

FAZILLA CHARMAINE CHIMBGANDAH

Versus

ALBERT CHITAUNHIKE N.O

And CHRISTONVILLE ENTERPRISES (PVT) LTD

HIGH COURT OF ZIMBABWE

CHIRAWU-MUGOMBA J

Harare, 15, 16, 17 and 18 May 2023

OPPOSED APPLICATION

P.R Zvenyika, for the Applicant

K. Mutyasira with M. Magiya, for the 1st Respondent

CHIRAWU-MUGOMBA J.

[1] The intriguing legal issue raised in this application is whether or not a deceased during their life time can donate *inter vivos* an immovable property registered in the name of a company and if so, the legal consequences arising therefrom.

[2] The facts of this matter are presented very simply by the applicant. She is the daughter of the late Matthew Chimbgandah (the deceased) who passed away on the 14th of March 2019. His estate under DR. 805/19 is being administered by the 1st respondent in his capacity as the executor.

[3] The deceased sometime in June 1994, registered the 3rd respondent. He became both a director and a shareholder. The company purchased immovable properties including an undivided 0.24% share being share number 212 in certain piece of land situated in the district of Salisbury called stand 18336 Harare, Township, commonly known as Flat C212 Mupfure Court, Eastview Gardens, Eastlea held under deed of transfer no. 9316/2003 (hereinafter the 'property').

[4] Sometime in July 2021, the deceased gifted the property at her wedding to the applicant. No paperwork was given to show that there had been a company resolution made to donate the

property. Such donation was verbal. At the time of the donation, the property was being managed by an estate agent. The property was later officially handed over to the applicant by the estate agent on the 7th of November 2017.

[5] The 1st respondent has refused to accept the applicant's claim to the property for the reason that no intention to donate the property by the deceased has been exhibited.

[6] Several discoveries have since been made by the applicant which include the fact that the applicant's step sister was appointed a director to the 3rd respondent at a time when she was a minor. The applicant concludes that therefore the 3rd respondent is a sham. The other named director remains largely unknown. Additionally, no returns have been filed since 2004. This explains why there is no resolution on the donation of the property. The 3rd respondent being a façade, the deceased was therefore an *alter ego* hence the court should lift the corporate veil and find that he was the actual owner.

[7] The applicant therefore seeks a *declaratur* in terms of section 14 of the High Court act [Chapter 7:06] that the 1st respondent amends the first interim liquidation and distribution account in the estate of the deceased. This in particular relates to the removal of 50% shares held by the 3rd respondent in the estate which owns the property in question. As consequential relief, the applicant seeks an order that she be declared sole owner of the property.

[8] The applicant claims interest on the basis of being a beneficiary of the deceased's estate who had property donated to her, that the 3rd respondent was a mere conduit for registration of the property. Her existing, future or contingent rights lie in the fact that the deceased was an *alter ego* of the 3rd respondent and the refusal by the 1st respondent to recognise the donation takes away her rights to the property.

[9] The 1st respondent filed a notice of opposition and opposing affidavit. He raised three preliminary points that (a) the relief sought is both a *declaratur* and consequential relief, (b) there is fatal-non joinder of the beneficiaries of the estate and (3) the applicant's claim has prescribed. These preliminary issues were abandoned at the hearing. It would be remiss of me if I do not comment on these issues.

[10] The 1st preliminary issue in my view touches on the merits of the matter. With respect to joinder, it is trite as set out in the High Court Rules, 2020, in R 32(11) that, '*no cause or matter shall be defeated by reason of the misjoinder or non-joinder of any party and the court may in*

any cause or matter determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter". While it is sometimes critical to join beneficiaries, this is not cast in stone. I also considered the fact that if the application is granted, the beneficiaries still have an opportunity to give their views on the estate account whilst it is lying for inspection as per the dictates of s52(8) (9) of the Administration of Estates Act [Chapter 6:01].

[11] Regarding prescription, the applicant avers that the property was donated to her in July 2017. The deceased passed away in 2019. The applicant lodged a claim with the executor after the registration of the estate. The concession on prescription was properly made.

[12] On the merits, the 1st respondent averred as follows in opposing the application. That the applicant has no property rights which she seeks the court to protect. She does not have title to the property. At best, she has a contingent right but so do the other beneficiaries in the property. The relief sought is tantamount to divesting the other beneficiaries of their expectation of inheritance of the property.

[13] The letter that applicant claims that it proves the donation merely appoints her to take over management of the property which is different from owning it. There was no proof that the deceased had donated the property in his personal capacity. There was no proof of a company resolution donating the property to the applicant.

[14] The piercing of the corporate veil is outside the purview of the 1st respondent. In any event it does not matter whether or not the veil is pierced since the deceased was the sole shareholder, meaning that the whole stake in the company devolves into the estate.

[15] In the heads of argument, the applicant made the following submissions. That applicant has met the requirements of a declaratur in light of the circumstances of the matter. That there is a case to be made for the lifting of the corporate veil in order to determine the effects of the donation. The applicant's interest is based on the fact that she is the biological daughter of the deceased and as such, one of the beneficiaries. Although the 2nd respondent is a company that has a separate legal existence, the courts can be justified in certain instances in uplifting the corporate veil. The 3rd respondent is a façade with the deceased having been its alter ego. This explains why there was no resolution on the donation.

[16] At the hearing, P.R *Zvenyika* made the following submissions. That the 3rd respondent was not a legal entity because one of its directors was a minor. Consequently, the court ought to find that it could not own property. When taken to task over this submission by the court on the basis that it was self -defeating, she quickly abandoned that line of argument.

[17] The 1st respondent in his heads of argument made the following submissions. The deceased could not lawfully make a donation of the property because he had no real rights in it. The 3rd respondent is the registered owner of the property. The purported donation is null and void and no rights flow from the nullity. Applicant's attempt to simultaneously apply for the lifting of the corporate veil and a declaratur is incompetent. At the hearing, Mr *Mutyasira* largely stood by the papers filed of record.

[18] It is common cause that the property is registered in the name of the 3rd respondent and has title deeds. That confers on the 3rd respondent real rights in the property. It is common cause that the 3rd respondent is a separate legal persona as per the words in the celebrated case of *Salomon vs Salomon and Co. Ltd*, [1897] AC 22 (HL)

[19] In my analysis of the application, three issues stand out. These are (a) the alleged donation of the property to the applicant, the listing of the value of the shares in relation to the property in the interim liquidation and distribution account and lastly the applicant's lodging of a claim which was rejected by the 1st respondent. It is worth noting that what the applicant termed a claim of the property is *strictu sensu* an objection to the estate account. In accordance with the Administration of Estates Act, a claim is made at the stage where the executor advertises for claims for and against the estate. See s43 generally.

[20] The legal question as I posed it in the introductory paragraph relates to the propriety of the deceased making a donation of a property that is registered in the name of a company.

[21] In *Kasule vs Kasule*, 2019 (2) ZLR 668, I had occasion to deal with a donation *inter vivos* @ pages 672 as follows: -

Section 10 of the General Law Amendment Act [*Chapter 8:07*] states as follows:-

10 Amendment of law in respect of formalities relating to donations

No contract of donation shall be invalid solely by reason of the fact that it is not registered or notarially executed.

[22] In *casu*, assuming that the donation was made, there was no need to reduce it to writing. However, for immovable properties, certain formalities to support the donation would need to be undertaken as per s14 of the Deeds Registries Act [Chapter 20:05] on the transfer of real rights.

[23] A donor can only transfer property that she or he is lawfully entitled to donate. A donation must comply with all legal requirements for a valid contract- See *Kasule* page 673. In *casu*, there is nothing else placed before the court to support the applicant's assertion. As rightly pointed out by the 1st respondent, there is no board resolution to that effect. The attempt by the applicant to claim that there could not have been a resolution given that the deceased was the alter ego of the company does not hold water. Neither does the attempt to claim that the other director is unknown.

[24] In my view, while a deceased can donate property, they can only donate property that belongs to them. The deceased could therefore not donate property registered in the name of the 3rd respondent without following the proper process. The fact that the applicant took over management of the property is neither here nor there.

[25] The applicant has advanced argument that the corporate veil should be lifted. While it is recognised that in certain instances, this can be done, challenging an estate account is certainly not one of the ways of lifting a corporate veil. In case law and in instances where this has been done, it has not been a walk in the park. Evidence has to be placed before the court to justify a departure from the rule as enunciated in the *Salomon* case. In *casu*, the applicant with nothing else except her word placed before the court, cannot seriously ask that the court make an order lifting the corporate veil. The applicant has shown a misunderstanding of the purpose of an estate account and the purpose of lodging an objection (not a claim). Her time to lodge a claim has since prescribed. The 1st respondent has rightly not listed the property in the estate account. What has been listed is the value of the deceased's shares in the 3rd respondent in relation to the ownership of the immovable properties.

[26] The only conclusion that can be reached is that the applicant has failed to meet the requirements of a declaratur. Based on her application, she has not shown any right to the

property, now and in the future. Having made that finding, there can be no consequential relief to talk about.

[27] The 1st respondent has sought costs on a higher scale. I do not see the justification for such especially regard being had to the fact that he also missed the critical legal issues at hand. The applicant might also well be a victim of poor legal advice. My clarion call to legal practitioners remains, that the law of succession is a specialised area and before putting pen to paper, they ought to identify the legal issues at hand.

DISPOSITION

1. The application be and is hereby dismissed.
2. The applicant shall pay the costs.

Muchirewesi and Zvenyika, applicant's legal practitioners

Mubangwa and Partners, 1st respondent's legal practitioners