

DISTRIBUTABLE (58)

COSMA CHIANGWA

v

**(1) DAVID KATERERE (2) ROBERT ADRIAN CAMPBELL
LOGAN (3) ISRAEL GUMUNYU**

**(4) REGISTRAR OF DEEDS (5) EDMOND CHIVHINGE (6) MASTER
OF THE HIGH COURT**

SUPREME COURT OF ZIMBABAWE

BHUNU JA, MATHONSI JA & CHITAKUNYE AJA

HARARE: 15 OCTOBER 2020 & 24 MAY 2021.

Judgment No. SC 61/21
Civil Appeal No. SC 433/19

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F. Girach, for the appellant

A. Saunyama with *M. Chipetiwa*, for the first respondent

No appearance, for the second to sixth respondents

CHITAKUNYE AJA: This is an appeal against the whole judgment of the High Court (“the court *a quo*”) handed down on 15 June 2011 wherein the court *a quo* granted an application for a declaratur that the sale and transfer of Stand 382 Good Hope Township to the appellant was null and void.

FACTUAL BACKGROUND

The matter before the court *a quo* was a court application for a declaration of the sale and registration of Stand 382 Good Hope Township of Subdivision B of Good Hope into the appellant's name as being null and void.

In November 1999 the first respondent entered into an agreement of sale in terms of which he purchased an immovable property, namely Stand 382 Good Hope Township of subdivision B of Good Hope, from the estate of the late Johanna Maria Francisca Logan as represented by the executrix testamentary of the estate. The immovable property was transferred to the first respondent on 2 April 2007 by virtue of deed of transfer number 1597/2007.

On 1 October 2006, one Tsungirai Musenha and the appellant, represented by third respondent, filed an application in the Magistrates' Court in Case No. 12060/06 citing Judgment No. SC 61/21 Civil Appeal No. SC 433/19. Robert Adrian Campbell-Logan, estate late Maria Johana Campbell-Logan and the Registrar of Deeds as respondents. They alleged therein that the second respondent had sold to them and they had purchased Stands Numbers 412 and 382 Good Hope Township of Subdivision B of Good Hope. On 5 October 2006 a rule *nisi* was granted by the Magistrates' Court, interdicting the 3 respondents and all those acting through them from disposing or transferring to anyone Stand Numbers 412 and 382 respectively being subdivisions of the remainder of subdivision B of Good Hope held under Deed Number 6180/95 pending the return date. The return date was, however, not stated in the order.

On 29 November 2006 the sixth respondent issued Letters of Administration appointing the third respondent as executor *dativo* to administer the estate of the late

Maria Johanna Francisca Campbell-Logan, for the sole purpose of effecting transfer of Stand Number 382 into the name of Cosma Chiangwa, (the appellant herein). On 4 July 2007 Stand 382 was transferred into the name of the appellant by deed of transfer 4079/2007.

This prompted the application in the court *a quo* wherein the first respondent sought an order that the sale, registration and transfer of the property in question to the appellant be declared null and void, that the appointment of the third respondent as executor *dativo* of the estate of the late Maria Johanna Francisca Campbell-Logan be declared null and void and that the first respondent be declared the sole owner of the property in question. The first respondent averred that the appointment of the third respondent as the executor *dativo* of the estate during the lifetime of the executrix testamentary and during a period when the executrix testamentary was still holding office and was not incapacitated was not valid in law. He also averred that when the second respondent sold Stand 382 to the appellant, he had no title to pass and that the sale was done in the second respondent's personal capacity and without authority. He further averred that when the second respondent sold the property to the appellant he knew that it had already been sold to the first respondent as he had co-signed the agreement of sale between the first respondent and the executrix testamentary.

Further, it was also alleged by the first respondent that the fourth respondent registered the property into the name of the appellant without checking his register. Furthermore, that the fifth respondent, who was the conveyancer of the property did not perform due diligence before drafting and lodging conveyancing papers with the Deeds Registry. Had he exercised due diligence and care he would have discovered that the immovable property belonged to the first

respondent as it had already been registered into his name more than two months earlier. The first respondent further indicated that the position that was stated by the executrix testamentary in the letter of 1 September 2007 was the correct position at law. The letter had raised, with the sixth respondent, the invalidity of the appointment of the executor *dativo* as it was done when the executrix testamentary had not been removed from office by a competent court or judge. It was thus averred that the sixth respondent acted without authority when he appointed the third respondent as executor *dativo* and consequently all acts done by the executor *dativo* in relation to the transfer of the property were of no force or effect.

On the other hand, the appellant contended that the application ought not to succeed for the reason that the first respondent was alleging fraud on the part of the persons who prepared and authored the documents which are being challenged and that such persons would need to be cross examined in trial proceedings. Secondly, he contended that there were disputes of fact which could not be resolved on the papers, such disputes being in relation to how two agreements of sale could have been concluded for the same property; how the Master authorized third respondent to deal with the property and how the first respondent (applicant then) sought to register his property with the fourth respondent. These issues, he contended, could not be adequately addressed in affidavits. Thirdly, he contended that the first respondent did not challenge or cause the suspension of the 'compellation order authorizing transfer of the property in issue emanating from Case No 1206/06 granted by the Magistrates Court in default on 8 November 2006. He further contended that the court therein decided that the property belonged to him and until that order is suspended, the court *a quo* could not hear the first respondent's case.

The appellant also contended that the first respondent had no real rights over the property in question and that the Registrar of Deeds had confirmed by letter that the property belongs to him. He contended that the first respondent's supposed title deed is not a valid title deed and does not confer any rights on him hence the first respondent could not challenge the registration of a property which he does not own. As such he averred that there was no double registration of the immovable property in issue.

The appellant further contended that the first respondent's purported agreement of sale dated November 1999 with the executrix testamentary was invalid because the executrix testamentary did not then have authority from the sixth respondent to sell the property, such authority only having been granted by the sixth respondent on 27 February 2006. He further averred that the first respondent had sued the wrong party as he should have sued the estate from which his rights emanate in terms of the agreement of sale. The appellant sought the court to dismiss the application with costs on the higher scale.

After considering submissions from the parties and papers filed of record, the court *a quo* found that the appellant's deed was unlawful and therefore null and void as his registration as owner was subsequent to that of the first respondent over the same property. It was held that this was sufficient justification for the court to declare the registration of the appellant as owner to be null and void as deeds follow the sequence of their relative causes. It also found that at the time ownership was purportedly passed to the appellant, the property no longer belonged to the estate but to the first respondent thus it had no rights to transfer to the appellant. Pertaining to the executor, the court *a quo* found that the appointment of the third respondent was irregular in that he was appointed as executor *dativo* whilst the executrix testamentary was still alive, holding

office, not incapacitated and still sane, thus rendering any acts carried out by him in the name of the estate as of no legal consequence.

The court *a quo* further found that the property was sold to the appellant by the second respondent who was an heir to the estate at a time when such property had not yet vested in him. It was on this basis that the court *a quo* held the purported sale to be fraught with illegality and therefore a nullity. It thus concluded that both the agreement of sale and the deed of transfer in favour of the appellant were in the circumstances null and void. Pertaining to the interdict, the court *a quo* found that the interim interdict granted had no return date and that it could not have been the intention of the Magistrates Court for it to be operative indefinitely as it could end up having the effect of a final interdict. It further found that the first respondent was not a party to the proceedings in that matter in which the interim interdict was granted hence the order could not bind him. On this basis, it found that the purported sale of the property was invalid.

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Aggrieved by the decision of the court *a quo*, the appellant noted the appeal to this Court on the following grounds;

1. The Learned Judge *a quo* erred in failing to appreciate and make a finding that there was a material dispute of fact regarding the validity of the agreements of sale between appellant and first respondent and consequently the deeds of transfer, which disputes could not be resolved on the papers.
2. The learned Judge *a quo* erred in her finding that the Regional, Town and Country Planning Act has no application in this matter yet it is the law that regulates agreements relating to the sale of land.
3. The learned judge *a quo* erred at law in invalidating the appointed executor *dativo* and setting aside his actions when such an appointment was a legal requirement for the purposes of transferring property into appellant's name.

4. The learned judge *a quo* erred at law in relying upon an agreement of sale which was never placed before the court for its scrutiny.

ISSUES FOR DETERMINATION

Three issues arise for determination being;

1. Whether or not the court *a quo* correctly found that there were no material disputes of fact.
2. Whether or not the court *a quo* correctly found that the Regional, Town and Country Planning Act did not apply in the present circumstances and,
3. Whether or not the court *a quo* erred in invalidating the agreement of sale between appellant and second respondent, the appointment of the executor *dative* and subsequently the purported transfer of the property into the appellant's name.

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SUBMISSIONS BEFORE THIS COURT

In motivating the appeal, appellant's counsel submitted that the order of the court *a quo* was incompetent as it conflicted with another order of the Magistrates Court in terms of which a *rule nisi* was issued prohibiting the second and third respondents from transferring or disposing of the property in dispute. He submitted that the court *a quo* ought to have set aside that order, failure of which it remains extant and commands obedience until set aside. He further submitted that the first respondent's agreement of sale with the executrix testamentary of November 1999 is a nullity because the executrix testamentary at the point of concluding the agreement did not have authority to sell the property which consent she only obtained on 27 February 2006. Counsel further submitted that the first respondent's case is premised on an agreement of sale which is void *ab initio* for the reason that the sale was conditional upon the

grant of a subdivision permit in terms of the Town and Country Planning Act, [Chapter 29:12]. It was submitted that the said Act specifically proscribes such agreements as *in casu*. He also argued that there were material disputes of fact which could not be resolved on the papers. In that light he moved that the appeal be allowed and that the matter be referred for trial.

Conversely, counsel for the first respondent submitted that the *rule nisi* did not have a return date hence it lapsed on 31 of December 2006 as it could not have been the intention of the Magistrates Court that it should operate indefinitely. Counsel also submitted that the property in dispute was sold to the appellant by an heir who had no power to sell. She stated that the power to sell vested in the executrix testamentary hence the sale was invalid. She further submitted that the executor *dative* (third respondent) had solicited for his own appointment so as to transfer the property to the appellant which conduct she alleged was improper as he was an agent for the appellant. She moved that the appeal be dismissed.

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DETERMINATION OF THE ISSUES

1. Whether or not the court *a quo* correctly found that there were no material disputes of fact.

The appellant in his first ground of appeal averred that the court *a quo* erred in failing to appreciate and make a finding that there were material disputes of fact regarding the validity of the agreements of sale between appellant and first respondent and consequently the deeds of transfer, which disputes could not be resolved on the papers.

A material dispute of fact arises where a party denies material allegations made by the other and produces positive evidence to the contrary. Generally in considering whether or not there is a material dispute of fact, the court is enjoined to adopt a robust common sense approach to such defenses when raised by litigants. In *Soffiantini v Mould* 1956 (4) SA 150 (E) the court made the following pertinent comments.

“ If by a mere denial in general terms a respondent can defeat or delay an applicant who comes to court on [application], then [application] proceedings are worthless, for a respondent can always defeat or delay a petition by such a device. It is necessary to make a robust, common-sense approach to a dispute on [application] as otherwise the effective functioning of the court can be hamstrung and circumvented by the most simple and blatant stratagem. The court must not hesitate to decide an issue of fact on affidavit merely because it may be difficult to do so. Justice can be defeated or seriously impeded and delayed by an over-fastidious approach to dispute raised in affidavit.”

In *Muzanenhamo v Officer in Charge CID Law and Order and Others* 2013(2) ZLR 604(S) at 608A-F PATEL JA aptly stated, *inter alia*, that-

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“As a general rule in motion proceedings, the courts are enjoined to take a robust and common sense approach to disputes of fact and to resolve the issues at hand despite the apparent conflict. The prime consideration is the possibility of deciding the matter on the papers without causing injustice to either party.

The first enquiry is to ascertain whether or not there is a real dispute of fact. As was observed by MAKARAU JP (as she then was) in *Supa Plant Investments (Pvt) Ltd v Chidavaenzi* 2009 (2) ZLR 132 (H) at 136F-G:

‘A material dispute of facts arises when material facts alleged by the applicant are disputed and traversed by the respondent in such a manner as to leave the court with no ready answer to the dispute between the parties in the absence of further evidence.’

In this regard, the mere allegation of a possible dispute of fact is not conclusive of its existence.

The respondent’s defence must be set out in clear and cogent detail. A bare denial of the applicant’s material averments does not suffice. The opposing papers must show a bona fide dispute of fact incapable of resolution without viva voce evidence having been heard. See the *Room Hire Co.* case, *supra*, at 1165, cited with approval in *Vittareal Flats (Pvt) Ltd v Undenge & Others* 2005 (2) ZLR 176 (H) at 180C-D; *van Niekerk v van Niekerk & Others* 1999 (1) ZLR 421 (S) at 428F-G.” (underlining for emphasis)

Where there is a material dispute of fact the court may dismiss the application, order oral evidence or refer the matter to trial with such orders as to pleadings as it sees fit.

Upon a consideration of the alleged disputes of fact I am of the view that the court *a quo* did take cognizance of the fact that the issue of the validity of the agreements of sale could be resolved without resorting to trial. The appellant did not show that the issue was incapable of resolution on the papers. The first respondent's papers were clear and concise. He entered an agreement of sale with the executrix testamentary in 1999. The executrix received her letters of administration in 1998 and obtained authority to sell in 2006 and thereafter in April 2007 transfer of the property was effected. That the first respondent's transfer papers were lodged and signed for by the Registrar of Deeds in April 2007 is without doubt. The executrix as the lawful representative of the estate had the right to authorise transfer to first respondent when she did so.

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On the other hand, the appellant's registration papers were only effected in July 2007. Section 10 of the Deeds Registries Act, [*Chapter 20:05*] provides that:

“10 When registration takes place

(1) Deeds executed or attested by a registrar shall be deemed to be registered upon the affixing of the registrar's signature thereto:

Provided that no such deed which is one of a batch of interdependent deeds, intended for registration together, shall be deemed to be registered until all the deeds of the batch have been signed by the registrar.

(2) If by inadvertence the registrar's signature has not been affixed to a deed at the time at which the signature should have been affixed in the ordinary course, the registrar may affix his signature thereto when the omission is discovered, and the deed shall thereupon be deemed to have been registered at the time at which the signature should have been affixed.

(3) All endorsements or entries made on title deeds or in registers in connexion with the registration of any deed executed or attested by a registrar shall be deemed to have been effected simultaneously with the registration of such deed, although in fact they may have been made subsequent thereto.” (Underlining for emphasis)

By virtue of this section the first respondent's title was deemed to have been registered on 2 April 2007 under transfer number 1597/2007 when the registrar affixed his signature.

Section 11 of the Act further provides for deeds to follow sequence of their relative causes in these words:-

“(1) Save as otherwise provided in this Act or as directed by the court—

(a) transfers of land and cessions of real rights therein shall follow the sequence of the successive transactions in pursuance of which they are made, and if made in pursuance of testamentary disposition or intestate succession they shall follow the sequence in which the right to ownership or other real right in the land accrued to the persons successively becoming vested with such right;

(b) it shall not be lawful to depart from any such sequence in recording in any deeds registry any change in the ownership in such land or of such real right unless the registrar is satisfied that the circumstances are exceptional and has consented to such departure:”
(underlining for emphasis)

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From the foregoing it was clear that the first respondent's registration of title preceded the appellant's. There was nothing unclear about the first respondent's case in this regard.

It was the appellant's case that left one with more questions than answers. He had purportedly bought the property from an heir who had no legal right to deal with the property and appellant's agent was appointed executor *dativo* upon his own solicitation when the executrix testamentary was still in office. He then had proceeded to effect transfer of the property three months after the first respondent had filed his transfer papers and the registrar had acknowledged their receipt by affixing his signature thereto thus complying with s 10. The fact

that the appellant's papers were inexplicably finalized first by the fourth respondent does not detract from the sequence of the lodging of the papers. In his papers the appellant had not proffered any reasonable explanation to that course of events. Unfortunately for appellant ss 10 and 11 protected the first respondent's position as the registrar had affixed his signature on 2 April 2007.

It was clear that with regard to the agreements of sale there was no real dispute as to their sequence and parties thereto. The agreements of sale had similar suspensive conditions acknowledging the state of the subdivision. The first respondent's agreement of sale was entered into with the executrix testamentary as the legal representative of the deceased's estate. The appellant's agreement of sale, on the other hand, was entered into with an heir who had no authority to deal in the property to the exclusion of the executrix.

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In the circumstances the appellant's request to have the matter referred to trial was only a delaying tactic hence it was not granted. In my view there were no real material disputes of fact. The real issues between the parties were capable of resolution on the papers without the calling of *viva voce* evidence or referring the matter to trial. There was thus no misdirection in this regard.

2. Whether or not the court *a quo* found that the Regional, Town and Country Planning Act did not apply

The appellant in his second ground of appeal averred that the court *a quo* erred in finding that the Regional, Town and Country Planning Act has no application in this matter yet it

is the law that regulates agreements relating to the sale of land. The court *a quo* stated as follows with regards to this Act:-

“None of the arguments raised by the first respondent as detailed earlier in this judgment can be of any avail to the first respondent in the face of the above stated and established facts. It would appear to me that the issue of whether or not the provisions of the Regional, Town and Country Planning Act are applicable and if so with what effect, cannot be of any avail to the respondents in the circumstances of this case. Neither can it be the basis for this court in these proceedings, to declare invalid the agreement of sale in favour of the applicant. That agreement has not been subjected to scrutiny by this court. The fact is that the applicant is currently registered as the owner of the property and there is no basis for this court, in these proceedings, to deny the relief sought by the applicant.”

The above is what the court *a quo* said with regards to the Act in question. It did not make any findings that the Act did not apply but rather that it would not delve into whether or not it applied in view of its findings pertaining to the registration of the first respondent's title that preceded that of the appellant which showed that he was the owner of the said property as of Judgment No. SC 61/21 2 April 2007. Such registration of title was done with the authority of Civil Appeal No. SC 433/19 of the case did not call for such a determination. A reading of the judgment of the court *a quo* shows that the court did not make any determination on whether or not the Act was applicable in this case hence the allegation by the appellant pertaining to this issue is misplaced and this ground of appeal lacks merit and so must fail.

3. Whether or not the court *a quo* erred in invalidating the agreement of sale between the second respondent and the appellant, and the appointment of third respondent as executor *dativo* and nullifying his subsequent actions.

In the third ground of appeal the appellant alleged that the learned judge *a quo* erred at law in invalidating the appointment of the executor *dativo* and setting aside his actions when such an appointment was a legal requirement for the purposes of transferring property into the

appellant's name. It is my view that the court *a quo*'s findings with regard to this aspect cannot be faulted. This is so because there was a duly appointed executrix testamentary in terms of the deceased's will. Such appointment had not been nullified or set aside. The court *a quo* aptly made the following findings in this respect:-

“Firstly, the applicant purchased the property in issue from the estate as represented by the executrix testamentary. The first respondent, on the other hand, purchased the same property purportedly from the same estate but in his case the estate was represented by the executor *dative*. It is an undisputed fact that the executor *dative* was appointed to the office while the executrix testamentary was still alive, holding office, not incapacitated and still sane. Neither had the executrix testamentary been removed from office. Secondly, the applicant's agreement of sale preceded that of the first respondent. Thirdly, it is also clear from the papers that the property was registered into the applicant's name on 2 April 2007 by deed of transfer 1597/2007 while the transfer to the first respondent was done 3(three) months later on 4 July 2007 by deed of transfer 4079/2007”

After discussing the applicable law including ss 10, 11 and 14 of the Deeds Registries Act, the court *a quo* proceeded to aptly conclude that:-

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“...the third respondent having been appointed as executor *dative* whilst the executrix testamentary was still alive, holding office, not incapacitated and still sane, was improperly appointed. The deceased had left a will in which the executrix testamentary was appointed. The sixth respondent was thus not dealing with an intestate estate. The third respondent's appointment as executor *dative* was in the circumstances irregular and any acts carried out by him in the name of the estate would thus be of no legal consequence. According to the affidavit placed before the magistrate in 12060/06, the second respondent who is the heir to the deceased estate, sold the property in issue to the first respondent. It thus appears that the second respondent purported to sell the property before the property had vested in him; hence arises the illegality and nullity of the purported sale to the second respondent (*sic*). Thus both the agreement of sale and the deed of transfer in favour of the first respondent are in the circumstances null and void.”

The court *a quo*'s findings in this regard cannot be faulted. It is trite that an executor/executrix is the recognized legal representative of a deceased estate. He/she is appointed to administer the estate and to ensure the estate is properly wound up with all assets and liabilities being accounted for.

In this regard s 23 of the Administration of Estates Act, [*Chapter 6:01*] (the Act) provides that:-

“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....”

It follows that in a case involving estates of deceased persons there shall be appointed a representative who is empowered through letters of administration to act for and on behalf of the deceased’s estate. This is so because the deceased estate cannot represent itself. In terms of s 25 of the Act a deceased estate is represented by an executor or executrix duly appointed and issued with letters of administration by the Master.

In *Nyandoro & Anor v Nyandoro & Ors* 2008 (2) ZLR 219(H) at 222H-223C Judgment No. SC 61/21
KUDYA J aptly restated the legal position as follows:- Civil Appeal No. SC 433/19

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“In *Clarke v Barnacle NO & Ors* 1958 R&N 358 (SR) at 349B -350A MORTON J stated the legal position that still obtains to this day in Zimbabwe. It is that “whether testate or intestate, an executor, either testamentary or dative, must be appointed.....so that the executor and he alone is looked upon as the person to represent the estate of the deceased person.” He left no doubt that towards the rest of the world the executor occupies the position of legal representative of the deceased with all the rights and obligations attaching to that position and that because a deceased’s estate is vested in the executor, he is the only person who has *locus standi* to bring a vindicatory action relative to property alleged to form part of the estate.

Arising from the nature of a deceased estate as described in *Clarke v Barnacle, supra*, and *Mhlanga v Ndlovu, supra*, it must follow that the citation of a deceased estate as a party to litigation is wrong. The correct party to cite in *lieu* of the deceased estate is the executor by name. The citation of the second plaintiff and second defendant *in casu* was therefore improper and incurable. It makes their presence before me a nullity.”

The executor/executrix of an estate has certain rights and powers in connection with the estate and certain duties to perform both at common law and in terms of the Act.

In *The Law and Practice of Administration of Estates*, 5th ed by D Meyerowitz at p 123 the esteemed author states that:

“An executor is not a mere procurator or agent for the heirs but is legally vested with the administration of the estate. A deceased estate is an aggregate of assets and liabilities and the totality of the rights, obligations and powers of dealing therewith, vests in the executor, so that he alone can deal with them.

He has no principal and represents neither the heirs nor the creditors of the estate.”

Further, at p 124 the author firmly states that:

“No proceedings can be taken against the estate without making the executor a party to them. Similarly, no person can institute proceedings on behalf of the estate except the executor. The estate cannot sue or be sued until an executor has been appointed.”

If therefore the totality of the rights, obligations and powers of dealing with a deceased estate is vested in an executor/executrix it follows that the executor/executrix must invariably be cited by name in any suit against the estate. Failure to cite the executor/executrix would be fatal to an action against the deceased’s estate.

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In *casu*, it is common cause that an executrix testamentary was still in office when the second respondent purported to sell the property in question to the appellant. The sale was without the consent or authority of the executrix. It is also not seriously disputed that the executrix was not cited as a party to the proceedings in the magistrates’ court that the appellant sought to rely on as authority for the third respondent’s actions. The appointment of the third respondent as executor *dative* was done without citing or involving the executrix. It would appear that the appellant and his agents chose to sidestep the executrix. Such conduct was unlawful and rendered their subsequent actions a nullity.

A properly appointed executrix cannot simply be ignored or sidestepped when dealing with a deceased estate. If there are any challenges with the executrix the proper procedure is to first seek his removal from office. An executrix cannot be removed from office or incapacitated from dealing with any asset of the estate by a purported appointment of an executor *dative*. It must be acknowledged that courts do not lightly remove an executor/executrix in the absence of evidence of serious misconduct or incapacitation that would prejudice the estate. In *The Master v Moyo NO & Ors* 2009 (1) ZLR 119(H) the court held, *inter alia*, that the removal of an executor should never be undertaken lightly. If the Master applies for the removal of an executor in terms of s 117(1) of the Administration of Estates Act [*Chapter 6:01*], the court must be satisfied that the executor had failed to perform satisfactorily any duty or requirement imposed on him by, or in terms of, the law. The court also alluded to the legal position that in an application for the removal of an executor, the executor should be cited in his personal capacity, not in his official capacity as executor. When an action is brought against an executor in his representative capacity, it is an action against the estate, rather than one against the individual.

In *casu*, there is no evidence on record to show that the executrix testamentary appointed by virtue of the deceased's will had been removed from office at the time the executor *dative* was appointed. The evidence, in fact, shows that the executrix was still in office and administering the estate. There was no evidence of any legal process or complaints for her removal from office.

In light of this, the court *a quo*'s finding that the appointment of the executor *dative* was tainted with illegality cannot be faulted. As a consequence all the actions he did subsequent

to that faulty appointment were a nullity. This ground of appeal therefore lacks merit. The court *a quo* could not have upheld an irregularity which *in casu* is the unlawful appointment of an executor *dativo* to administer the estate in the face of an existing executrix testamentary.

DISPOSITION

It is evident from the above that all the grounds of appeal lacked merit. In the circumstances the appeal must fail. On costs there is no reason why costs should not follow the cause. The appeal must be dismissed with costs.

It is accordingly ordered that:-

“The appeal is hereby dismissed with costs.”

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BHUNU JA: I agree

MATHONSI JA: I agree

Shava Law Chambers, appellant’s legal practitioner

Chigwanda Legal Practitioners, 1st respondent’s legal practitioner