REPORTABLE (65)

Judgment No. SC 77/06
Civil Appeal No. 150/05

EXECUTIVE HOTEL (PRIVATE) LIMITED v

EDWARD DONALD BENNETT (In his capacity as the Executor of the Estate of the late ROBERT COURTNEY IRWIN)

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, CHEDA JA & ZIYAMBI JA
HARARE, JUNE 20, 2006 & MAY 31, 2007

A P de Bourbon SC, for the appellant

E W W Morris, for the respondent

CHIDYAUSIKU CJ: This is an appeal against the judgment of MAKARAU JP setting aside an Agreement of Sale between Barwin Holdings (Pvt) Ltd ("Barwin Holdings") and the Executive Hotel (Pvt) Ltd ("the Executive Hotel") on the grounds that a Mr Robert Courtney Irwin ("Irwin"), who was the director of Barwin Holdings and represented the company, lacked capacity to contract by reason of lack of *corpus mentis*, and, alternatively, on the ground that the Agreement of Sale was void *ab initio* because of a common mistake in respect of the *merx*.

The facts forming the background of this case are succinctly set out in the judgment of the court *a quo* and they are as follows –

During his lifetime the late Irwin was a director and shareholder of Barwin Holdings. He held 59 999 Class A voting shares, while three other persons related to him and a Trust held the remainder of the 150 000 issued shares. The issued share capital of Barwin Holdings of 150 000 shares was made up of 90 000 Class A shares that carried voting rights; and 60 000 Class B shares that were non-voting. The late Irwin held 59 999 of the Class A shares, while the now late Mrs A T Irwin, his wife, held one Class A voting share. The remaining 30 000 Class A voting shares were held by a Trust known as the Stuart Irwin Trust. A Mrs L J Mihalik and a Mrs G Smitheram held the non-voting shares. They each had 30 000 Class B shares.

Barwin Holdings owned a piece of land on which a building commonly known as the Executive Hotel is situated. The Executive Hotel is an operating hotel, made up of twenty-eight bedrooms and other facilities ancillary to the running of the hotel business. This property and liquid assets of $1.2 million constituted the assets of Barwin Holdings. Barwin Holdings leased this building to the Executive Hotel under a notarial Agreement of Lease. This lease was to subsist until 28 February 2002.

In November 1999 a meeting was held, during which the possibility of renewing the lease was discussed. At this meeting the late Irwin allegedly indicated his desire to sell the property after discussing the issue with family members. It was also confirmed at this meeting that the Executive Hotel would be interested in buying the property.

On 18 January 2000 an Agreement of Sale was entered into between Barwin Holdings, represented by the late Irwin, and the Executive Hotel, represented by a Mr Squires ("Squires") and a Mr Levy ("Levy"), both directors of the Executive Hotel. In terms of this Agreement of Sale the entire shareholding of Barwin Holdings was sold to the Executive Hotel for the sum of $2 million. This agreement was reduced to writing and duly signed by the late Irwin on behalf of Barwin Holdings and by Squires on behalf of the Executive Hotel.

At the time of the conclusion of the agreement the late Irwin was eighty-eight years old and had suffered two cerebral vascular accidents, in common parlance strokes, the first of which resulted in him being confined to a wheelchair. He was under twenty-four hour nursing care and could not dress, feed or bath himself. His speech was impaired. He was totally blind.

The late Irwin died two months later, on 14 March 2000. Mr Bennett ("Bennett") was in due course appointed executor of the estate of the late Irwin. He filed an application in the court *a quo* seeking an order setting aside the Agreement of Sale between Barwin Holdings and the Executive Hotel. In his application Bennett contended that, at the time of the signing of the Agreement of Sale, the late Irwin was suffering from mental incapacity to such an extent that he did not appreciate what he was doing and could not have reached a true agreement. The application was opposed.

In support of the application Bennett filed a detailed basis upon which he relied for his assertion that the late Irwin lacked capacity to assent to and conclude a binding Agreement of Sale. He also filed affidavits from six other persons in support of his contention.

Among the affidavits filed in support of his contention was one from the late Irwin's wife, who has since died, and another from the late Irwin's nurse. The affidavits of the late Irwin's wife and the nurse gave details of the happenings prior to the day leading to the signing of the Agreement of Sale. Both women deposed to the fact that the late Irwin was alone when he signed the Agreement of Sale, as opposed to the Executive Hotel which was represented by its two directors and its legal practitioner who safeguarded its interests. The late Mrs Irwin deposed to the fact that after the Executive Hotel's representatives had left after the signing of the Agreement of Sale the late Irwin cried and stated that he did not know what he had done.

Bennett also filed a supporting affidavit from a Dr W A MacDougall, who had been the late Irwin's doctor from 1975 until his death. According to Dr MacDougall, the late Irwin exhibited symptoms of Parkinson's disease as early as 1998. The doctor also had it recorded on the late Irwin's patient card that after the two cerebral vascular accidents in 1999 the late Irwin suffered from alternating periods of clarity and mental confusion. From November 1999 the late Irwin was on a sedative that might have contributed to his lack of reasoning ability and would have made him drowsy.

He concluded that the late Irwin was incapable of handling his own affairs on the date the Agreement of Sale was concluded.

Three other supporting affidavits were filed by Bennett. These were two from accountants and financial advisers to the late Irwin and one from a long-time business associate and personal friend of the late Irwin. The tenor of the affidavits of these three deponents was that the late Irwin's mental capacity deteriorated after the two cardio vascular accidents and that he was no longer as attentive and focused as he used to be.

In particular, Ms Linda Jane Weedman ("Weedman") filed an affidavit in which she stated that she had visited the late Irwin on 18 January 2000 at about 3 pm. This was the day the Agreement of Sale was signed. The purpose of her visit was to discuss certain business matters with the late Irwin and his wife. She avers that during the discussions over tea it became evident to her that the late Irwin was no longer of sound mind. She gained the impression that the late Irwin was unable to follow the conversation and did not attempt to initiate any part of the discussions. His attention was limited and on occasions he nodded off. During the course of the afternoon the late Irwin asked his wife on several occasions how to get out of "the plane" and it was clear to her that the late Irwin thought he was on an aircraft, wished to disembark and was looking for the door. She also avers that at one point the discussion was on property values in Cape Town and it appeared to her that it was not possible to have a sensible discussion with the late Irwin. She eventually decided to leave without having

concluded the business which she had come to resolve as the late Irwin was unable to make, and, to her mind, incapable of making, a proper decision. She also stated that the late Mrs Irwin spoke to her privately about her concern regarding the impending visit of Squires and Levy that evening. She advised the late Mrs Irwin to contact Bennett.

The Executive Hotel denied the mental incapacity of the late Irwin. Both Squires and Levy, the two directors of the Executive Hotel, supported by Mr Alwyn Leonard Arthur Pichanick ("Pichanick), the Executive Hotel's legal practitioner, deposed to affidavits in which they separately denied that the late Irwin showed any signs of lack of mental capacity, as detailed in Bennett's application and supporting affidavits. They had all been acquainted with the late Irwin prior to the two cardio vascular accidents in various degrees and they did not detect any change in him that might have been caused by the two cardio vascular accidents and that might have prevented him from appreciating what he was doing. Regarding the medical evidence of Dr MacDougall, Levy and Pichanick do not comment on the facts deposed to by the doctor. Squires indicated that he was not competent to comment on the medical details reflected in the doctor's affidavit, but maintained that, from his own observations, he found the late Irwin capable of handling his own affairs.

It is quite clear that there is a dispute of fact on the papers. However, the learned Judge in the court *a quo* came to the conclusion that she could resolve the dispute of fact by taking a robust view of the matter. She resolved the dispute of fact in favour of Bennett and against the Executive Hotel. It is quite clear from the judgment that the

learned Judge was guided by the correct legal principles in arriving at that conclusion. In this respect, she had this to say at pp 5-6 of the cyclostyled judgment:

> "In resolving to be robust in this application, I have been guided by the remarks of GUBBAY JA (as he then was) in the case of *Zimbabwe Bonded Fibreglass (Pvt) Ltd v Peech* 1987 (2) ZLR 388 (SC) at p 339 where he had this to say:
>
> > 'It is, I think, well established that in motion proceedings a court should endeavour to resolve the disputes 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. Consequently there is a heavy *onus* upon an applicant seeking relief in motion proceedings, without the calling of evidence, where there is a *bona fide* and not merely illusory dispute of fact.'
>
> In my view, it would be over fastidious of me to insist that the evidence of Dr MacDougall be tested by cross-examination before I can rely on it. It has not been challenged. It is expert evidence. The respondent has introduced no other expert evidence to cast any doubt on its veracity. The doctor has given the basis upon which he concludes that the late Irwin lacked capacity to conclude a sale. Not only had the late Irwin's cerebral activity been affected by the accidents (his speech was impaired, his motor movement was impaired and he needed 24 hour nursing services) but he was also on a drug that would suppress his cerebral activity and make him drowsy. Faced with such uncontroverted expert evidence, in my view, it will be shirking responsibility on my part not to resolve the dispute of fact in favour of the applicant. The respondent cannot be allowed to call oral evidence on facts that could have been presented by opposing affidavits. If contrary expert evidence was available to the respondent, it ought to have been placed before the court by way of affidavit."

Thus the learned Judge was alive to the dangers of resolving factual disputes on the basis of affidavits. In this regard the following observation by the learned Judge at p 6 of the judgment is pertinent:

> "In dealing with this dispute of fact on this basis, I am keenly aware that it is highly undesirable to assess affidavit evidence on the same level as oral evidence, as affidavits may be cleverly crafted by their drafters to give an impression that may not be borne out by the witness under cross-examination."

As I have already stated, the court *a quo* set aside the Agreement of Sale on the basis that the late Irwin lacked the mental capacity to conclude the Agreement of Sale. The Executive Hotel was dissatisfied with that judgment and appeals to this Court against it on the grounds set out in the Notice of Appeal, which reads in part as follows:

> "1. The learned Judge *a quo* erred in finding that the disputes of fact on the papers could be resolved in favour of the respondent.
>
> 2. That the learned Judge erred in finding that even if the Agreement of Sale could not be set aside on the basis of a lack of mental capacity by the late Robert Courtney Irwin, the Agreement of Sale was nonetheless null and void due to a lack of consensus *ad idem*, alternatively, was unenforceable. The learned Judge should have found that a lack of consensus or unenforceability did not avoid (void) the contract where the lack of consensus and unenforceability arises for (from) one party's misrepresentation."

As I have already stated, the learned Judge also found in the alternative that the Agreement of Sale between the parties was void *ab initio* by reason of a mutual mistake; the mistake being that both parties concluded the Agreement of Sale on the basis that the late Irwin owned all the shares in Barwin Holdings and was able to transfer those shares, when in fact the late Irwin only owned some of the shares and could not sell the shares which he did not own.

The notice of appeal raises two issues that fall for determination by this Court –

(1) Whether the court *a quo* was correct in determining this matter without hearing evidence or referring the matter to trial and resolving the matter in favour of Bennett; and

(2) Whether the Agreement of Sale entered into between the parties was void *ab initio* by reason of mutual mistake or common mistake.

I now turn to deal with the issues.

Given the backdrop to the signing of the Agreement of Sale, the nature and the complexity of the Agreement of Sale itself, I am satisfied that the court *a quo* was correct in determining this matter on the papers and in concluding that the late Irwin lacked the mental capacity to conclude the Agreement of Sale.

The main submission of Mr *de Bourbon*, who appeared for the appellant, as I understand it, was that the Executive Hotel should have been given an opportunity to cross-examine Dr MacDougall and that in that cross-examination it is possible that the doctor might have conceded that the late Irwin signed the Agreement of Sale at a time the late Irwin's mind was lucid. He argued that this was probable, given the evidence contained in the affidavits of Squires, Levy and Pichanick, which the court *a quo* could not dismiss as false.

I am not persuaded by this submission. Assuming, for argument's sake, that Dr MacDougall did make such a concession, that concession would not bind the

court. The question of whether the late Irwin had the requisite *corpus mentis* at the time of signing the Agreement of Sale is a question of fact, to be decided by the court. See *Blamire's Executrix v Milner and Wirsing* 1969 NLR 39. The learned Judge would have had to decide whether such a concession was properly made. Given the evidence that is common cause in this case and which evidence, in my view, is against the making of such a concession, the probabilities are that the court would not have accepted that the concession was properly made. I shall revert to this aspect of the matter later.

Another contention by Mr *De Bourbon* was that if there had been a trial the conduct of the late Irwin in respect to other business transactions carried out at around about the time of the signing of the Agreement of Sale might establish that the late Irwin had the mental capacity to conclude the Agreement of Sale.

This contention is indeed speculative. The evidence of Weedman is credible and is not speculative. She attempted to do business with the late Irwin on the same day that the Agreement of Sale was signed. She attempted to do business with the late Irwin about two hours before the Agreement of Sale was signed. She failed to conclude the business transaction with the late Irwin because he exhibited lack of mental capacity to do business. Given this evidence, which is credible and from an independent witness, going on a fishing expedition for evidence to the contrary is an exercise in futility.

I pause here to deal with the issue of what constitutes lack of capacity through insanity or dementia, also often referred to as lack of *corpus mentis*. As I have already stated, the issue of whether a contracting party had the requisite capacity is a question of fact.

The issue of what constitutes *corpus mentis* or lack of it has been considered in a number of cases. In *Blamire's* case *supra* HARDING CJ had this to say:

> "If the jury are of opinion that [at the time of the transaction] Colonel B was in such a state of mental incapacity as to be unable to estimate what was or what was not a beneficial bargain, or if they shall be of opinion that his state of mind was such as would in common honesty not make him liable or responsible for any act or contract, or if they are of opinion that he was [at a certain date] of such unsound mind as to be incapable of managing his own affairs, then they will find a verdict for the plaintiff.
>
> If, on the contrary, they are of opinion that when the shares were sold Colonel B, though strange or eccentric in his behaviour, was still in possession of a knowledge of what was not or what was favourable to his interests, or that he was not of such unsound mind as to render him incapable of managing his own affairs, they will find a verdict for the defendants."

In the case of *Pheasant v Warne* 1922 AD 481 at p 488 INNES CJ made the following observation:

> "And a court of law called upon to decide a question of contractual liability depending upon mental capacity must determine whether the person concerned was or was not at the time capable of managing the particular affair in question – that is to say whether his mind was such that he could understand and appreciate the transaction into which he purported to enter."

Pheasant's case *supra* was approved of and followed in a number of cases, such as *Uys v Uys* 1953 (2) SA 1 and *Raulstone v Radebe* 1956 2 PH F85 (N).

Three principles of testing the existence or otherwise of *corpus mentis* emerge from the foregoing authorities. I would summarise these as follows –

(1) Was the state of mind of the contracting party whose capacity is at issue such that he was incapable of estimating what was or what was not a fair and beneficial bargain?;

(2) Was the state of mind of the contracting party whose capacity is at issue such as would in common honesty not make him liable or responsible for such act or contract?; and

(3) Whether the contracting party whose capacity is at issue was of such unsound mind as to be incapable of understanding and appreciating the transaction into which he purported to enter.

Professor Christie, in his book *The Law of Contract in South Africa* 3 ed, commented on these three tests for determining the capacity of contracting parties and makes the following observation:

> "Remembering that the fundamental question is whether there was *consensus*, and that a negative answer to that question has the drastic result of making the contract void *ab initio*, the first of these tests – inability to weigh up a bargain – seems too lenient because such inability is consistent with mere stupidity, which is not enough. The second test, with its reference to common honesty, is a useful reminder of the policy of the law to protect the insane at the expense of other parties to contracts. The third test accords with that laid down by INNES CJ in *Pheasant v Warne* 1922 AD 481 488: … [quoted above].
>
> This is the test which, with slight variations of wording, has been applied in most of the cases. But it is not exclusive of other tests … ."

While it might have been preferable to hear evidence in regard to the disputed facts in this case, upon application of the above principles or tests to the evidence *in casu* that is common cause and the evidence whose veracity is palpable, it is possible, in my view, to take a robust approach to the evidence and reach a conclusion without the risk of doing an injustice to the Executive Hotel. I now turn to deal with that evidence.

The evidence that the late Irwin was of unsound mind on the days leading up to the signing of the Agreement of Sale is so cogent that the court *a quo* had no choice but to accept it. Doctor MacDougall clearly stated that the late Irwin was incapable of managing his own affairs, although he had lucid moments. The late Mrs Irwin said that the late Irwin was confused and delusionary during the days leading up to the signing of the Agreement of Sale. She specifically averred that the late Irwin sometimes thought he was in prison or on an aircraft when in fact he was not. The late Irwin had such an illusion only hours before signing the Agreement of Sale according to Weedman. This evidence establishes beyond doubt that the late Irwin was experiencing delusionary episodes during the period leading up to, and two hours before, the signing of the Agreement of Sale. The late Irwin's nurse, Ms Moyo, supports the late Mrs Irwin's evidence. Her observations were to the effect that the late Irwin was not capable of managing his own affairs. As I have already stated, Weedman visited the late Irwin with a view to concluding business on the day that the Agreement of Sale was signed, but she left without concluding the business because, in her opinion, the late Irwin did not have the requisite *corpus mentis* to conclude her intended business. At worst these witnesses

can be accused of exaggeration, but their basic allegation that the late Irwin was delusionary can safely be accepted.

Apart from the above evidence, some of the provisions of the Agreement of Sale itself are consistent with the late Irwin being so confused or delusionary as to be incapable of estimating what was or was not a fair and beneficial bargain. In my view, the Agreement of Sale the late Irwin concluded is one that he should not "in common honesty" be held responsible for. The probabilities are that it is not the kind of agreement which, if the late Irwin was capable of managing his own affairs, he would have concluded.

The late Irwin sold the entire shareholding of Barwin Holdings for $2 million. Barwin Holdings owned the property, which was insured for the sum of $11 million but was valued at $17 million. Barwin Holdings had liquid assets of $1.2 million. For both the property and the assets the late Irwin asked for a purchase price of $1.5 million. The purchase price that the late Irwin asked for is simply ridiculous. The representatives of the Executive Hotel, Squires and Levy, appreciated the absurdity of the purchase price, hence they offered to pay $2 million.

The attempt by Squires and Levy to justify the low purchase price for the Barwin Holdings shares on the basis of the Municipal evaluation of the Hotel and what it had cost the late Irwin to construct the Hotel, in my view, is nonsensical. No serious businessman, least of all Squires and Levy, would evaluate a property they wish to sell on

that basis. Why, then, did the late Irwin sell the shares of Barwin Holdings, a company with such a valuable property and liquid assets for such a ridiculously low price? The probability, in my view, is that the late Irwin had become incapable of managing his own affairs. The price which the shares were sold for clearly shows that the late Irwin was incapable of estimating what was or was not a fair and beneficial bargain to himself or to Barwin Holdings. I am satisfied that common honesty demands that he should not be held responsible for entering into such a prejudicial agreement.

It is also common cause that the late Irwin owned 59 999 shares of Barwin Holdings and the rest of the issued shares were owned by other people. Yet in the Agreement of Sale the late Irwin represents that he owned all the shares. Why, then, did the late Irwin represent to Squires and Levy that he owned all the shares when in fact and in reality he only owned a portion of the shares? Either the late Irwin was deliberately misrepresenting the facts to Squires and Levy or was confused over the ownership of the shares of Barwin Holdings. I see no reason why the late Irwin would want to be deceitful to Squires and Levy by misrepresenting his shareholding in Barwin Holdings. The most probable explanation is that he was confused over the shareholding of Barwin Holdings. Given the background and the circumstances of this Agreement of Sale, confusion is the most probable explanation for the late Irwin's misstatement that he owned all the shares of Barwin Holdings. In my view, his confusion can only be attributed to the mental condition of the late Irwin.

Not only was the late Irwin confused regarding his shareholding in Barwin Holdings, he clearly was also confused as to whether or not he had discussed the sale of the shares of Barwin Holdings with members of his family who owned some of the shares. He clearly was also confused as to whether such members of the family holding shares in Barwin Holdings had given him authority to dispose of their shareholding. The evidence of members of the family who are shareholders in Barwin Holdings that they were never consulted over the sale and did not consent to the sale of their shares to the Executive Hotel cannot but be accepted. The late Irwin misrepresented to Squires and Levy that he had their consent and approval. That misrepresentation was due, in my view, to confusion as opposed to deceit.

Clause 6 of the Agreement of Sale provides as follows:

"6. SELLER'S UNDERTAKINGS

THAT the Seller undertakes that as against payment by the Purchaser of the purchase price he shall deliver to the Purchaser the following documents:

6.1 The Share Certificates relating to the issued capital, together with the appropriate Share Transfer Forms relating to their transfer, all duly completed and signed by the Seller.

6.2 A written Cession of the loan account from the Seller to the Purchaser.

6.3 Resolutions passed by the Directors of the company, authorising the transfer of the issued capital from the Seller to the Purchaser and the Cession of the loan account from the Seller to the purchaser.

6.4 Letters of resignation from all the Directors of the Company as at the effective date.

6.5 The Memorandum and Articles of Association of the Company together with the Certificate of Incorporation of the Company together with all such title deeds, agreements, documents, vouchers, tax returns and assessments, minute books, registers and all other correspondence or

> papers relating to the business and the affairs of the Company and in particular all fiscal and other relevant or necessary returns, payments and any other documents which the company is possessed of and which it is required by law to keep, all properly written up and completed."

In terms of Clause 6 of the Agreement of Sale the late Irwin undertook to do several things, such as to effect transfer and delivery of the Share Certificates; to deliver the resolution passed by the directors authorising the transfer of the issued capital; to deliver letters of resignation from all the directors; to deliver the Memorandum and Articles of Association; and a whole host of other things. It is common cause that the late Irwin did not do any of the things required of him in terms of Clause 6 of the Agreement of Sale. The late Irwin never made an effort to do any of the things he undertook to do in terms of Clause 6 of the Agreement of Sale up to the time of his death two months after the signing of the Agreement of Sale. Why, then, did the late Irwin undertake to do things which he made absolutely no effort to fulfil? The probabilities are that the late Irwin did not fully understand the import of what was required of him in terms of Clause 6 of the Agreement of Sale by reason of impaired mental condition. If in fact he had fully appreciated the provisions of Clause 6 of the Agreement of Sale, one would have expected him to take the initial steps to do what was required of him. Instead of initiating the implementation of Clause 6 of the Agreement of Sale, according to the late Mrs Irwin, the late Irwin cried and confessed that he did not know what he had done as soon as Squires and Levy had left after the signing of the Agreement of Sale.

It is quite clear from his conduct that the late Irwin was not capable of estimating what was or was not a fair bargain and that in common honesty he should not

be held liable to implement the provisions of Clause 6 of the Agreement of Sale, which he obviously did not understand. This evidence clearly shows that the late Irwin was no longer capable of managing his own affairs.

Finally, there are a number of factors that seriously undermine the credibility of the assertions of Squires and Levy.

Firstly, Squires and Levy insisted on giving instructions to their legal practitioner to draft the Agreement of Sale during lunchtime because of the diary constraints of their legal practitioner. They were not prepared to accept the delay that would have been caused by waiting until their legal practitioner was free to see them.

Secondly, Pichanick's secretary was not available to type the Agreement of Sale. The services of another typist had to be secured to ensure that there was no delay in the typing of the Agreement of Sale and consequently a delay in its signing.

Thirdly, after the Agreement of Sale was typed Pichanick, Squires and Levy went to the late Irwin's house after 5 pm to sign and conclude the Agreement. Why this urgency to finalise the Agreement of Sale?

The reason given for this urgency by Squires and Levy is that Squires was traveling to South Africa on holiday within a day or two and the Agreement of Sale had to be concluded before he left. Both Squires and Levy are directors of the Executive Hotel and Levy, who was not going anywhere, could easily have represented the

Executive Hotel and signed the Agreement of Sale on its behalf. So the explanation proffered by the appellant for the urgency is not convincing.

Finally, Clause 6 of the Agreement of Sale provides for payment of the purchase price after compliance by the seller with Clause 6 of the Agreement of Sale, yet the purchaser paid the purchase price immediately upon the signing of the Agreement of Sale before compliance with Clause 6. No explanation is offered for this hurry to make payment before compliance with Clause 6 of the Agreement of Sale. One would have expected Pichanick to advise his client to hold back payment to the late Irwin until there had been compliance with Clause 6 of the Agreement of Sale. Indeed, one would have expected the purchase price, if it was readily available, to be paid into a Trust Account pending compliance with Clause 6 of the Agreement of Sale. Elementary prudence would have prompted Pichanick to advise his client to make payment after compliance with Clause 6 of the Agreement of Sale. If such advice was offered, it is not difficult to imagine why his client did not accept it. It is clear that the rush to conclude the Agreement of Sale was intended to ensure that the Agreement was concluded before any intervention by a relative or agent of the late Irwin.

In my view, the age, the blindness and the apparent poor health of the late Irwin and the ridiculously low purchase price he was asking for the shareholding should have sent warning bells to Pichanick, Squires and Levy that all was not well and that it was desirable to have the late Irwin assisted either by his own legal practitioner or by someone who was managing his business affairs. Failure to appreciate this represents a

very serious lapse of judgment. For this reason it can only be said that Squires and Levy were the authors of the misfortune of the appellant. They should have known better and at least attempted to ensure that a blind man of eighty-eight years in apparent poor health was assisted.

In the result, I am satisfied that the conclusion of the court *a quo*, that the late Irwin lacked the mental capacity to enter into the Agreement of Sale, was correct.

In view of the conclusion I have reached on the first issue raised in this appeal, it is not necessary to determine the second issue, namely whether the Agreement of Sale *in casu* was void *ab initio* by reason of common mistake.

In the result, the appeal is dismissed with costs.

CHEDA JA: I agree.

ZIYAMBI JA: I agree.

Wintertons, appellant's legal practitioners

Atherstone & Cook, respondent's legal practitioners