001 to date. In any case, the property was no longer available for sale. It had already been placed under Judicial attachment and a caveat was placed before the Registrar on 9 April 2001 (i.e. some 4 months before the third respondent's late husband purported to have bought the property).

The other point we should note is that Orthosurge, the company that borrowed money from Scotfin, was never declared insolvent. Machawira was on a date undisclosed, declared insolvent. True, Machawira had shares in the solvent company. In that case his Trustee had a say in those shares. The sale of the property did not remove Orthosurge from existence. The property was only one of Orthosurge's assets.

The submission that Machawira had been cited in HC 8525/97 because he had been the guarantor of the loan was not refuted by the respondents.

Whereas the case was instituted in 1997, Scotfin only got its order on 13 March 2001. As already indicated, the papers do not tell us the date when Machawira was declared insolvent. Scotfin might have instituted proceedings long before Machawira was declared insolvent.

However the order in favour of Scotfin has the phrase - "the one paying the other to be absolved."- To me that means if the borrower, Orthosurge, paid Scotfin, the guarantor's obligation would fall away.There would therefore be no need to proceed against the guarantor. Accordingly *in casu* the lender was properly proceeding against the borrower's property.

If indeed there is a clear distinction between Machawira and the borrower, who was never declared insolvent, one would find it difficult to allow the entry of transmission to dictate the determination of this matter. There was, in my view, a clear distinction between Machawira and the borrower.

In line with Salomon, *supra* in Company Law and Capitalism (1972) at pages 53-54, Tom Hadden States:

> "CORPORAET PROPERTY
> The conception of the company as an independent entity also dictates the legal approach to company property. In the first place the property of the company is distinct from its shareholders, despite the fact that its shareholders collectively have the ultimate legal authority over its use and disposal. Similarly though the directors and managers of the company are in day-to-day control over the company's property, they must exercise their powers in the primary interests of the company rather than themselves or even of the shareholders. This has important consequences both in relation to the duties of director and controlling shareholders as discussed below and also more specifically in relation to the management and disposal of company assets and income.
>
> In substance these rules represent little more than a reaffirmation if the separate identity of the company and of the fact that as a statutory creation its permitted activities are strictly limited. Thus no single shareholder is entitled to regard the company's property as his own regardless of the extent of his interest in or control over its affairs:----------."
> I believe the above principles are applicable to this case.

Our company law, in my view, has not shifted from the principles of law emancipated in the above quotation. To that end the Trustee could register an interest in the shares and indeed pursue Machawira's shares in Orthosurge.

Machawira as a single shareholder must have known the extent of Orthosurge's assets – i.e. the property sold at an advertised public auction, being one of the assets. It has not been disputed that the property that was targeted for execution was owned by Orthosurge as confirmed by the Deed of Transfer 0008393/2002 in the name of Orthosurge. I do not see any reason why Scotfin should not have proceeded in the manner it did. It could only target the known assets of the borrower, who was still solvent.

Having obtained judgment on 13 March 2001 Scotfin placed a caveat on the property. It advertised it for sale in August 2001. The respondents did nothing about Scotfin's public actions.

In *Machiva v Commercial Bank of Zimbabwe* 2000 (1) ZLR 302 (H) the late CHATIKOBO J, said, among other things:-

> "One of the important functions served by the requirement of land registration is the provision of information to members of the public, in particular to financial institutions who may want to encumber properties as security for money loaned to the owners of

> those properties. Similarly, people who intend to acquire land also resort to the records held in the Deeds Office to ascertain if the land which they want to purchase is free of any encumbrances. Compare *Frye's (pvt) Ltd v Ries* 1957 (3) SA 575 (A). Generally speaking, members of the public are entitled to rely on the records held in the deeds Office and to assume that such records reflect the position about land ownership and the burdens which may be reflected on the deeds of transfer. If the position were otherwise, the land registration system in the entire country would be a farce and the lending system in the financial sector would be thrown into chaos. However, the basis of my decision is not that the bank in the present matter assumed from the fact that the property was registered in Chitanda's name that he was the owner. Rather, I base my decision on the fact that ownership could have passed from Chitanda to the applicant upon registration of transfer occurring and that the act of delivery necessary to pass ownership could not have been complete before registration of transfer. Legally, therefore, Chitanda remained the true owner until 2 July 1997 when the mortgage bond was registered. The fact that the applicant has personal rights arising from the sale which he can enforce against Chitanda does not make him owner of the land before he takes transfer and the only way he can take transfer is by ensuring that the debt for which the land was mortgaged as security is discharged. Unless that happens, the bank is entitled to hold on to security offered by Chitanda. ----------"

Scotfin knew that the borrower owned the property and there was no other caveat on the property except its own. Accordingly, the property was never owned by the respondents.

I do note that on 24 June 2002 the respondents obtained a Provisional Order interdicting, the applicant, the Sheriff and the Registrar of Deeds from registering the property into the name of the applicant. Indeed the Sheriff and the Registrar of Deeds were cited in that Order and yet they are the ones who proceeded to transfer the property to the applicant.

The respondents, without submitting any evidence in the form of certificates of service, argued that the Provisional Order was served on the applicant. In this judgement, I have indicated the applicant's position relating to the issue of the Provisional Order – a position, which to a large extent, makes a lot of sense.

Given the fact that both the Sheriff and the Registrar were involved in this matter, I do not see how they could then deny service of the provisional order on them (if at all it was ever effected). It is, in my view, most probable that the respondents, upon obtaining the order, did not pass it on to the Deputy Sheriff for service on both the applicant and the Registrar of Deeds.

Furthermore up to this day, no steps have ever been taken to confirm the provisional order. If at all the respondents were serious, that should have been done.

It must be noted that soon after the writ of execution, on 9 April 2001, Scotfin placed caveat No 379/2001 on the property advising the Registar of Deeds of the Judicial attachment.

Surely, if the Registrar of Deeds was indeed later served with another Judicial Process of 24 June 2002, he would have alerted the parties of the developments. I therefore believe that, despite its existence, the Provisional order has no place in these proceedings. That order was obtained after another judicial process had been allowed to proceed.

The property was sold through a public auction on 31 August 2001 and transfer to the applicant was effected on 26 July 2002. I therefore want to believe that the only notification of a Judicial process that was before both the Registrar of Deeds and the Sheriff of Zimbabwe was the Caveat of 9 April 2001 placed by the Judgement Creditor, Scotfin. That process was never interfered with.

It is true that any reasonable person would ask why the applicant only sprang upto assert his rights after the death of Peter Zhanero. However, the underlying issue is that he had already obtained title procedurally and that being the case there is no way this court can deny him the relief he seeks. There was no proof of fraud relating to the manner in which the applicant obtained transfer of the property. There is therefore nothing before me that would call for the invalidation of the applicant's title to the property. Transfer of the property to the applicant was properly executed.

Indeed, given the proper process followed by the applicant in acquiring the property there is nothing to render the transfer invalid. The issue of insolvency did not attach to Orthosurge and therefore, as I have already stated, the Act did not apply. Fraser could still pursue Machawira's shares in Orthosurge – a company with a separate identity from Machawira (the insolvent).

This finding, in my view, effectively disposes of the counter-claim.

The applicant's claim should succeed.

I therefore order as follows:-

1. The respondents' counter-claim be and is hereby dismissed
2. The first, second and third respondents and all those claiming a right of occupation through them be and are hereby ordered to vacate the remainder of stand 1026 Gatooma Township commonly known as No 1 Chimoio Road, Kadoma within 14

days of service of this order upon them, failing which, the Deputy Sheriff be and is hereby authorised to evict them from the said property and give vacant possession thereof to the applicant; and

3. The respondents shall pay cost of suit.

Messrs Sawyer & Mkushi, applicant's legal practitioners
Messrs Muza & Nyapadi, respondent's legal practitioners