THE ESTATE OF THE LATE JEAN MOIR HEDLEY
versus
ANGWA CITY INVESTMENTS THREE (PVT) LTD
and
SAINT SEBASTIAN ESTATE AGENTS
and
THE ESTATE OF THE LATE ISRAEL GUMUNYU
and
REGISTRAR OF DEEDS
and
THE MASTER OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
UCHENA J
HARARE, 29 November 2012 and 14 February 2013.

Opposed Application

C Mucheche, for the applicant
P Nyeperai, for the first respondent.

UCHENA J: The applicant is the Estate of the late Jean Moir Hedley, represented by John Moir Rosslyn Hedley in his capacity as its curator *bonis*. The first respondent Angwa City Investments (Pvt) Ltd purchased a flat belonging to the applicant's estate. The applicant is challenging the legality of that sale. The second respondent Saint Sebastian Estate Agents, is the first respondent's Estate Agent with a mandate to manage the flat in dispute. The third respondent the estate late Israel Gumunyu is cited for the involvement of the late Israel Gumunyu, in the sale of the applicant's flat without the Master's authority, and his failure to hand over the purchase price to the applicant. Israel Gumunyu committed suicide when this matter was being investigated leaving his estate to answer for his handling of the applicant's estate. The fourth respondent the Registrar of Deeds is being cited in his official capacity as the officer responsible for the registration of immovable properties. The fifth respondent the Master of the High Court

is being cited in his official capacity as the officer responsible for the administration of deceased estates.

Jean Moir Hedley died testate leaving behind three adult children. She in her will bequeathed all her estate to John Moir Rosslyn Hedley and appointed an executor testamentary. John in anticipation of the pending inheritance but not in accordance with his mother's will, took all the papers pertaining to his late mother's estate to the Will Writing Centre where he handed them to Israel Gumunyu who promised to handle the estate. In para 2 of her will the late Jean Moir Hedley appointed National Executor and Trust (Private) Limited to be the Executor and Administrator of her estate. Israel Gumunyu sold the applicant's flat without the Master's authority. This got him in trouble which he apparently avoided by taking his life. The avoidance was however only personal and of a temporary nature as his estate is still to account for his handling of the applicant's estate.

The applicant seeks an order in the following terms;

1. The agreement of sale entered into by and between the applicant as represented by Israel Gumunyu in his capacity as its Curator *Bonis* and the first respondent is declared null and void *ab initio*.

2. The fourth respondent be and is hereby ordered to cancel deed of transfer number 4483/10 in favour of the first respondent and register the property known as an undivided 2.380% share being share number 20 in certain piece of land situate in the District of Salisbury, being stand 1773 Salisbury Township, measuring 2379 square metres in the name of the applicant.

3. The third respondent be and is hereby directed to reimburse the first respondent the purchase price it paid to Israel Gumunyu for the property called an undivided 2.380% share being share number 20 in certain piece of land situate in the District of Salisbury, being stand 1773 Salisbury Township, measuring 2379 square metres pursuant to the null and void agreement of sale entered into by and between the applicant as represented by Israel Gumunyu in his capacity as its Curator *bonis* and the first respondent on 3 September 2010

4. The first and third respondents shall pay the costs of this application.

The first and second respondents opposed the applicant's application, and filed a counter claim for arrear rentals and the eviction of John Moir Rosslyn Hedley from the

flat in dispute. The third to fifth respondents did not file any opposing papers. The second respondent filed opposing papers and participated up to the filling of Heads of Argument. In its Heads of Argument it said it would abide with the order of the court. It thus did not participate in this litigation any further.

The facts of this case are common cause. Mr *Nyeperai* for the first respondent does not dispute them but sought to hang the legality of the purchase of the applicant's flat without the Master's authority on s 41 (a) of the Administration of Estates Act [*Cap 6.01]* herein-after called the Act. He submitted that the late Israel Gumunyu sold the flat at the instance of John Moir Rosslyn Hedley the beneficiary of the late Jean Moir Hedley's will. He further submitted that John was in desperate need of cash and had suggested the sale of the flat when Gumunyu had not succeeded in timeously accessing money from the late Jean Moir Hedley's foreign Accounts. That is not in dispute. It is common cause, that John Moir Rosslyn Hedley and his two siblings wrote letters to the Master in which they were persuading him to authorise Israel Gumunyu to sale the flat. The issue is whether or not s 41 (a) of the Act authorises a curator *bonis* to do under it what he is prohibited from doing by other sections of the same Act.

Mr *Mucheche* for the applicant submitted that a curator *bonis*' authority, is restricted by ss 22 (2) and 91 of the Act. Section 22 (2) of the Act provides as follows;

> "(2) Every such curator *bonis* may collect such debts and may sell or dispose of such perishable property belonging to the estate as the Master shall specially authorize."

Mr *Mucheche* submitted that in terms of s 22 (2) of the Act a curator *bonis* can only dispose perishable property and only when specially authorised by the Master. He submitted that immovable property is not perishable and can not be sold by a curator *bonis*. He further submitted that if a curator *bonis* needs the Master's special authority to sale perishables, the legislature could not have required less stringent restrictions for him to sale immovables. I agree with Mr *Mucheche*'s interpretation of s 22 (2). Mr *Nyeperai* for the first respondent agreed with Mr Mucheche's general, interpretation of s 22 (2), but disputed Mr Mucheche's submission on the intention of the legislature on the curator bonis' sale of immovables.

Mr *Mucheche* for the applicant also submitted that in terms of s 91 of the Act a curator *bonis* can not sell immovable property belonging to or forming part of any estate under his guardianship, unless the High Court or any judge thereof has authorized such sale or unless the person by whom any such curator bonis has been appointed has directed such sale to be made. Section 91 of the Act provides as follows;

> **"91** No tutor, either testamentary or dative, and no curator, either nominate or dative, or curator *bonis* shall sell, alienate or mortgage any immovable property belonging to any minor or forming part of any estate under the guardianship of such tutor or curator, unless the High Court or any judge thereof has authorized such sale, alienation or mortgage or unless the person by whom any such tutor testamentary or curator nominate has been appointed has directed such sale, alienation or mortgage to be made."

Mr Mucheche submitted that s 91 prohibits the sale of immovables by a curator *bonis* unless he has been authorised to do so by the High Court, a judge of the High Court or by the person who appointed him. I agree with his submission.

The clear meaning of s 91 is that a curator *bonis* cannot sale immovable property without being authorised to do so by the High Court, a Judge of the High court, the testator or the person who appointed him. In this case Israel Gumunyu was appointed curator *bonis* by the Master in terms of s 22 (1). He thus could not sale the applicant's immovable property without the Master's authority. That is probably why he had asked John and his siblings for letters of support to request the Master to authorise him to sale the flat. It is not in dispute that he thereafter sold the flat without the Masters authority.

Mr *Nyeperai* for the first respondent, does not dispute this interpretation of s 91 and that in terms of it Israel Gumunyu was not entitled to sale the flat without the authority of either the High Court, a Judge of the High Court or the Master. He however submitted that the provisions of s 41 (a) of the Act authorised him to do so as it does any other person.. Section 41 (a) provides as follows;

> "**41** If—
> (*a*) before letters of administration are granted by the Master to any executor for the administration of any estate, any person takes upon himself to administer, distribute or in any manner dispose of such estate or any part thereof, except in so far as may be authorized by a competent court or by the Master or may be absolutely necessary for the safe custody or preservation thereof or for providing

> a suitable funeral for the deceased or for the subsistence of the family or household or livestock left by the deceased; or
> (*b*) ----------:
>
> Provided that when any person who is sued for the payment of any debt or legacy which he has rendered himself personally liable to pay in manner aforesaid proves to the satisfaction of the court before which he is sued that the true amount and value of the property which has actually been duly administered, distributed and disposed of by him did not exceed a certain sum, and that his administration, distribution or disposal of the same was not fraudulent, then and in every such case such person shall only be personally liable for so much of such sum as he fails to prove has been distributed or disposed of in such manner and for such purposes as by law the same ought to have been distributed or disposed of, and for the amount of the costs by him incurred in and concerning such suit by the plaintiff therein, notwithstanding that by reason of such person's personal liability having been restricted in manner aforesaid such plaintiff has not recovered from such person any part of the debt or legacy sued for".

Mr *Nyeperai* submitted that a curator *bonis* can like "any other person" within which definition he falls dispose of the deceased's property without any authorization for the benefit of the deceased's family. He in this case relies on John's desperate need for cash.

Section 41 (a) as read with the proviso to s 41 authorizes any person without the authority of a competent court or the Master to take it upon himself to take the deceased's property into his safe custody for its preservation or to sale the deceased's property when it is absolutely necessary for the purpose of providing a suitable funeral for the deceased or for the subsistence of the deceased's family or household or livestock, and limits such person's liability to the deceased's estate or its creditors, in the circumstances there mentioned. The words "any person" have a very wide meaning and can mean any person without exception. That is the meaning Mr *Nyeperai* for the first respondent sought to give to s 41 (a). His submissions are persuasive when considered from a general perspective. He submitted that the need to sale arose from the apparent desperation of John the beneficiary of the applicant. That would if that was the only consideration to be given to the interpretation of s 41 (a), have given him success.

Mr *Mucheche* for the applicant submitted that provisions of a statute should, be construed in harmony with each other, so that there would be no conflicts between

sections of a statute. He submitted that if the legislature wanted to include a curator *bonis* within the meaning of the words "any person" in s 41 (a) they would not have limited his authority to dispose the deceased's property in ss 22 (2) and 91. My understanding of his submission is that the interpretation of s 41 (a) of the Act, must be sought *ex visceribus actus.* This means the intention of the legislature in enacting s 41 (a) of the Act must be sought from the bowels of the Act. The bowels of the Act here refers to other parts of the Act, in this case including ss 22 (2) and 91.The resultant interpretation becomes clear when the section in issue is read and interpreted together with provisions which precede and follow it. Mr *Mucheche* was therefore arguing that the legislature could not have given the curator *bonis* powers under s 41 (a) which it had taken away from him in ss 22 (2) and 91. I agree with Mr *Mucheche.*

The intention of the legislature in enacting s 41 (a) was to enable "any person" to before the appointment of an executor take it upon himself to act for the preservation of the deceased's property, or sale the deceased's property for purposes of giving the deceased a decent burial or for the sustenance of the deceased's family or livestock. This was intended to provide for situations which arise before an estate can be properly administered under the authority of the courts and the Master. It is inconceivable that the legislature could have envisaged the use of s 41 (a) in circumstances where the Master has already been involved in the administration of a deceased estate. In this case the Master had already appointed Israel Gumunyu the applicant's curator *bonis.*

I therefore find that Israel Gumunyu had no authority to sale the applicant's flat. When the Act is read and interpreted as a whole he could only have validly sold the flat with the Master's authority. The sale was therefore illegal and a nullity. The fact that the first respondent was an innocent purchaser is not relevant as the sale was a nullity. See the cases of *Furure Katirawu* v *David Katirau and Others* HH 58/07 @ p 5, *Farai Chitsinde and Another* v *Stanely Musa and Another* SC 20/11 and *Kudzanayi Frank Katsande* v *Razmond Katsande* HH 113/10 @ p 7 in which a judge of the Supreme Court and two judges of the High court held that the issue of innocent purchaser does not turn a non-sale into a valid sale.

The applicability of s 41 (a) of the Act in this case is further excluded by its not being applicable if the person taking it upon himself to dispose the deceased's property does so for fraudulent purposes. The authorization and protection against liability given to persons who take it upon themselves to intervene for the deceased's burial or the deceased's dependents by disposal of the deceased's property does not extend to fraudsters. In this case Israel Gumunyu had asked the deceased's children for letters supporting his being authorised to sale. He without reverting back to them sold the flat without the Master's authority. He did not deposit the purchase price into the applicant's account. An officer from his office, who deposed to the applicant's supporting affidavit, agreed with what John the applicant's curator *bonis* deposed in his founding affidavit. On p 12 of the record and para 20 of his founding affidavit John said;

> "Unfortunately probably having realised the gravity of the situation he was in, Mr Gumunyu committed suicide, having abused his office by intentionally and unlawfully defrauding and depriving my late mother's Estate of a significant part of its property, to my prejudice as the beneficiary therein."

This was a direct allegation of fraud yet Clever Mandizvidza who is employed by the Will Writing Centre as its operations manager on p 29 of the record and para(s) 2 and 3 of his supporting affidavit said;

> " 2. Mr John Moir Rosslyn Hedley approached our offices some time in February 2010 seeking advice on how he could wind up his late mother's Estate. Mr Gumunyu then advised him that our office could handle the matter for him.
>
> 3. I can confirm that what Mr Hedley has deposed to in his founding affidavit as far as his dealings with Mr Gumunyu in this case are concerned is true and correct."

This is a telling admission by the Late Gumunyu's office that the applicant's estate was fraudulently dealt with by Gumunyu. If it was otherwise his office would have exonerated him. If for example the money was in their account pending its being deposited into the applicant's account Mandizvidza would have said so. The admission by his office is strengthened by his committing suicide.

In his founding affidavit John said he handed everything to Gumunyu. That included the deceased's will which clearly appoints some one else as the executor. Why

would Gumunyu offer to handle the deceased's estate when he and his Will Writing Centre were not the appointed testamentary executor. This suggests fraud as confirmed by the subsequent events culminating in the disappearance of the purchase price. The sale of the applicant's flat by Gumunyu is tainted with fraud and nothing can hang on it. The applicant's application must succeed and the first respondent's counter claim for the eviction of John from the flat in dispute must fail. The applicant's draft order seeks an order against the third respondent in favour of the first respondent. The first respondent vehemently resisted the applicant's application. It can not therefore benefit from an application it resisted in whole till the end of the parties' submissions. If the first defendant chooses to recover from the third respondent it can institute its own proceedings.

The applicant had in its draft order sought costs against the first and third respondents. The third respondent did not oppose the applicant's application. It therefore did not cause the applicant costs beyond those which would have been necessary for it to apply for a default judgment against it. The second respondent participated up to the filling of its Heads of Argument. The applicant had to deal with its opposition to that stage. The rest of the applicant's costs were caused by the first respondent. It will therefore be ordered that the first second and third respondents pay the applicant's costs incurred as a result of their necessitating and opposing the applicant's application. Each respondent's liability should be limited by the extend of its resistance to the applicant's application.

I therefore order that

1. The agreement of sale entered into by and between the applicant as represented by Israel Gumunyu in his capacity as its Curator *Bonis* and the first respondent is declared null and void *ab initio*.

2. The fourth respondent be and is hereby ordered to cancel deed of transfer number 4483/10 in favour of the first respondent and register the property known as an undivided 2.380% share being share number 20 in certain piece of land situate in the District of Salisbury, being stand 1773 Salisbury Township, measuring 2379 square metres in the name of the applicant.

3. The first, second and third respondents shall jointly and severally the one paying the others to be absolved pay the applicant's costs up to the filling of its application.

4. The first and second respondents shall jointly and severally the one paying the other to be absolved, pay the applicant's costs from the filling of their notices of opposition to the filling of the second respondents' Heads of Argument.

5. The first respondent shall pay the rest of the applicant's costs.

Matsikidze and Mucheche, applicant's legal practitioners
Costa & Madzona, 1st respondent's legal practitioners
Bvekwa Legal Practitioners, 2nd respondent's legal practitioners

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