SUSAN TAURAI MAPUNDE DUBE NO
(In her capacity as the Executor Dative Estate Late Daniel Thembinkosi Dube)
versus
ROBERT MATOKA
and
THE REGISTRAR OF DEEDS
and
THE MASTER OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
NDEWERE J
HARARE, 19 October, 2015, 10 March 2016, 20 June 2016, 19,20,21,22,23 October, 2015, 10 March 2016, 20 June 2016 and 03 August 2017

Civil trial

F Mahere, for the plaintiff
N Mugiya, for the defendants

NDEWERE J: The dispute before me started as an opposed application before MAWADZE J in 2014. On 8 May, 2014, after going through all the papers placed before him, MAWADZE J's view was that the interests of justice would be better served if the matter was referred to trial for a proper ventilation of all the issues. He ordered that the court application shall stand as the summons and the notice of opposition as the appearance to defend. A declaration was to be filed within 10 days of the court order and thereafter the matter would proceed to trial in terms of the High Court Rules.

The plaintiff is seeking the following:

a) An order that the agreement of sale of 20 May, 2011 between the late Daniel Thembinkosi Dube and Robert Matoka be declared null and void *ab initio*; and be set aside.
b) An order rescinding the default order granted in HC 6820/11 handed down on 31 August, 2011 in the matter between first defendant and the late Daniel T Dube, compelling transfer of the property purportedly sold in terms of the agreement in paragraph (a) above.

c) An order setting aside the transfer of the property purportedly sold by the sale agreement in para (a) above.

d) An order compelling the second defendant to reinstate the Deed of Transfer in respect of the late Daniel T Dube.

e) An order of costs against the first defendant.

The issues which the parties agreed to refer to trial were as follows:

1. Whether or not the late Daniel Dube had the mental capacity to enter into an agreement with first defendant.
2. In the event that the late Daniel Dube lacked mental capacity, how much money should be refunded to the first defendant.
3. Whether the court order in case no. HC 6820/11 was properly obtained.

At the beginning of the trial, the plaintiff amplified the issues further and came with the following as an issue;

"2.(a) Was $50 000 paid by first defendant to the deceased?"

The first defendant did not object to this additional issue which is connected to the second issue on the joint PTC Minute. The issue thus became the fourth issue. We thus ended up dealing with four issues during the trial.

The plaintiff, who is the late Daniel Dube's wife as well as the Executor of his estate was the first to testify. She said her husband was an Economist with a degree in Economics from the University of Zimbabwe. She said at the beginning of his career, her husband was a successful businessman. At age 23 he was already a director of some companies and he later set up his own financial institution, Innofin. However, as the economic meltdown in Zimbabwe started, Innofin began to struggle. From 2004, no income was getting to the family from the business and the plaintiff's income was the one covering all family expenses. The late Daniel Dube got stressed. In 2005, he then started saying he was on a spiritual journey. He would fast continuously; get into his study in the morning and stay there till the evening. Then on 25 January, 2006, he left home for work but did not return home at his usual knock off time which was between 5:30pm and 6 p.m. Around 10 pm, the plaintiff rang his office line and the late Daniel Dube said he was in the office working and he was fine. The following day, she received a call from the security personnel at Eastgate who said she had to follow up her husband at Harare Central Police Station.

When she got to Harare Central Police Station she saw her husband dressed in a trousers and jacket but without a shirt, shoes, or socks. He was mumbling to himself. The

police informed her that they had brought in her husband because they had received a report that he was observed removing his clothes at an NMB ATM. She tried to speak to him to find out what had happened and his response was that he had to humiliate himself like Christ did. When she asked the police if she could take him home, the husband refused and said their home was evil. The police then told her that they could not release him into her custody without a doctor's evaluation. Later, a medical doctor, Dr Paul Chimedza who was also a family friend came and convinced the police to release the late Daniel Dube into his custody. The couple proceeded to Dr Chimedza's house and stayed there for two weeks. While they were still at doctor Chimedza's house, the doctor also consulted his colleague Dr Madhombiro who was a Psychiatrist. She said Doctor Madhombiro came to attend to the late Daniel Dube whilst they were still at Dr Chimedza'a house. His diagnosis was that the deceased had had a mental breakdown. He prescribed some medication, but the deceased refused to take it. He asked the deceased to call at his offices for review but the deceased refused to go. Eventually, the couple left for their own home.

Her evidence was that the deceased's mental condition did not improve. Some of the abnormal behaviour she observed was his refusal to eat or drink and seeing everything as evil. He broke his glasses and said they were evil. At one point he hired a taxi from town to his house when he had no money to pay; at other occasions he would fill up his car with fuel when he had no money to pay. He stopped paying all bills till they got a final demand on their mortgage which she had to clear. He stopped going to work and eventually Innofin closed down.

She said between 2006 and 2008, he could wake up in the middle of the night, beating up the air and would ask the plaintiff if she could not see the soldiers. He would pull out posters and burn them, and burn clothes. He would stop workers from doing their work and call them to hear him preach. He would open windows during the night and ask the plaintiff if she could not see the people outside. He would take long walks alone, saying he was talking to God. He would even twist his pyjamas, saying they were evil. The plaintiff's testimony was that she began to get scared of sleeping with him. She feared that in that state of mind, he could just get up and strangle her during the night.

She said since he refused treatment, she sought intervention from his family; to no avail. Her evidence was that initially, they believed that there was nothing wrong with him; it was just the spiritual journey he was telling them about. She said she sought professional counselling and that is where she was told about the tough love programme and that she

should write a letter to the deceased, giving him conditions to restore their relationship. That did not help. She said eventually, her own family decided to take her back from the matrimonial home after accusing the Dubes of not doing anything to help the situation. This was in 2008. She said she did not leave the matrimonial home right away.

In March, 2009, the plaintiff said she got a job in Mozambique and she left for Mozambique with her daughter while the deceased remained at the matrimonial home.

She testified that sometime after her departure for Mozambique, the deceased left the matrimonial home and went to live with his parents at number 20 Clovelly Road, Chadcombe. That is when his parents accepted that he was ill; when he started living with them and was burning things saying they were evil. The plaintiff said she would visit the deceased even at Chadcombe, but there was no improvement in his condition. He would act like he was talking to many people and he had lost weight. Her testimony was that in 2011, he no longer wanted to see them. He would tell people to tell her that he was not at home. Her evidence was that without medical treatment, he never improved which means that at the time the contract of 20 May, 2011 was concluded, he did not have the mental capacity to conclude a reasonable contract.

The next witness was Dr Paul Chimedza. Dr Chimedza described the late Daniel Dube as an astitute person and one of the leading economists in the country during his prime. He said at age 23, he became a Managing Director at Bard. He said there was nothing unusual about Daniel Dube's behaviour till 26 January, 2006 when he received a call from his wife while at Harare Central Police Station, telling him that the deceased had been arrested for public indecency because he had undressed at an ATM in town. He said he rushed there and when he got there, he observed that his behaviour was delusional and he was saying things which did not make sense. He was saying God had told him to remove his clothes and that nothing mattered anymore because the world was coming to an end. He said he looked dirty and unkempt for a man of his stature. He said he persuaded the police to release him into his custody for treatment and eventually they agreed and he took him and his wife to his house and tried to help.

While he was at his house, he observed his mood swings; one moment he would be very elated and enthusiastic and the next moment, he would be depressed and would cry. He would read the Bible continuously. At other times he looked angry and irritable and would lock himself in his room and stay there. Dr Chimedza said his opinion as a Doctor was that he

had a bio polar disease, swinging between mania and depression. He felt he needed to see a psychiatrist because he was exhibiting signs of mental illness.

His evidence was that he refused to be taken to a psychiatrist. Dr Chimedza still looked for a psychiatrist and he engaged Dr Madhombiro who agreed to go and see the deceased while he was still at Dr Chimedza's house. He said Dr Madhombiro came, saw the deceased and prescribed some medicine but the deceased refused to take the medicine, saying he did not need any treatment because he was following God's will. After two weeks the couple left his house but his testimony was that he continued to interact with the deceased and that on several occasions he would ask for some money from him. He said he continued to tell him to get treated till the late Dube started avoiding him.

The third witness for the plaintiff was Dr Madhombiro. He said he agreed to see the deceased at Dr Chimedza'a house. When he got there, he observed that the deceased was unkempt, held on to his Bible and his talk had a religious flavour. He was talking too much. One moment he would be elated and the next moment he would be sad and cry. He said it was clear he did not want to see a psychiatrist. As far as he was concerned, he was not ill. His testimony was that the refusal to be treated was an indication that he lacked insight. He had a problem, but he did not realise he had a problem. His diagnosis was that the deceased had psychosis's meaning he was out of touch with reality. He said the deceased did not come to his rooms for review after this visit.

Dr Madhombiro said he first saw the deceased in 2006 at Dr Chimedza'a house. Then he saw him again on 5 December, 2011 after he was referred by Dr Lunga. His diagnosis of the deceased's condition in 2011 was that he was suffering from organic mental disorder, which was definite brain damage. He was not eating and he was not sleeping. He said people with such a condition lack insight. They do not know what is wrong; they will not admit that there is a problem and they will refuse to take medication. His testimony was that if a psychiatric patient is not treated, the psychosis will not go away. He said even if the patient is on treatment, there are still residual symptoms. He said such people do not recover. He said the deceased case was worse because he declined treatment and never returned for review. After being advised that the cause of death for the deceased was a kidney ailment and not mental illness, he said that is consistent with the deceased's illness because the body is one and if one is not eating and sleeping, that leads to other breakdowns of the body so most likely his kidneys were damaged as a consequence of the mental illness.

The fifth witness for the plaintiff was Alfred Muungani. Alfred's evidence was that he was acquainted with both the deceased and his wife. He had regarded the deceased as his role model and followed his business programmes on television and in the newspapers. He had known him from High School in 1996. He said up to 2005, there was nothing unusual about the late Daniel Dube's behaviour. Then in January, 2006, he received a report from the plaintiff about his suspected mental illness. He even saw his picture in the paper about the stripping incident although his name was not disclosed. He said he visited him at his home about a month after the stripping incident. He said he was shocked when he saw him. He had lost weight; he was talking to himself and was making hand gestures. He denied being ill and said he was fasting. He said thereafter, the deceased would visit him at his office, and ask for money. This was between 2006 and 2010. Sometimes he would ask for transport or for snickers and T-shirts. He would ask him to take him to Jameson Hotel. He said at one time, he said he had a meeting at Jameson Hotel and when they got there, they had breakfast and after the meal, he had no money to pay. The witness ended up paying. He dressed inappropriately. At other times the witness would find him waiting for him at his work place. He would get there by a hired taxi and fail to pay the fare. The witness said in 2011 he was worse. He was still pestering him for money and at times he sounded desperate. Her asked for $5 000 to go to Nigeria and Israel to be prayed for. Another time, the witness said he accompanied him to First Capital Plus where he wanted to get a $5 000 loan for the trip to Nigeria and Israel. He asked him to assist him to apply for the loan, saying he had eyesight challenges. The loan application was unsuccessful.

His evidence was that if you spent five minutes with the deceased; you would realise that he was not well. He said he had interacted with the deceased a lot in the last quarter of 2011. He would visit him at his workplace and he would then drive him to his parents' home in Chadcombe.

Innocent Vusimuzi Dube also testified for the plaintiff. He lived in Chadcombe with his grandparents. The deceased was his paternal uncle. He said the deceased's parents were of advanced age. The father was 92 and suffering from dementia while the mother was 88 and also suffering from dementia. He said the deceased's health deteriorated, but it was not easily visible around 2006. They only realised the problem when he left his home and joined them in Chadcombe. He said the deceased would burn his clothes, saying they were evil. He said in 2009, in Chadcombe he took clay pots and wooden rods at number 20 Clovely, and burnt them, saying they were evil. He said the plaintiff would bring him groceries and clothes and

he would take them all and burn them. He said the deceased denied being ill. He said God was talking to him. He said he was very convincing when he made those denials. He would use hand gestures when talking. Then sometimes he would cry but he would not tell you why. During cross examination, the witness said he was aware of an incident when the deceased stayed for two weeks in Meikles Hotel with his brother Mike, but could not pay the bill. He said that was between 2010 and 2011. Innocent V. Dube was the last witness for the plaintiff.

The first defendant testified. His evidence was that around September to October, 2010, he met the deceased after a burglary case at No. 11 Scanlen Drive. He said their relationship later grew as they exchanged personal information about their lives. He said eventually, the deceased offered the first defendant accommodation at No. 11 Scanlen Drive. In lieu of rentals, the first defendant was to pay rates and ZESA bills which had accumulated to over $10 000-00. They did a lease agreement which both parties signed. He said later, the deceased offered him the first option to buy the house. He said the initial price he charged was US$120 000-00. The first defendant said he could not afford US$120 000-00. He said he reduced the purchase price toUS$80 000-00. He said later, the sale price was reduced to US$50 000-00 in view of the clearance of the rates which had been over US$10 000-00. He said he got a loan and paid all the money owing and deceased prepared an acknowledgment note which he signed. He said at no time did the deceased exhibit mental instability.

The witness said the police were led to No. 11 Scanlen Drive by the accused persons they had arrested after a series of burglaries in the Borrowdale/Highlands area. The accused persons admitted the charges and then led the police to all the homes they had burgled. When they got to No. 11 Scanlen Drive in Highlands they were surprised to find no one at home. They picked a diary in the garage and saw some phone number which they rang and they were told that the owner of the house was at No 20 Clovelly Road Chadcombe. He said he was not the investigating officer so he is not the one who interviewed him. He said the offer to live at No. 11 Scanlen Drive was communicated through the investigating officer, one Hute Pasi. He said his initial reaction was that he could not afford to rent a low density property, then the deceased said all he had to do was to clear the utility bills. He said arrears were around $9 000-00 and he paid $200-00 monthly for both electricity and water. The lease agreement was signed on 30 December 2010 and was effective from 1 January 2011. He said he interacted with the deceased a lot. They would go to Sam Levy and have meals there. He said he had a dedicated taxi driver who used to take him home. The witness said following the separation with his wife the deceased regarded women as evil.

On how the sale offer arose, he said on 10 April 2011, the deceased asked to meet him and his wife and they met at Brownte Hotel and made the offer. He said they met again and had lunch at Ambassador Hotel and he asked what price first defendant was offering. He indicated that he had reduced the price to $80 000-00, but the first defendant still said he could not afford it. He said they met for the third time and that is when he reduced the price to US$50 000-00. He said he asked him for $1 000-00 which was paid right away. On 20 May 2011 the sale agreement was reduced to writing by Messrs Chinyama & Partners. He said the first defendant led him to them, saying they were his lawyers and they would do the conveyancing. He however, later admitted to a friendship with Mr Chinyama. "Chinyama would not have allowed me to get into an agreement where I would fall victim," he said. He said later, the deceased prepared an acknowledgment of payment and confirmation of receipt of title deeds, at first defendant's request.

The first defendant said he applied for a loan of US$80 000-00, and got it. The witness also confirmed getting a visit from Peter Gundani, the deceased, the deceased's mother and deceased's father around 5 December, 2011. He said on that visit, the deceased openly told his parents that he had sold the property to him. He said the deceased's father objected, saying he could not have done that, because the property belonged to him.

The first defendant's evidence about Nickson Chabvunda was that he was hired by the deceased as a guard. He worked elsewhere during day time but would come and sleep at the deceased's place in the cottage as a caretaker or guard. He said before the sale was concluded, Nickson took instructions from the deceased.

On service of the court application to compel transfer, the first defendant's evidence was that he knew that the deceased was served because he had asked him why he was taking him to court when he went to pick him up from the airport on his return from South Africa. He confirmed that the first defendant was in South Africa when the court application to compel transfer was done.

On payment of the purchase price, he admitted that payment was not in terms of the agreement of sale and that no written variation of the agreement was ever made. He confirmed that there were no bank records showing the movement of funds from the purchaser to the seller, all he had was the handwritten acknowledgement prepared and signed by the deceased. He said $5 000.00 cash was paid to the deceased at Mr Chinyama's offices in Mr Chinyama's presence.

On the value of No. 11 Scanlen Drive, he admitted that he did not seek another valuation. He also admitted that the only medical evidence available about deceased's mental condition was from Dr Chimedza and Dr Madhombiro. He admitted he had not sought any other medical evidence to refute what the two doctors who testified said about the deceased's mental condition.

Itai Munyeza, the Managing Director of More Finance, also testified. His career history was all in financial institutions: 1990 UDC; 1997 to 2002, Leasing Company of Zimbabwe, 2003 to 2009, Kingdom Bank and 2010 to 2015, First Capital Plus. First Capital Plus later changed its name to More Finance. He confirmed giving the first defendant a loan of US$80 000-00 after using deceased's property as collateral security. He did not recall the agreement of sale and its terms. He said although the loan agreement said no interest shall be payable on the loan in para 2.1., interest had already been paid up front. He confirmed that there were no witnesses to the first defendant's signature on the agreement.

He said they paid the loan in cash, some of it to the deceased and the balance to the first defendant. In his evidence in chief, he did not indicate how much was paid to the deceased. He confirmed that he had no bank record to indicate the payment to the deceased. During cross examination, he said the first defendant received some of the money and told them to give the balance to the deceased.

He confirmed that deceased also approached them for a loan, but his application was not successful.

The last witness was Charles Chinyama, a legal practitioner of 17 years experience at the time of the trial. He said he knew the first defendant prior to this transaction and he had developed a friendship with him over the years. He said he did not know the deceased prior to this. He said both the first defendant and the deceased approached him and asked him to act on their behalf. He said his client was first defendant, deceased just got involved since they were going to split the legal bill between them. When he was reminded that in terms of the agreement, the first defendant was responsible for legal fees, he said then it meant the first defendant was his client, and not the deceased. "I thought they were both my clients, but from what you are telling me, he was not my client," said Mr Chinyama. When he was reminded that he was appointed conveyancer by the seller, who was the deceased, he said, then it meant the deceased was his client. He said he later opted to act for the first defendant against the deceased in the court application to compel transfer. He said he did not advise the deceased that he was now opting to act for the first defendant against him. On the application to

compel transfer, initially he said he is not litigation happy, he normally waits 3 to 4 months before taking clients to court, but he conceded that in this instance, he took the deceased to court in less than a month and not after the three or four months he had referred to earlier. He confirmed that the deceased was in South Africa when the court application to compel transfer was made.

On service of the application on the deceased, Mr Chinyama said for him to serve him there, there must have been a variation of the address of service. He conceded that if there was such a variation, it ought to have been in writing and he ought to have attached it to his papers. He conceded that the certificate of service of the court application did not indicate the address where it was served.

On payment of the purchase price, he said a portion of it was paid in his office. He however said he was not physically present when the deceased was paid.

During his testimony, Mr Chinyama asked why Daniel Dube was being referred to as the deceased. When he was told that it was because he had died; he said he was not aware of that. When he was referred to affidavits he deposed to in 2013, which indicated that he knew about the death of the deceased, he said his memory had lapsed. His evidence was that when he attended to the transfer of the property, he did not know that the deceased had died. He said if he had known, he would have had to stop the transfer until an executor had been appointed.

> "Plaintiff's Council (PC): So you agree that the transfer was contrary to s 44 of the Deceased Estates Act?
>
> Witness: (W): I do not deny that. If I had known, I would have stopped it.
> P/C: So such transfer was invalid?
> W: As an officer of this court, I have to agree. It was invalid"

Mr Chinyama conceded that there was no proof that the court order to compel transfer was served on the deceased.

> "PC: Turn to page 33 of the record. Did you ever bring this order to the attention of the deceased?
> W: I cannot remember.
> PC: There is no proof that it was served on the deceased? You agree that on the face of it, there is nothing to show that Dube was served? No proof that this order was ever served on the deceased?
> W: I cannot dispute that
> PC: You agree that Mandimutsira, if he did not serve the document, was acting improperly?
> W: It was wrong, consciously, or unconsciously."

The above is a summary of the oral evidence which was led during the trial. What follows is an analysis of the evidence in relation to the issues for determination.

1. Whether or not the late Daniel Dube had the mental capacity to enter into an agreement with the defendant.

In the case of *Executive Hotel (Pvt) Ltd* v *Bennet N.O* 2007 (1) ZLR 343 (S), the Supreme Court held that the issue of whether the deceased had the requisite mental capacity at the time of signing the agreement of sale was a question of fact, to be decided by the court.

Indeed, that is the correct approach. We have a deceased with a history of mental illness testified to by the wife who lived with him as having occurred from January, 2006 to 2009 when she left for Mozambique and for which he refused treatment. His nephew, who lived with him from when he moved to Chadcombe in 2009 to when he died, confirms this illness from when the deceased moved to number 20 Clovelly Drive, Chadcombe. The manifestations of the illness were the same as the wife had told us. Hitting the air, talking to himself, burning clothes and burning other items and labelling them evil. Refusing treatment and denying being sick, saying I am talking to God. The wife lived with him continuously from 2006 to 2009 when she left the matrimonial home. The nephew lived with him from 2009 when he moved to Chadcombe to 3 July, 2012 when he died.

There is also a business colleague and family friend, Alfred Muungani, who interacted with him from 2006 to 2011. The manifestations of the illness through this friend and business colleague were his requests for money; his frequent visits to hotels and failure to pay the hotel and the change in his physical appearance from the man he took as a role model previously. In addition to this was Dr Chimedza who interacted with him from 2006 when the illness first manifested itself and right up to his death. His evidence was that he kept on telling him to get treatment, but he refused. But Dr Chimedza did not give up because the evidence shows that he is the one who got him into Parirenyatwa where he eventually died of a kidney ailment on 3 July, 2012.

Dr Madhombiro also gave expert evidence on the deceased's mental condition when he saw him first in 2006 and later on 5 December, 2011. His testimony was that in December, 2011, he had deteriorated. His testimony was that he did not get treated in 2006 and he did not get treated in 2011 because he never followed up on treatment and reviews. He said the condition never gets better if not treated, even if its treated, there are always some residual symptoms. He said the illness does not disappear, it is just managed through treatment. He

said his behaviour was in line with the mental illness. He said such people lack insight; they do not realise they have a problem.

No other expert medical evidence was called to refute Dr Madhombiro's evidence, so the court will accept his evidence as correct. He remained unshaken under cross – examination about the 5 December, 2011 visit by the deceased. He said his records revealed that the deceased visited his surgery on 5 December, 2011 in the company of a woman whom he thought was his wife. As pointed out in *Executive Hotel* v *Bennett supra* "it was expert evidence which had not been challenged. No other expert evidence had been introduced to cast doubt on its veracity."

It is highly improbable that a man who manifested a mental illness in 2006 to 2011; which was never treated as borne out by the evidence above and a mental illness which made him lack insight, would have the mental capacity to conclude a reasonable agreement of sale for the sale of a house. It is clear from the evidence referred to above that while the deceased may have physically participated in conclusion of the agreement, he obviously lacked in sight as a result of his mental illness. That is why the Agreement of Sale itself does not make sense in that a house valued on the market for $230 000-00 was sold for $50 000-00 only. No other value was given for the property besides the value of $230 000-00. So the court accepts $230 000-00 as the correct market value at the relevant time.

It is clear from the evidence throughout the trial that the deceased was a person in need of money; that is why he kept asking for money from others and loans from banks. If his mental capacity had not been impaired by his illness, he would have sold his house at market value in order to realise more money and solve his financial problems.

Even the first defendant's own evidence confirms that there was something wrong. They were led to deceased's house in Borrowdale by burglars, only to find that there was absolutely no one at home. In his evidence he said they were surprised to find no one home. That is not normal behaviour. If deceased's mental faculties were functioning properly, he would not have moved to Chadcombe, leaving his valuable property unattended. A person with a sound mind could have obtained Estate Agents to rent it out, to get the money he needed; or at worst he would have sought the services of a caretaker or guard. He did not do so, because he lacked insight as Dr Madhombiro said.

The first defendant tried to argue that he was not aware of the mental illness. In fact, he said all the people who testified for him were not aware of the illness because the deceased sounded very intelligent and convincing. These submissions do not help him at all once it is

clear that he lacked the mental capacity to conclude a contract. As highlighted by Christie in *The Law of Contract In South Africa*, p 293;

> "…. The contract is void *ab initio* and it therefore makes no difference whether the other party did, or did not know of the first party's mental illness."

This means that ownership of the property in dispute did not pass to the first defendant. As Christie highlighted on p 293 above;

> "……. Because the contract is void, not merely voidable at the instance of the insane person or his curator, there can be no question of ratification, and all the other consequences of a void contract follow; for instance if the contract was a purported sale, ownership would not pass….."

2. Was $50 000-00 paid by the first defendant to the deceased?

On payment, as can be gleaned from the narrated evidence, there are no financial records which show the movement of money from the first defendant to the deceased. There is also no receipt to confirm the receipt of any cash. All we have is a handwritten acknowledgment allegedly written by this person who lacked insight. I say allegedly because there was no conclusive evidence to show that deceased wrote the acknowledgment in the form of a handwriting expert.

This case involved the first defendant, a senior police officer, as buyer. He knew everything about the need for evidence to prove payment from his profession as a police officer. He also had a senior lawyer representing him. The senior lawyer actually said part of the payment was done in his office; yet there is no proof in the form of a receipt or a formal acknowledgment from the law office. In addition the first defendant and Mr Chinyama, the lawyer contradicted each other. The first defendant said an amount of $5 000-00 was paid at Chinyama's offices, in Chinyama's presence yet Chinyama himself said he was not present when the payment was made. Why the contradiction if in fact the money was paid?

Then there was a financial institution represented by its experienced Managing Director. He told the court that they had no record of paying the deceased and he himself did not actually know how much they paid the deceased. So the senior police officer, senior lawyer and senior financier could not show the court any proof that the deceased was paid $50 000-00.

The alleged payment was also in breach of the written contract, and there was no written variation of the contract to show that the payment modalities had been varied. Yet the contract provided that any variation of the contract was to be in writing. The method of payment stated in the contract was as follows:

"2. Payment Terms

a) USD 1,000 (One thousand United States dollars) has already been paid to the seller.
b) A commitment fee of USD 3,000 (Three thousand United States dollars) payable upon signature hereof.
c) A cash deposit of USD 6,000(Six thousand United States Dollars only) to be made immediately upon confirmation of the status of the Mortgage Bond endorsed on Deed of Transfer No. 6366/2000 with Wintertons Legal Practitioners.
d) The balance of USD 40.000 (Forty thousand United States dollars) to be paid in three instalments to be made as follows;
   (i) USD 15, 000 (Fifteen thousand United States Dollars within 30 (Thirty) calendar days from the date of signature hereof.
   (ii) USD 15, 000 (Fifteen thousand United States Dollars within 60 (sixty) calendar days from the date of signature hereof.
   (iii) USD 10, 000 (ten thousand United States Dollars within 90 (ninety) calendar days from date of signature hereof)
e) The fees for preparation of this agreement of sale shall be borne by the Purchaser."

The above method of payment given in the agreement was not followed; neither was it varied in writing; yet there was a lawyer involved who knew the implications of not putting variations to a contract in writing.

The court has no basis therefore, to make a finding that the deceased was paid $50 000 for the house in dispute. Court decisions are based on the evidence submitted to the court and in this case no evidence of payment of $50 000-00 was submitted to the court. Therefore the first defendant's claim to have paid $50 000-00 to the deceased for the house cannot be accepted.

2(b) <u>In the event that the late Daniel Dube lacked mental capacity, how much money should be refunded to the first defendant?</u>

This issue falls away because of the finding that $50 000-00 was not paid to the deceased for the house.

3. <u>Whether the court order in case no. HC 6820/11 was properly obtained</u>

The order in case No. HC 6820/11 was given in default. After going through the evidence adduced during the trial, it is clear that the order was not properly obtained.

The deceased's address of service on the agreement of sale was 20 Clovelly Road, Chadcombe, where he was based when he met the first defendant. The first defendant is the

one who was based at no. 11 Scanlen Drive. There was no legal basis for the first defendant and his lawyers to serve the court application at the first defendant's address. The plaintiff's accusation that this was a deliberate ploy to ensure that the deceased and his family did not see the court application therefore has some merit.

In addition, both the first defendant and Mr *Chinyama* testified that when they filed the court application, the deceased was in South Africa. This means he was not aware of what was going on in Zimbabwe. The fact that service was improperly done at No. 11 Scanlen Drive made it impossible for him and his entire family to know what was going on. Even after obtaining the court order, Mr Chinyama conceded that there is nothing to show that the deceased was made aware of the Court Order. The deceased may have gone to his grave without knowing about the order to compel transfer.

The first defendant sought to rely on an alleged person named Nickson Chabvunda, but no proof was given to the court to show that this Nickson actually exists. It is clear from the evidence that when No. 11 Scanlen was broken into, there was no one at home. When the police got there, there was still no one at home. A diary led them to some phone number which eventually led them to No. 20 Clovely Chadcombe. So it is common cause that there was no gardener/caretaker or guard at that address during that time.

Soon after the burglary, it is common cause that the first defendant moved in to look after the property. So why would a gardener/caretaker/guard have been recruited by the deceased at that stage? The person who could have recruited such a person was the first defendant, and not the deceased.

There are just too many contradictions in the Nickson story. The first defendant's evidence was that before the sale was concluded, Nickson took instructions from the deceased. We know for a fact that the application to compel transfer was after the sale had been concluded, with transfer being the only issue outstanding. If we take the first defendants evidence, it means at that stage Nickson was taking instructions from the first defendant. Nickson's affidavit and that of Webster Mandimutsira said service was effected on 14 July 2012; yet we know that the deceased had already died by then.

The first defendant also said Nickson just came to sleep in the cottage as guard, during the day he would work somewhere else. And the first defendant conceded that any service of process on Nickson had to be during the day and not at night. This means Nickson could not have been served at all since during the day he would be away from No. 11 Scanlen Drive, working, elsewhere.

To make matters worse, neither Nickson nor Webster Mandimutsira were available to testify. The court was told that Nickson could not be found, while Webster was said to have died.

Even the allegation of a clerk ringing the deceased, in South Africa, to check where he was is highly improbable. The usual thing is for a clerk to simply proceed to the address for service and effect service. There is no reason to ring the other party to litigation.

As correctly pointed out in Herbestein and Winsen's *The Civil Practice of the Supreme Court of South Africa*, 4th edition, at p 690 – 692:

> "A final judgment, being *res judicata* is not easily set aside, but the court will do so on various grounds; such as fraud, discovery of new documents, error or procedural irregularity."

In *Mutare City* v *Mawoyo* 1995 (1) ZLR 258 the court stated as follows:

> "A final judgment may only be set aside if it was obtained as a result of fraudulent misrepresentation."

In my view, serving the deceased at the first defendant's address instead of his chosen *domicilium,* and using such service to obtain a default judgment was a fraudulent misrepresentation to the court that gave the default order.

If the court had been made aware that in fact service was on first defendants address for service and not on the deceased's chosen and known *domicilium*, it would not have granted the default order.

There is also the issue of conflict of interest on the lawyer's part. He purported to be representing the seller by being the conveyancer, yet he was acting against his official client in favour of his friend, the first defendant. The same lawyer who ought to have alerted the deceased about the lack of service was acting against the deceased, in common purpose with the purchaser. Instead of protecting the seller's interest, that lawyer is the one whose clerk changed the address of service as it were and confirmed having served at the wrong address; alleging that this was what the deceased had said. Yet we know deceased could not have spoken to the clerk as he was out of reach in South Africa. No wonder the clerk's affidavit says he served on 14 July, 2012 long after the deceased had died. This is because no service was ever done!

In terms of r 42C of the High Court Rules, an address for service may be changed by the delivery of notice of a new address for service. No such notice was ever given by the

deceased and indeed, the first defendant concedes that the address of service was not changed.

Since the basis of obtaining the Court Order in case number HC 6820/11 was that deceased, having been properly served, decided not to defend, the order was not properly obtained because we now know that the deceased was never served. He was not at number 11 Scanlen Drive; he was actually out of the country. The alleged server of process and the alleged receiver who both did not come to testify orally, both gave 14 July, 2012 as the date of service in their affidavits; thus confirming that there was no service at the time of the Court Application.

In addition to all the above issues there was the aspect of complying with the Administration of Estates Act, [*Chapter 6:01*], s 44 after the deceased death.

Section 44 of the Administration of Estates Act; [*Chapter 6:01*], provides as follows:

"44:

(1) "No person who has obtained the judgment of any court against any deceased person in his lifetime, or against his executor in any suit or action commenced against such executor, or which, having been pending against the deceased at the time of his death, has thereafter been continued against the executor of such person, may sue out or obtain any, process in execution of any such judgment before the expiration of the period notified in the Gazetted in the manner in this Act provided.

(2) No such person shall sue out and obtain any process in execution of any such judgment without first obtaining an order from the court or some Judge therefore for the issue of such process."

It is clear that the intention of the legislature in crafting section 44 of the Administration of Estates Act was to enhance transparency when dealing with deceased estates for the simple reason that the deceased will no longer be there to defend the estate or clarify issues. The first defendant did not bother to comply with these sections. And this is a defendant who is a senior police officer, who cannot claim to have been ignorant of how deceased estates are handled. Even the fast pace at when the property got transferred after the deceased's death is suspicious.

The order compelling transfer was given on 31 August, 2011. Nothing happened for almost a year thereafter. The deceased then died on 3 July, 2012. On 11 July, a deeds search on behalf of the plaintiff revealed that the property was still in the deceased's name. On that very day, 11 July 2012, Mr Chinyama was given the Power of Attorney to pass transfer by the Deputy Sheriff. On 17 July, 2012 the plaintiff wrote to the second defendants, requesting placement of an XN caveat on the property. The second defendant said he could only place

an XN Caveat if the plaintiff had a Court Order to that effect. The following day, On 18 July, before the plaintiff could have obtained a court order, the property was transferred to the first defendant.

During evidence, Mr Chinyama conceded that s 44 of the Administration of Estates Act was not complied with. He said if he had known that the deceased had died, he would not have proceeded with the transfer until an executor was appointed. The relevant part of his evidence reads as follows:

> "The plaintiff's Counsel (P/C) : So you agree that transfer was contrary to s 44 of the Administration of Estates Act?
> Witness (W) : I do not deny that. If I had known I would have stopped it.
> P/C : So such transfer was invalid?
> Witness: As an officer of this court, I have to agree. It was invalid."

In conclusion, in view of the deceased's mental incapacity, all acts which resulted from the void contract of sale were also null and void.

Accordingly, it is ordered that:

1. The agreement of sale between Robert Matoka and the late Daniel Tembinkosi Dube of 20 May, 2011 be and is hereby declared null and void and is set aside.
2. The order granted in HC 6820/11 of 31 August, 2011 be and is hereby rescinded.
3. The transfer of Stand 106 Quinnington Township of Subdivision K of Quinnington of Borrowdale Estate measuring 8397 square metres held by Daniel Dube under Deed of Transfer No. 6366/00 dated 11 July, 2 000, to Robert Matoka on 18 July, 2012, be and is hereby declared null and void and set aside.
4. The second defendant be and is hereby ordered to reinstate the Deed of Transfer in favour of Daniel Dube for Stand 106 Quinnington Township, Deed of Transfer No. 6366/00 of 11 July 2 000 within 30 days from the date of this order.
5. The first defendant shall pay the costs of suit.

Honey & Blanckenberg, plaintiff's legal practitioners
Mbidzo Muchadehama & Makoni, 1st respondent's legal practitioners