

DISTRIBUTABLE (29)

ALFRED MUCHINI

v

**(1) ELIZABETH MARY ADAMS (2) SHEPHERD MAKONYERE
N.O (3) ESTATE LATE ALVIN ROY ADAMS (4)
REGISTRAR OF DEEDS (5) MASTER OF THE HIGH
COURT**

**SUPREME COURT OF ZIMBABWE
ZIYAMBI JA, GARWE JA & OMERJEE AJA
HARARE, FEBRUARY 12, 2013**

L Uriri, for the appellant

F Mahere, for the respondents

ZIYAMBI JA: At the end of the hearing we dismissed the appeal with costs. The following are our reasons for so doing.

The subject of the dispute between the parties is an immovable property known as plot number 13 Glynham, Masvingo (“the property”). It formed part of the estate of the late Alvin Roy Adams (“the deceased”) who died on 9 July, 2004. The first respondent is his widow.

About one year after the demise of the deceased, in July 2005, the first respondent, desiring to sell the property, approached the legal firm *Mwonzora & Partners* requesting their assistance in finding a buyer. They found the appellant and, on 7 July 2005, the first respondent sold the property to the appellant for Z\$350 000 000.00. It is common cause that payment was made by the appellant to *Mwonzora & Partners*. Thereafter the

appellant moved onto the property having evicted the first respondent and her children therefrom.

Mwonzora & Partners did not transmit the proceeds of the sale to the first respondent who continued to press for payment without success. In the end, that firm advised her to find another firm of legal practitioners to represent her as they were now representing the appellant.

The first respondent engaged the services of Messrs *Robinson & Makonyere* who attended to the appointment of an executor to the estate. Upon his appointment Mr *Shepherd Makonyere*, the second respondent, wrote to the appellant appraising him of the position and advising him that he was liable to be evicted since the property had been purchased by him before the appointment of an executor to the estate. In response, the appellant filed an *ex parte* application in the Magistrates' Court seeking an interdict to prevent his eviction by the executor. An interim order was granted.

In his founding affidavit filed in support of his application before the Magistrates Court the appellant stated his case as follows:

“13. I aver that the threats to evict me from the premises are disturbing my peaceful occupation of the premises in that:

- (i) I bought the house lawfully from the First Respondent and paid the purchase price in full.
- (ii) I occupied the premises with the clear and express consent of both the First Respondent and all beneficiaries of the said Estate.
- (iii) I have made considerable improvements on the premises.
- (iv) First Respondent had ostensible authority to dispose of the property by virtue of being the surviving spouse of the **LATE ALVIN ROY ADAMS**”.

However, at the hearing before the magistrate the appellant argued that the sale of the property had been conducted in terms of s41 of the Administration of Estates Act, (*Cap 6:01*). In so doing, he sought to rely on an allegation made in the opposing affidavit sworn by Chantelle Adams, the first respondent's daughter that:

“2. When my father died in July 2004, the family was left in a crippled financial position.

3. My mother then decided to sell the immovable property in dispute, and approached Messrs Mwonzora and Associates to make the necessary arrangements.

10. From the beginning, I did not approve the sale of the property but since my mother was desperately in need of the money, I could not resist.”

The magistrate dismissed this argument on the basis that an applicant's case must stand or fall on its founding affidavit. He discharged the rule *nisi*. The appellant appealed to the High Court which dismissed the appeal. Still dissatisfied, he has appealed to this Court.

It was contended by Mr *Uriri*, on behalf of the appellant, that the sale of the property was effected in terms of s 41 of the Administration of Estates Act [*Cap 6:01*] (“the Act”) as it was absolutely necessary for the subsistence of the deceased's family. He submitted that although an allegation to that effect was not made in the founding affidavit, the issue was sufficiently canvassed before the magistrate and both the magistrate and the court *a quo* had erred in taking the stance that the application stood or fell on the allegations made in the founding affidavit. In any event, he argued, the sale of an estate asset in contravention of s 41 of the Act was not a nullity since the only sanction imposed by the Act was personal liability, on the person disposing of the estate asset, for the debts and liabilities of the estate.

It is trite that an application stands or falls on the averments made in the founding affidavit. See *Herbstein & van Winsen* the Civil Practice of the Superior Courts in South Africa 3rd ed p 80 where the authors state:

“The general rule, however, which has been laid down repeatedly is that an applicant must stand or fall by his founding affidavit and the facts alleged therein, and that although sometimes it is permissible to supplement the allegations contained in that affidavit, still the main foundation of the application is the allegation of facts stated therein, because these are the facts which the respondent is called upon either to affirm or deny. If the applicant merely sets out a skeleton case in his supporting affidavits any fortifying paragraphs in his replying affidavits will be struck out”

This was the principle applied by the court *a quo*. It said:

“In his founding affidavit, the appellant submitted that the sale should be upheld because the widow or first respondent “had ostensible authority to dispose of the property by virtue of being the surviving spouse of the late Alvin Roy Adams”. Now, in law, the applicant’s case falls or stands upon what is said in the founding affidavit. It cannot be propped up by what may chance in respondent’s opposition. However, the issue of ostensible authority seems to have been abandoned during the proceedings in the court *a quo*. It certainly is not part of the grounds of appeal. On this basis alone, the conclusion would have been inescapable that the sale of the property fell foul of the peremptory provisions of section 21 of the Administration of Deceased Estates Act (Chapter 6:01)”.

In my view by the stance adopted by both courts below is unassailable.

In any event, as was submitted on behalf of the respondents, the appellant failed to establish that the disposal of the property was absolutely necessary for the subsistence of the family as *Mwonzora & Associates* had declined to release the proceeds thereof and have, to date, not done so.

It is incredible that the very firm of legal practitioners which arranged the sale and retained the proceeds could be pressing for transfer of the property from the first

respondent who was a client at the time of the sale in full knowledge that the purchase price has not been paid to her. It is aggravating that this stance is being taken by that firm as representatives of the purchaser of the property when it was the first respondent, the seller, who first approached them and for whom they were acting at the time of the sale. The High Court referred the question of the conduct of this firm of legal practitioners to the Law Society for investigation and rightly so, in my view. A high standard of integrity is expected from legal practitioners.

As to the status of the sale, the Act governs the administration and distribution of all deceased estates. SS 23, 21, 41 and 42 are particularly relevant. They provide as follows:

“23 Letters of administration

The estates of all persons dying either testate or intestate shall be administered and distributed according to law under letters of administration to be granted in the form B in the Second Schedule by the Master to the testamentary executors duly appointed by such deceased persons, or to such persons as shall, in default of testamentary executors, be appointed executors dative to such deceased persons in manner hereinafter mentioned.

21 Custody of estate of person not married in community

On the death of any person not being one of two spouses married in community of property, the spouse of the deceased or, in default or absence of the spouse, the child or children of the deceased or, in default, absence or minority of the child or children, the next of kin of the deceased or, in default, absence or minority of the next of kin, the person who at or immediately after the death has the chief charge of the house in or of the place on which the death occurs shall secure and take charge of all goods and effects of whatever description belonging to the deceased and being in the house or upon the premises at the time of death, and shall retain the same in his or her custody and possession until delivery thereof is demanded by the executor of the deceased or by any other person lawfully appointed by the High Court or any judge thereof or the Master, to receive delivery of the same.

41 Liability in certain cases for debts and legacies

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) ...every such person shall thereupon become personally liable to pay to the creditors and legatees of the deceased all debts due by the deceased at the time of his death or which have thereafter become due by his estate, and all legacies left by the deceased in so far as the proceeds and assets of such estate are insufficient for the full payment of such debts and legacies:

42 Duty of person in possession of assets of estate of deceased person

Every person not being the executor of the estate of a deceased person duly appointed in Zimbabwe who has or comes into possession or custody of any property or asset belonging to such estate shall forthwith either deliver such property or asset to the duly appointed executor, if any, then being in Zimbabwe or report the particulars thereof to the Master; and if such first-mentioned person fails to do so, or parts with any such property or asset to any person not authorized by the Master by letters of administration or other direction to receive the same, he shall, apart from any other liability he may incur thereby, be liable for all dues payable to the public revenue in respect of such property or asset”. (Emphasis added)

It was submitted by *Ms Mahere* that the sale of the property was null and void by reason of its having been effected in contravention of subs 41 and 42 of the Act. In support of this submission we were referred to the following remarks of *Innes CJ in Schierhout v Minister of Justice*:¹

“It is a fundamental principle of our law that a thing done contrary to the direct prohibition of the law is void and of no effect. The rule is thus stated...So that what is done contrary to the prohibition of the law is not only of no effect, but must be regarded as never having been done -and that whether the lawgiver has expressly so decreed or not; the mere prohibition operates to nullify the act.”

In *Pottie v Kotze*² it was explained that the usual reason for upholding a prohibited act to be invalid

¹ 1926 AD99 at 109

² 1954 (3) SA 719 (A) 726-7

“is not the inference of an intention on the part of the Legislature to impose a deterrent penalty for which it has not expressly provided, but the fact that recognition of the act by the Court will bring about, or give legal sanction to, the very situation which the Legislature wishes to prevent.”

I agree with the submission by *Ms Mahere* that the intention of the legislature in enacting s 42, and indeed s 41 of the Act was to protect the position of beneficiaries and, I would add, creditors of a deceased person pending the administration of the estate and that were the court to sanction the disposal of an estate asset in circumstances such as the present, it would bring about the very situation which the legislature sought to prevent thereby causing prejudice to both the beneficiaries and creditors of the estate.

The clear intention as expressed in the Act, and in particular the sections thereof quoted above, is to prohibit the distribution of a deceased estate by persons other than executors.

Further, the authority to dispose of certain assets of a deceased estate before the appointment of an executor is strictly limited to the circumstances set out in s 41. In the present case it would have to be shown that the sale of the property was *absolutely necessary* for the subsistence of the family. The use of the word *absolutely* is significant and is indicative of a higher standard than mere necessity.

Not only was no allegation of absolute necessity made in the founding affidavit but it is clear that such necessity was not present when the property was sold. This is because the first respondent was represented at the time of the sale by the very legal practitioners who drew up the founding papers for the appellant. They would have known,

had they diligently performed their duties, whether or not the requirement of absolute necessity was present. Their failure to place reliance on this aspect of absolute necessity in the founding affidavit can only mean that no such necessity existed. Their belated reliance on s 41 was a desperate attempt to redeem the application which otherwise was clearly without merit.

GARWE JA: **I agree**

OMERJEE AJA: **I agree**

Costa & Madzonga, the appellant's legal practitioner

Chadyiwa & Associates, 1st-3rd respondents' legal practitioners