SUSAN TAURAI MAPUNDE DUBE NO
(In her capacity as the Executrix Dative Estate Late Daniel Dube)
versus
ROBERT MATOKA
and
THE REGISTRAR OF DEEDS
and
THE MASTER OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
MAWADZE J
HARARE, 7 November 2014 and 8 May 2014

Opposed application

Advocate *F. Mahere*, for the applicant
O. Shava, for 1st respondent
No appearance, for the second and third respondents

MAWADZE J: This is an opposed application in which the applicant seeks the setting aside of the judgement in case HC 6820/11 handed down on 30 August 2011 (which is a matter between first respondent Robert Matoka v Daniel Tembinkosi Dube and another). The basis for seeking the setting aside of the judgement is that it was obtained by fraud as the court application leading to the granting of the default judgement was never served on to the respondent Daniel Tembinkosi Dube. It is further alleged that Daniel Tembinkosi Dube at the material time did not have the mental capacity to perform juristic acts. Lastly is alleged that the transfer of the property in issue was done after the death of the late Daniel Tembinkosi Dube before an Executor had even been appointed and that this was a fraud on the estate and the state.

The terms of the order sought by the applicant are couched as follows;

"IT IS ORDERED THAT;

1. The judgement case no HC 6820/11 handed down on 31 August 2011 in the mater between Robert Matoka v Daniel Tembinkosi Dube and Another be and is hereby rescinded.

2. The transfer of the property known as Stand 106 Quinnington Township of Subdivision K of Quinnington of Borrowdale Estate measuring 8397 square metres to Robert Matoka under deed of transfer number 2261/2012 be and is hereby set aside.

3. The second respondent is hereby ordered to reinstate deed number 6366/00 dated 11 July 2000 in the name of Daniel Tembinkosi Dube.

4. The agreement of sale between Daniel Tembinkosi Dube and Robert Matoka entered into on 20 May 2011 be and is hereby declared null and void *ab initio* and is set aside.

5. The first respondent pays the costs of suit."

The background facts of the matter are as follows:-

The applicant is the surviving widow of the late Daniel Tembinkosi Dube (the deceased) and was appointed the Executrix Dative of Estate late Daniel Tembinkosi Dube DR 1104/12 on 14 September 2012. She currently works in Mozambique but maintain residence at 62 Stepples Road Colne Valley Chisipiti Harare. The deceased died on 3 July 2012.

The first respondent is a constable in the Zimbabwe Republic Police based at ZRP Highlands and resides at the property in dispute known as Stand No 11 Scanlen Drive, Quinnington Harare. He entered into an agreement of sale of the said property with the deceased who was the owner of the property on 20 May 2011 after which he instituted proceedings through a court application to compel transfer on 13 July 2011 in HC 6820/11 which order was granted in default on 31 August 2011. The first respondent effected transfer of the said property on 18 July 2012 under deed of transfer number 2261/2012.

The second respondent, the Registrar of deeds and the third respondent the Master of the High Court are cited in their official capacities.

The applicant customarily married the deceased in 2003 and the marriage was later solemnised in terms of the Marriage Act [*Cap* 5:11] on 7 February 2006 in Harare. The marriage was blessed with one child, a girl, Danixa Tanyaradzwa Dube who was born on 26

October 2004. The deceased before the marriage had acquired the immovable property known as No 11 Scanlen Drive, Quinnington Harare which became the matrimonial home. Applicant alleges she assisted in paying off the mortgage after the marriage.

The deceased had a Bsc Economics degree obtained at the University of Zimbabwe and he was a financial consultant. The deceased's professional history is largely common cause. He worked for First Merchant Bank and used to run a column in the Herald called "Economic Talk with Danny Dube." He left and joined CBZ as head of Economic and Strategic Unit after which he joined Board Asset Management and was once ZNCC president in the 1990s. The deceased left Board Asset Management to set up Genesis Bank with one Reg Max.

In 2002 the deceased left Genesis bank to set up Innofin Asset Management with one Edwin Moyo. However, due to the economic meltdown which started around 2003 Innofin Asset Management began to struggle and was eventually liquidated at the instance of Old Mutual in 2006. From that time the deceased was never employed, neither did he engage in any meaningful economic activity until his death on 3 July 2012.

The applicant in her founding affidavit chronicles how the collapse of the deceased's business enterprise was so devastating on the deceased leading to severe stress and ultimately to mental illness. In her founding affidavit the applicant states that on 26 January 2006 deceased was arrested at Eastgate Complex Harare after derobing and walking nude in public. This according to the applicant was the beginning of the deceased's mental illness which afflicted him until death. The applicant said deceased had lost his mind as he would mumble to himself saying God had instructed him to undress in public and that they had to stay with Doctor Chimedza at his house for two weeks but deceased refused to be treated, he would not eat or drink water but would be reading the bible incessantly.

However as per para 17 of the applicant's founding affidavit the applicant said there were times when the deceased would have lucid moments. She says;

"At times however he was his normal self and I thought he was getting better."

According to the applicant the deceased was evaluated by Dr Madhombiro, a psychiatrist and was found to have manic depression disorder but he refused treatment. The applicant said the deceased developed the habit of borrowing money from several people or getting services without paying back. This prompted applicant to pay off the mortgage for the property.

The applicant in her founding affidavit said deceased's condition deteriorated as he refused to take prescribed medicine and was now unemployed and unable to fend for the family as he spent most of the time preaching and reading the bible. He had also lost a lot of weight. This prompted the applicant in March 2009 to relocate to Mozambique with the daughter where she had secured employment. Applicant said she returned briefly in June and September 2009 but deceased who had abandoned the matrimonial home and staying with his parents in Chadcombe Harare was avoiding her and locking himself in his room. There is no further details from the applicant on what she did thereafter from 2009 until in July 2012 when she came after the deceased's death on 3 July 2012. All the applicant said is that she believed that in 2011 when deceased entered into agreement of sale of the matrimonial house with the first respondent, he was mentally unstable, not able to hold meaningful conversation, visibly sick and therefore had no capacity to contract. It would appear applicant relies on the evidence of other witnesses as regards deceased's state of mind in 2011 as it would appear she never interacted with him during that time.

Dr Paul Chimedza who is a qualified medical doctor and has been practising in Harare since 1998 was a close friend of the deceased since their days at the University of Zimbabwe. In his supporting affidavit he confirmed the incident of 26 January 2006 when the deceased derobed in public and how he took deceased and stayed with him at his house for two weeks. He said that deceased refused any medication hence he was unable to help him. He said deceased suffered from bipolar disorder or manic depression which he described as vacillating between two extremes of mania and depression. Dr Chimedza explained that in such a condition deceased on one extreme would seem to be normal and on the other extreme would be extremely depressed and withdrawn. In such a state Dr Chimedza said deceased would lack insight into thoughts and actions as he would not be aware of what is right or wrong. It is Dr Chimedza's opinion that deceased would not have the capacity to enter into contracts.

Dr Chimedza said he caused in January 2006 the evaluation at his house of deceased by Dr Madhombiro who after hours in consultation with deceased confirmed that he suffered from manic depressive disorder. Deceased however refused to take the prescribed medicine.

It is not clear from Dr Chimedza's affidavit as to the exact dates after January 2006 that he interacted with the deceased until his death. All Dr Chimedza says is that he would after 2006 meet deceased who still refused treatment and would ask for money from him or

avoid him. The only incident he specifically refers to is some time in 2012when he said he met deceased who asked for US$5000-00 saying he wanted Dr Chimedza to be his guarantor at a Bank but Dr Chimedza told deceased he would only agree if deceased sought medical help.

The applicant also relied on the evidence of Peter Gumundani, Gift Shoko, Innocent Vusimuzi Dube and Alfred Muungani who all filed supporting affidavits in relation to deceased's mental state. Let me briefly deal with that evidence.

Peter Gumundani a car dealer grew up with the deceased as deceased's father was his guardian. He said deceased suffered from mental illness in 2006 when his business enterprise collapsed. Peter Gumundani said deceased exhibited strange behaviour like talking to himself, staying on hotels without paying and was now unemployed. At one time he said deceased asked to use registration books of motor vehicles he sells as he sought to borrow money but he declined. He said when applicant relocated to Mozambique deceased was not able to pay utility bills at his matrimonial house and moved to stay with his mother in Chadcombe, Harare.

Gift Shoko is the Chief Operating Officer of Trust Bank and a cousin to the deceased in that Gift Shoko's mother and deceased's father are siblings. Gift Shoko said he stayed with deceased's parents in Chadcombe from 1992 when he was at University of Zimbabwe.

Gift Shoko said deceased was severely depressed in 2006 when his company Innofin collapsed and in January 2006 he allegedly disrobed in town. He said deceased showed signs of mental illness from that time as he would preach incessantly alleging that the applicant his wife was bewitching him and refusing any medical help. Gift Shoko said deceased's matrimonial relationship collapsed in 2009 and that after the applicant's departure for Mozambique deceased at one point left this matrimonial home to stay in the streets of Harare. Gift Shoko said he intervened, removed deceased from the streets and took him to his parents' house in Chadcombe. He also said it was from 2009 that deceased would stay in hotels without paying bills and was giving away movable property in the matrimonial house to strangers like furniture. Gift Shoko said he is the one who linked first respondent to deceased in 2011 after the burglary at deceased house. Gift Shoko said he then met the deceased in August 2011 and deceased wanted to borrow US 5000-00 in order to go to Israel and wanted Gift Shoko to assist him to get the loan from First Capital Plus. Gift Shoko said he was asked to provide security but he asked deceased why he was not using title deeds of

the matrimonial house and deceased said he had used the title deeds to apply for permanent residence in South Africa. At that time Gift Shoko said deceased still exhibited signs of illness as he talked to himself making meaningless gestures. Gift Shoko seems to not to have interacted with the deceased thereafter until the deceased's demise.

Innocent Vusimizi Dube is nephew to the deceased and had been staying with deceased's parents since birth in Chadcombe Harare at No 20 Clovelly Road. He said deceased came to stay with them in Chadcombe in 2009 after abandoning his matrimonial home and was unemployed. Innocent Vusimuzi Dube (Innocent) said deceased had been mentally ill since 2006. He said when deceased came to stay with them in 2009 he observed that he was still afflicted with the mental problem as deceased could not sustain a coherent conversation, would talk to himself, cry for no apparent reason and refuse any medication.

Alfred Muungani (Alfred) is a cousin to deceased and is a Financial Consultant with Genious Advisory Services. He regarded deceased not only as a friend but a mentor in their profession. He said he met deceased in November 2011 and realised that deceased was mentally ill as he talked to himself and made nonsensical gestures. In January 2012 Alfred said he took deceased to First Capital Plus several times where deceased wanted a loan of US$5000-00 to travel to Israel and wanted Alfred to offer himself a surety. Alfred said one Mr Munyeza of First Capital Plus refused to loan money to deceased saying deceased was mentally ill and unstable. Alfred believed deceased had no mental capacity to execute agreements on account of mental illness.

It is the applicant's case that the deceased suffered from mental illness from 2006 to the time of his death that is on 3 July 2012. It is on this basis that applicant seeks to have the agreement of sale entered into between the deceased and first respondent to be declared null and void and set aside due to lack of *compos mentis* on the part of the deceased on the time of the transaction.

The first respondent has vehemently disputed that the deceased suffered from the mental illness at the time they entered into an agreement of sale. In his opposing affidavit he stated that he cannot admit or deny the deceased's mental state alluded to in 2006 as no psychiatrist report has been provided. The first respondent said he met the deceased after the burglary at the property Stand No 106 Quinnington Township of Subdivision 11 of Borrowdale Estate also known as No 11 Scanlen Drive Quinnington, Harare (hereinafter the property) and denied that he was linked to deceased by Gift Shoko.

The first respondent said when deceased came to the Police Station in connection with the burglary at the property deceased was normal in 2010 and gave a very comprehensive statement to the police about the burglary. He said it was after this interaction that deceased asked him to be a tenant at the property. He said deceased drafted a lease agreement (see pp 86 of the record) which is an agreement of tenancy between the deceased and first respondent signed by the parties on 30 October 2010. The first respondent was to occupy the property on 1 January 2011 and would be responsible for all outstanding maintenance and utility bills which were in arrears and was not paying rentals. The first respondent said that agreement was drawn by the deceased and none of the persons who provided supporting affidavits like Gift Shoko and Innocent who were aware that the first respondent was staying in the house never raised any issue, more so of deceased's alleged mental illness. The first respondent said when he entered into the agreement of sale of the property with the deceased on 20 May 2011 deceased did not exhibit any signs of mental illness. Infact the first respondent said throughout all his dealings with the deceased he never noticed that the deceased was mentally ill. He chronicled his dealings with the deceased.

The first respondent said the agreement of sale was done by a legal practitioner appointed by the deceased Mr Chinyama who has confirmed that in his supporting affidavit. He said one Itayi Munyeza was also involved and both deny that deceased was mentally ill.

The first respondent said the deceased and his parents visited him at the property when he had already bought the property in the company of Peter Gumundani. The first respondent puts into issue the version by Peter Gumundani that first respondent in December 2011 or January 2012 denied when asked that he had bought the property and that he was just living rent free clearing accumulated utility bills which were to be cleared by May 2012 after which issue of rentals would be discussed. (See para 15 of Peter Gumundani's affidavit). In fact Peter Gumundani's version is that first respondent, during that visit was advised that deceased was mentally ill and could not sell him the house and that first respondent simply said deceased had told him to lie to deceased's relatives that he had bought the house. The first respondent's version is that the deceased was also present during the visit and that deceased told all present, that is, his parents and Peter Gumundani that he had sold the property to the first respondent and showed them the agreement of sale. The first respondent said no one protested and no issue of deceased's mental illness arose nor was it ever raised. The first respondent said the only person who protested was deceased's father who said the

property was his and that deceased should not have sold it. This was to no avail as the property was in deceased's name. There is therefore a material dispute of fact on what transpired on this day. No affidavits were recorded from the deceased's parents who were present that day hence is just Peter Gumundani's word against the first respondent.

The first respondent said that when he was advised of the death of the deceased he had long bought the property and effected transfer. He denied that there was any discussion about his status at the property at that stage. The first respondent therefore puts into issue the deceased's state of mind during the transaction and insists that deceased was mentally sound at the material times he interacted with him.

In relation to the allegation of fraud, the applicant in her founding affidavit raised a number of irregularities she said the unearthed which confirm that the first respondent committed fraud.

The deceased died on 3 July 2012 and the cause of the death is chronic kidney failure. He died at Parirenyatwa Hospital. The applicant said it was after deceased's death and burial that the first respondent was as approached by Gift Shoko and one Mike Dube and asked to pay rentals and that the first respondent then claimed for the first time that he had bought the property and hold title to the property. As already said this is disputed by the first respondent.

The applicant said this prompted her to carry out a deeds search and on 11 July 2012 she established that the transfer had not been done contrary to the first respondent's assertions. She said the attempts to obtain the Agreement of Sale were unsuccessful as Itayi Munyeza of First Capital Plus was unco-operative. The applicant then requested the Registrar of Deeds to place an XN caveat on the property but this was declined in the absence of a court order. The applicant said First Capital Plus who were said to have the title deeds remained uncooperative. The applicant said she suspected that the deceased had borrowed money from First Capital Plus using title deeds to the property as surety. The applicant said she only established later that the first respondent had hurriedly effected transfer on 18 July 2012 on the basis of a court order in HC 6820/11 granted in default and deceased was compelled to transfer the property to the first respondent on the basis of an Agreement of Sale.

According to the applicant her investigations revealed a number of irregularities which she outlined as follows:-

i) that the Deputy Sheriff was granted the power of attorney to transfer the property on 11 July 2012. Soon after the deceased's death on 3 July 2012. According to the applicant this was irregular and improper as no curator or executor to the deceased's estate had been appointed.

ii) that the first respondent only started to put into motion the fraudulent process of transfer of the property after deceased's death.

iii) that the court application HC 6820/11 to compel transfer was served at No 11 Scanlen Drive (the property) where the first respondent was now staying and not the deceased who was now staying at No 20 Clovelly Road, Chadcombe, Harare and had given that address as his *domicilium* as per the Agreement of Sale. According to the applicant there was a deliberate ploy and misrepresentation by the first respondent to serve the court application where the deceased was not staying. Thus the first respondent served the court application on himself.

iv) that the return of service of the court application shows that the court application had been served on the deceased's employee, one Nickson Chabvunda when the truth is that the deceased never had such an employee who is also not known to this applicant and deceased's relatives. According to the applicant this employee is fictitious. This would mean that the court order to compel transfer was fraudulently obtained without proper service.

v) that the court application was purportedly served on 14 July 2011 when it had been issued in August 2011. Applicant queries how service could have been effected before the process itself had been issued out.

vi) that the forced transfer of the property was premised on an Agreement of Sale which Agreement of Sale according to the applicant is invalid because deceased had no mental capacity to enter into any agreement, a fact the applicant says the first respondent was well aware of.

vii) that the property was sold for a paltry US$50 000-00 when its current value as per the Valuation Certificate Annexure 1 is US$230 000. According to the applicant, this puts into issue the genuinesses of the sale of the property, and deceased's mental state.

viii) that it is not even clear if deceased was paid any purchase price as the acknowledgment of receipt of money by the deceased from the first respondent is fraudulent because it does not show when and how this purchase price was paid. The applicant stated that she doubts that a mere constable in the police had the wherewithal to even raise this US$50 000 in one month.

It is on the basis of the above alleged irregularities that the applicant seeks to have the order in HC 6820/11 set aside on the basis that it was fraudulently obtained. It is the applicant's case that the court application was in fact never served on the deceased and that the Agreement of Sale is invalid as deceased lacked mental capacity to contract. It is on this basis that the applicant seeks an order to set aside the transfer of the property to the first respondent on account of the fact that it is based on an order obtained by fraud and was done without the Master's consent. A declaration to the effect that an Agreement of Sale is void on account of lack of mental capacity by the deceased to enter into such an agreement is sought on the same basis.

The first respondent has not only disputed deceased's alleged lack of mental capacity to contract but also disputed that there was impropriety, let alone fraud in the transfer process of the property. The first respondent also denied that the transfer of this property was hurriedly done after deceased's death. Let me deal with the first respondent's version of events on the irregularities raised by the applicant:

i) the first respondent disputes that there was any impropriety in effecting the transfer of the property after the deceased's death. This is a legal point which I shall later deal with conclusively.

ii) the first respondent denies that the transfer process was hurriedly done after deceased's death. The first respondent said when the deceased delayed to facilitate transfer, probably in a bid to avoid paying capital gains tax as he was a financial expert, he breached the Agreement of Sale. This prompted the first

respondent to make a court application in HC 6820/11 on 13 July 2011 to compel transfer which a court order was granted on 30 August 2011. According to the first respondent, the deceased had signed an acknowledgement of payment of the purchase price of US$50 000 on 22 June 2011. (See p 103 of the record). This acknowledgment of payment was signed by the first respondent and the deceased. It is not clear if applicant puts deceased's signature into issue on this document or simply relies on deceased's alleged lack of mental capacity. The first respondent stated that the transfer of the property is a process not an event and that it started in July 2011 almost a year before deceased's death and that the rates clearance certificate (see p108) was only obtained on 22 March 2012 and expired in May 2012.

iii) The first respondent denied committing any fraudulent act preceding the court application in HC 6820/11 as alleged. He said after executing the lease agreement (see Agreement of Tenancy on p 86 of record) dated 30 December 2010 the deceased and the first respondent entered into an Agreement of Sale of the same property on 20 May 2011 (see Memorandum of Agreement of Sale on pp 40 – 44 of the record). Both the Lease Agreement and Agreement of Sale bears deceased's signature. The first respondent stated that the Agreement of Sale was drafted by a legal practitioner Mr *Chinyama* chosen by the deceased. This is confirmed by Mr *Chinyama* in his supporting affidavit. The first respondent said that the full purchase price was paid in terms of the Agreement of Sale and that the one Itayi Munyeza in his supporting affidavit confirms this fact.

iv) The first respondent admits that in terms of the Agreement of Sale the deceased's *domicilium* was No 20 Clovelly Road Chadcombe, Harare and that the court application was not served at that address but at the property in issue. According to the first respondent the deceased was aware of the court application as per the affidavit of one Webster Mandimutsa an employee in the firm Chinyama and Associates who served the court application. In his

affidavit Webster Mandimutsa stated that on 14 July 2011 he was asked to serve the court application on deceased at No. 20 Clovelly Road, Chadcombe. However, before he did that he telephoned the deceased on his mobile number which he had to confirm his whereabouts. He said the deceased advised him to proceed to No 11 Scanlen Drive Quinnington, Borrowdale, Harare (the property) and serve the caretaker, one Nickson Chibvonda, which he did. On the allegation by the applicant that Nickson Chibvonda may be fictitious as deceased had no such employee, the first respondent attached a supporting affidavit from Nickson Chibvonda who stated that he was employed by deceased at the property at the end of 2010 after the property had been broken into as a caretaker and that he would receive deceased's correspondence. He confirmed that on 14 July 2014 he was served with a court application in HC 6820/11 which deceased received after two weeks.

Mr *Chinyama* in his affidavit said after the court application in HC 6820/11 was issued out on 13 July 2011, served on 4 July 2011 and order granted on 31 August 2011 he later served the deceased with the court order well before the transfer of the property.

v) The first respondent correctly refuted the allegation that the court application was issued in August 2011 and purportedly served on 14 July 2011. I invited both counsel for the applicant and the first respondent to inspect original record in HC 6820/11 and they both confirmed that the court application was issued on 13 July 2011. Applicant's allegation in this regard lacks merit and is false.

vi) The first respondent disputed that the Agreement of Sale is void *ab initio* as he puts into issue the deceased's alleged mental status at the time of signing this agreement. The first respondent attached supporting affidavits from a legal practitioner *Charles Chinyama* and *Itayi Munyeza* who all disputed that the deceased was not mentally stable at the time the Agreement of Sale was signed.

Charles Chinyama who claims not to have personal interest in the matter said that he prepared the Agreement of Sale of the property on the deceased's instructions and that the deceased did not exhibit any abnormalities during the time he took instructions from him in May 2011 and throughout the process of preparing the Agreement and the signing which all happened in Mr *Chinyama*'s offices. In fact Mr Chinyama said prior to the signing of the Agreement of Sale he advised deceased to have the bond against this property cancelled and that deceased did so on 30 May 2011 as per consent no 1672/11. As per the letter dated 31 May 2011 this process was done by Wintertons who then wrote to the deceased of the cancellation of the bond and that deceased should collect the title deeds of the property from Wintertons. As per that letter, the deceased did so on 22 June 2011 as he signed on the letter. The applicant has not commented on the deceased's signature on this letter (see p 111 of the record). Mr *Chinyama* said after deceased had been paid the purchase price he left for South Africa without attending to the transfer of the property and that the first respondent then approached Mr *Chinyama* who then started the transfer process in HC 6820/11 culminating in the order granted by my late brother KARWI J dated 1 September 2011 (see p 55 of the record). Mr *Chinyama* said he then served the deceased with the court order to compel transfer on 20 September 2011 at his offices. All in all Mr *Chinyama* said both the deceased and the first respondent had the capacity to contract, and that everything was done above board.

Itayi Munyeza the Chief Executive Officer of Finance Pvt Ltd, a micro finance institution stated in his affidavit that he interacted with the deceased in May 2011 when the first respondent approached his company to borrow money to purchase the property in issue from the deceased. He requested to see the deceased who came in June 2011 with the first respondent. Itayi Munyeza said he interviewed the deceased to establish if indeed the sale of the property to the first respondent was genuine. He observed no irregular speech or countenance on the part of deceased whom he said was very eloquent. Itayi Munyeza said the deceased explained that the first respondent was his friend

who had done a lot for him and that if he fails to buy the property deceased would rather donate it to church as he was not after making money from the property. Itayi Munyeza said they caused a deed search of the property to be done and advised deceased to have bond against the property cancelled. He said deceased alleged he had received part payment of the purchase price. Later, he said the deceased came to collect the balance and signed an acknowledgment of receipt of payment in the presence of Itayi Munyeza. He said at no stage did he notice that the deceased suffered from mental disorder and that as a professional financial institution he ensured everything was above board.

It is clear that both Mr *Chinyama* and Itayi Munyeza corroborate the first respondent that deceased did not exhibit any signs of mental illness at the time of executing the Agreement of Sale and other processes ancillary thereto.

vii) The first respondent admits that he bought the property for US$50 000 and insists that deceased was paid the money, a fact supported by Itayi Munyeza. The first respondent said the price of US$50 000 is what deceased asked for as deceased was very grateful for the help the first respondent had rendered to him when all deceased's close relatives had abandoned him. In fact the first respondent said deceased threatened to donate this property to the church if the first respondent failed to buy it. This is confirmed by Itayi Munyeza. The first respondent said the impression he got was that the deceased was abandoned by all those close to him and did not want anyone else besides the first respondent to benefit from the property. There is therefore a dispute as to the fairness or otherwise of the purchase price of the property and the circumstances surrounding the agreement on the figure of US$50 000. There is also a dispute as to whether this purchase price was paid and if so how it was paid.

The first respondent submitted that the fact that applicant and the deceased's relatives took no action from 2006 to have the deceased mentally treated or to

protect his estate shows that the deceased was not mentally ill. The first respondent said during his stay at the property from January 2011 until after deceased's death in July 2012 the applicant never visited the property to check on its state or the furniture they allege the deceased had abandoned in 2009. He said such conduct by applicant is strange and not explained, more so as applicant alleged deceased was mentally ill and had abandoned the matrimonial home. The first respondent said deceased's cause of death was kidney failure and that there is no medical evidence on his mental state either that the time of signing of Agreement of Sale or of death. The first respondent said he borrowed US$80 000 from More Finance (Pvt) Ltd using the property in issue as security. He offers no further explanation how he managed to do that.

At the commencement of the hearing, Mr *Shava* for the first respondent withdrew one of the two points *in limine* he had raised. I dismissed the remaining point *in limine* after hearing arguments by both counsel for lack of merit. Mr *Shava* for the first respondent had taken the point that this application should be dismissed as if it was made out of time and that no explanation for the delay has been given by the applicant. There is no merit in this argument as this application is not being brought in terms of r 63(1) of the High Court Rules 1971(the Rules) which gives time limit in which to apply for rescission of a judgement granted in default. This application is being made in terms of r 449 (1) (a) of the rules which relates to setting aside or rescinding a judgment or order given in error. There is no time limit prescribed in respect of this Rule. The applicant also seeks the setting aside of that judgment on the basis of common law ground of fraud. The applicant said she became aware of the judgment on 10 July 2012, hence the cause of action cannot be said to have prescribed. It is on this basis that I dismissed the points *in limine.*

I now turn to the merits of this application.

There are certain factual and legal issues raised by the applicant which are incorrect. I intend to dispose of these first.

It is incorrect as the applicant alleges that the court application in HC 6820/11 was purportedly served before it had been issued. The record of proceedings in HC 6820/11 shows that the court application was issued on 13 July 2011 and served on 14 July 2011.

It is therefore incorrect to allege that it was issued in August 2011.

The legal point taken by the applicant is that the transfer of the property was done after the death of the deceased and that this was in violation of the Administration of Estates Act [*Cap 6:01*] as no curator or executor had been appointed and that the Master had not consented to the transfer. The deceased died on 3 July 2012 and the property was transferred on 18 July 2012, which is after deceased's death. It is the applicant's case that the transfer of this property is invalid on the basis that it was done without complying with the provisions of the Administration of Estates Act [*Cap 6:01*]. This issue in my view can be resolved by the interpretation accorded to s 44 of the Administration of Estates Act [*Cap 6:01*]. The Master's report (see p 132 of the record) also relies on this provision.

The question which arises is whether the death of the deceased stopped the execution of this judgement granted in favour of the first respondent before deceased's death. The answer is in the negative. In the case of *Margaret Malawusi* v *SladenMarufu&5 Ors* SC 1/03 SANDURA JA at pp 8-9 of the cyclostyled judgment had this to say in dealing with the same question.

> "In my view, the section is clear and unambiguous. Subsection (1), in relevant part reads:
>
> 'No person who has obtained the judgment of any court against a deceased person in his life time <u>may sue out or obtain any process in execution</u> of any such judgment –' " (emphasis added)

Clearly, what is prohibited is suing out or obtaining a writ of execution after the death of the judgment debtor.

Subsection (2) in relevant part reads:

> "No person shall sue out and obtain any process in execution of any such judgment …….. without first obtaining an order from the court or some judge thereof <u>for the issue of such process.</u> (emphasis added)
>
> Again subs (2) makes it clear beyond doubt that what is affected is suing out and obtaining any process in execution of judgment after the judgment debtor's death. In other words what is affected is applying for and obtaining the writ of execution after the debtor's death.

> Neither subs (1) nor subs (2) affects the continuation of the process of execution where the writ was issued before the debtor's death as was the position in the present case."

In casu, the order to compel transfer was granted on 30 August 2011 well before deceased's death on 3 July 2012. I do not believe that the deceased's death would have affected the process of execution where the order to compel transfer had been issued before deceased's death. I find no merit in this point relied upon by the applicant to have the transfer of this property declared invalid.

The applicant seeks the setting aside or rescission of the court order in HC 6820/11 on the basis of r 449 (1) (a) of the Rules that it was erroneously granted in the absence of the deceased as the first respondent is alleged to have fraudulently engineered the non- service of the application. The error referred to by this applicant is fraud. The applicant further seeks the setting aside of the Agreement of Sale of the property on the basis of lack of *compos mentis* on the part of the deceased at the time of the transaction.

In terms of R 449 (1) (a) of the rules a party affected by the judgment or order that was erroneously granted in his or her absence is allowed to apply for the rescission of that judgment or order. See *Matambanadzo* v *Goven* 2004 (1) ZLR 399 (S) at 403F – 404A-E.

I am satisfied on the facts of this case that the applicant has the *locus standi* in *judicio* to institute these proceedings as she has an interest in the subject matter of the judgment in issue. The applicant is the surviving widow of the deceased and now the sole guardian and custodian of the minor child. The applicant therefore, has a direct and substantial interest in the property in question which was the matrimonial home. See *Matambanadzo* v *Goven (supra)* at 404D.

It is an established principle of law that a judgment or order obtained by fraud will not be allowed to stand. The celebrated authors Herbstein & Van Winsen The Civil Practice Of High Courts and Supreme Court of Appeal of South Africa 5thed at pp 939-940 discuss this established principle and state *inter alia* ……..

> "A judgment procured by fraud of one of the parties whether by forgery, perjury or in any other way such as fraudulent withholding of documents cannot be allowed to stand……. It must however, be shown that the successful litigant was a party to the fraud or perjury on the grounds of which it is sought to set aside the judgment. Furthermore, there must be proof that the party seeking rescission was unaware of the fraud until after judgment was delivered …….. The person seeking relief must be able to show that

> because of fraud of the other party, the court was mislead into pronouncing a judgment which, but for the fraud it would not have done."

In the case of *Mutare City Council* v *Mawoyo* 1995 (1) ZLR 258 (H) MALABA J (as he then was) at 264A stated as follows:

> "The general rule is that once a final judgment or order has been given, the judge who gave it or any other judge of parallel jurisdiction has no power to alter, rescind, vary or set it aside excepting few instances recognised at common law or by rules of the High Court.
>
> One of the exceptions recognised at common law is when a judgment has been obtained through fraudulent misrepresentation. The statutory exception would in our case include Order 49 r 449 (1) and Order 9 r 63 (1) of the Rules of the High Court of Zimbabwe."

See also *Bopoto* v *Chikumbu* & Ors 1997 (1) ZLR 1 (H).

The esteemed authors Hebstein & Van Winsen *(supra)* at 940-941 cite the case of *Swart* v *Wessels* 1924 OPD 187 at pp 789-90 which explains the nature of the onus the applicant has to discharge in seeking the setting aside of a judgment procured through fraud. A party seeking such a relief on the grounds of fraudulent evidence must prove the following;

> "(1) that the evidence was incorrect.
>
> (2) that it was made fraudulently and with intend to mislead, and
>
> (3) that it diverged to such an extent from the true facts that the court would, if the true facts had been proved before it, have given a judgment other than what it was induced by the incorrect evidence to give."

The position of the law and what the applicant has to prove in order to have the judgment granted in HC 6820/11 set aside on the basis of fraud is therefore clear.

The applicant also seeks to have the Agreement of Sale set aside on the basis of the deceased lack of mental capacity to contract. The issue which arises is whether the deceased was capable at the material time of managing his affairs and enter into such contracts like the Agreement of Sale of the property. In other words was deceased of such sound mind to appreciate and understand the contractual obligation. In the case of *Executive Hotel (Pvt) Ltd* v *Bennet* NO 2007 (1) ZLR 343 (S) CHIDYAUSIKU CJ stated that the question of whether

the deceased had the requisite mental capacity at the time of signing the Agreement of Sale is a question of fact to be decided by the court. The learned Chief Justice went further to state that it is not always necessary to call for oral evidence where the relevant doctor's evidence would be tested by cross examination. In other words where the doctor's evidence in relation to deceased mental state remains uncontroverted (by other expert evidence) or its veracity is not put in doubt the court should be able to take a robust approach and make a proper finding of fact in that regard. The court should however, be guarded against the risk of doing an injustice to the other party.

The question one should answer in relation to deceased's mental state at the material time is whether there is a material dispute of fact in that regard which cannot be resolved on the papers even after taking a robust approach. The same applies to the question of whether the element of fraud has been proved.

The sum total of the applicant's argument on the issues in dispute is that I should adopt the approach enanciated in *Fibreglass (Pvt) Ltd* v *Peech* 1987 (2) ZLR 388 at p 339 where it was stated that;

> "It is, I think, well established that in motion proceedings a court should endeavour to resolve the dispute raised in affidavits without the hearing of evidence. It must take a robust and common sense approach and not an over fastidious one, always provided that it is convinced that there is no real possibility of any resolution doing an injustice to the other party concerned."

I am satisfied that there are real and material disputes of facts in this matter both in relation to the allegation of fraud and deceased's alleged mental state which cannot be resolved on the papers filed. I have already summarised in much detail the contrasting versions of the applicant and the first respondent on the contentious issues. I shall therefore simply highlight the difficulty the court has faced in resolving these disputes.

(a) Whether proper service was affected in HC 6820/11:

While it is accepted that service was not effected at the *domicillium* in terms of the Agreement of Sale the question which arises is whether the first respondent acted fraudulently or proper service on the instructions of deceased was effected. The applicant's case is that there was no basis to serve the court application at an address deceased was not residing which is a place the first respondent was staying except to ensure that deceased would not receive the court application and to fraudulently obtain a default judgment. The first respondent has given an explanation as to why

service was not done at the *domicillium* and insisted that proper service was therefore effected and that deceased was aware of the court process. The affidavit of Webster Mandimutsa cannot be simply dismissed as false without showing why it is false. I am unable to agree on the basis of applicant's assertion that Nickson Chibvonda who deposed to an affidavit is a fictitious person and that he does not exist. I am also not able to disregard Mr *Chinyama*'s evidence that he served the court order on the deceased. In my view both versions by the applicant and the respondent remain probable. In other words there are legitimate concerns raised in relation to the propriety of the service of the court application and there is a *prima facie* plausable explanation tendered by the first respondent. The dispute cannot be resolved on the papers filed of record.

(b) The allegation that the transfer was improper:

The applicant has put into issue the Agreement of Sale and the manner the first respondent allegedly hurriedly effected transfer of the property few days after deceased's death. The applicant has also raised doubt as to whether the deceased received any purchase price in view of the inconsistencies between Itayi Munyeza, the first respondent and Mr *Chinyama* on when and how the purchase price was paid. The applicant has, with good cause, questioned the role of Mr *Chinyama* and his legal firm in this matter. Mr *Chinyama* acted for the deceased as he said but thereafter acted for the first respondent virtually in the same transaction. There is apparent conflict of interest and it is his firm which also effected the disputed service of the court application and also effected transfer of the property after obtaining the order in HC 6820/11. The applicant raises several allegations against Mr *Chinyama*, a senior legal practitioner and officer of this court. On the other hand Mr *Chinyama* has given his own version of events insisting that his conduct was above board and that due process was followed. Relevant documents like the lease agreement, agreement of sale, cancellation of bond, acknowledgment of payment and the court order completion transfer were provided. It would not be possible to resolve this factual dispute I have alluded to and the propriety or otherwise of the roles played by Mr Chinyama and Itayi Munyeza in this matter.

(c) Deceased's alleged mental capacity:-

Applicant has raised genuine concerns about deceased's alleged mental illness. On the other hand the first respondent has denied all these allegations and gave his own version. Let me just highlight some of these disputed facts.

(a) it is not in dispute that in 2006 as per applicant and doctor Chimedza's evidence deceased suffered from some mental illness diagnosed as mamic depression disorder. I do not believe that applicant fabricates the story of deceased derobing in public and all other observations corroborated by other witnesses who filed supporting affidavits. It is also correct that doctor Chimedza is not a psychiatrist and most importantly the bulk of his evidence relates to 2006 some five years before the signing of the Agreement of Sale in May 2011. Applicant's evidence is that she last interacted with deceased in 2009. It is also applicant's case that at times deceased had lucid moments. Without giving further details applicant has not placed before the court clear and relevant evidence about deceased's state of mind during the relevant period in 2011. One would have thought that the evidence of the deceased's parents who stayed with him from 2010 until his death in 2012 would be relevant. On the other hand the first respondent, Mr *Chinyama* and Itayi Munyeza has disputed deceased's state of mind. While one may be tempted to dismiss their evidence on account of the fact of them not being medical experts they gave detailed evidence of their interaction with the deceased and why they came to the conclusion that deceased was of sound mind. Such evidence can only be properly interrogated in cross examination.

(b) the fact that deceased just abandoned the property with all movable property inside maybe indicative of his mental state. However, the question remains why applicant also abandoned the same property and why deceased's relatives failed to take action to protect the property if at all deceased was mentally ill.

(c) the sale of the property probably valued at USD230 000 for a paltry USD50 000 maybe indicative of an unstable mind as the deceased would not have failed to appropriate the value of the property he acquired being an astute economist himself. On the other hand the first respondent and Itayi Munyeza

explained the possible reason why deceased accepted USD50 000. It may be true that deceased felt betrayed by those close to him when his fortunes waned and was abandoned. It may be true that the first respondent is a cunning and calculating policeman who took advantage of his role in investigating the burglary and subsequently took advantage of the deceased's mental state to dispossess him of his property through a well crafted and elaborate process. It is equally true that the first respondent can be the biblical good Samaritan who helped deceased in time of need and was genuinely rewarded by the grateful deceased after which he followed all due process to take possession of the property.

(d) the deceased maybe deemed to have been non-*compos mentis* on account of a number of factors stated like abandoning the property, failure to pay utility bills, undressing in public, inability to hold meaningful conversion, refusing medication, staying in the streets, accusing wife of witchcraft, talking to himself, preaching and reading bible incessantly, failure to pay for services rendered and crying for no reason. All these factors taken cumulatively may show that deceased was *non- compos mentis* at the relevant time on 20 May 2011 when the agreement of sale was signed which would render it null and void and the transfer of the property a nullity. On the other hand there is evidence that deceased exhibited lucid moments like signing all relevant documents produced. His signature has not been put in issue. He approached Wintertons to cancel the bond and went to the law firm to collect his title deeds which he signed for. His interaction with Mr *Chinyama* and Itayi Munyeza are of a person who was in his sound and sober senses.

I am therefore satisfied that there are material disputes of facts in this matter which cannot be resolved on the papers filed. In the exercise of my discretion I have two options, which is to dismiss the application, see *Masukusa* v *National Foods Ltd &Anor* 1983 (1)ZLR 232 at 234D – F, *Mashingaidze* v *Mashingaidze* 1995 (1) ZLR 219 (H) or to refer this matter to trial.

I have opted for the latter option because I am of the view that the interests of justice are better served if this matter is referred to trial. The matter involves the

property in which the applicant and a minor child have an interest. There are serious questions which arise in this matter which can only be answered after the trial process. At this stage it is unfair and unjust to dismiss the matter as there is a possibility that first respondent may have acted improperly. A proper ventilation of all the issues through a trial process would resolve these material disputes of facts and put the matter to rest in a fair and just manner.

Accordingly, it is ordered that:

1. The matter be and is hereby referred to trial.
2. The court application shall stand as the summons and the notice of opposition as the appearance to defend.
3. The applicant be and is hereby ordered to file the declaration within 10 days of this order and thereafter the matter shall proceed in terms of the rules of this court.
4. Costs shall be in the cause.

Honey & Blackenburg, applicant's legal practitioners
Mbidzo, Muchadehama & Makoni, 1st respondent's legal practitioners