

TENDAI CHAKAIPA
(in his capacity as Executor Dative of the Estate of the late Stanford Beaton Chunga)
versus
PHILIP NHERERA
and
SABINA NHERERA
and
ADRIAN TULANI CHUNGA
and
MASTER OF THE HIGH COURT OF ZIMBABWE

HIGH COURT OF ZIMBABWE
MAMBARA J
HARARE; 27 February and 7 March 2025

Opposed Application

M Chasakara, for the applicant
T L Mapuranga, for the 1st respondent

MAMBARA J: This matter comes before the Court on the application for a declaratory order and an order in *rei vindicatio* filed by the Applicant, Tendai Chakaipa, in his capacity as Executor Dative of the Estate of the late Stanford Beaton Chunga. The Applicant seeks first a declaration that the agreement of sale dated 14 December 2016—purporting to effect the alienation of certain subdivisions of the estate—is *void ab initio*, and secondly, as ancillary relief, an order in *rei vindicatio* directing the repossession of the disputed land parcels from the first and second Respondents. The underlying dispute concerns whether the purported sale effected by the 3rd Respondent, who was at the time a beneficiary of the estate, was legally effective in alienating estate property without the requisite authority.

The Applicant's submission is premised on the proposition that the purported sale is void because it was effected without the necessary legal capacity and proper authority, in light of the statutory and common law requirements that govern the alienation of estate property. It is averred that the third respondent did not have the capacity to transfer any estate asset without the express approval of the Master of the High Court of Zimbabwe or the duly appointed Executor Dative. The first respondent, *per contra*, raises *points in limine* and contends that the

history of the matter—marked by repeated negotiations, attempts since 2018 to cancel the agreement, and proposals to resolve the dispute by way of a deed of settlement—unequivocally indicates that the parties were fully aware of the material disputes of fact underlying the transaction. Such factual uncertainties, it is submitted, preclude the possibility of resolving the dispute on the papers without a full trial. Further, the first respondent submits that the estate is estopped from raising *a rei vindicatio* against the respondent because of the previous acts of the deceased executor. Finally, it is submitted that the matter is *lis pendens* because cases HC616/18 and HC 1909/19 are pending and the same relief as in the present matter is being sought.

The Respondents are arguing that there exist serious factual controversies that cannot be resolved through a declaratory application. They emphasize that the matter involves multiple interrelated issues of fact concerning the authority of the third respondent, the proper administration of the estate, and the conflicting narratives regarding the negotiations that took place between the parties. In their submissions, the respondents have drawn particular attention to the fact that the parties themselves engaged in discussions aimed at resolving the dispute, which in turn suggests that the issues are not amenable to summary adjudication. They further rely on the established legal position that where material disputes of fact exist, the inherent jurisdiction of the Court in vindicatory matters is not a substitute for a full trial.

In addressing this matter, it is necessary to consider the nature of declaratory relief and the vindicatory remedy within the framework of both statutory and common law. Declaratory relief is an equitable remedy intended to provide a judicial determination of rights and obligations without necessarily ordering any direct enforcement. However, its appropriateness is circumscribed by the need for a clear and uncontested factual matrix. As established in *Zimbabwe Educational Scientific Social and Cultural Workers Union v Claud Kaharo* HH 222/11 where the court held that a declaratory order is not appropriate where factual disputes leave the Court “riddled with doubt and uncertainty.” In that case the Court was particularly clear that the inherent jurisdiction to determine vindicatory claims under common law must be exercised with caution, and only in instances where the issues of fact are beyond dispute.

Similarly, in the South African decision of *Soffiantini v Mould*, 1956 (4) SA 150 (ED) at 154, it was emphatically held that summary relief is inappropriate when the facts are contested to the extent that the Court is left with no “ready answer” from the affidavits before it. This principle was further reiterated in *Masukusa v National Foods Limited & Anor*, 1983

(1) ZLR 233 at 234, where the Court underscored that the declaratory process is not a vehicle for circumventing the evidentiary stage in the presence of significant factual disputes.

The applicant's case, as it now stands, is undermined by a lack of clarity on the factual basis for the purported sale. At the time of the alleged sale, the third respondent, though a beneficiary of the estate, did not have the requisite authority to alienate any part of the estate property. The proper administration of the estate falls within the exclusive prerogative of the Master of the High Court and the duly appointed Executor Dative. The existence of a formal subdivision permit and the subsequent registration of the estate with the Master of the High Court under DR No. 3174/2023 are indicative of the legal formalities that govern the disposition of estate assets. Accordingly, the alleged sale agreement dated 14 December 2016 is fundamentally flawed because it purports to effect the transfer of property without adhering to these statutory and procedural requirements.

Furthermore, the historical context of the dispute cannot be ignored. Since 2018, there have been multiple attempts to cancel the purported sale agreement and to resolve the matter through a deed of settlement. Such attempts are indicative not only of the underlying material disputes but also of the parties' recognition that the issues at hand are too complex to be resolved by a mere declaratory order. In effect, the repeated negotiations and the divergent positions adopted by the parties serve as a testament to the fact that there are genuine, material disputes of fact that require a full trial before a definitive resolution can be reached.

In considering the respondents' submissions, it is instructive to note the detailed analysis in the decision of *Grain Marketing Board v Albert Mandizha*, HH 14/16, where the Court observed that "a material dispute of fact arises when the averments made in an affidavit have a direct bearing on the outcome of the matter yet leave the Court with no ready answer in the absence of further evidence." This observation is particularly applicable to the present case. The conflicting accounts regarding the authority of the 3rd Respondent, the conduct of negotiations, and the subsequent proposals for a deed of settlement collectively indicate that the factual matrix is unsettled. The fact that both the Applicant and the third respondent participated in discussions aimed at resolving the dispute further complicates the issue. It is evident that the dispute is not merely a technical issue but rather a substantive matter that implicates fundamental questions about the proper administration of the estate and the exercise of the Executor Dative's authority.

The legal implications of these factual disputes are significant. Granting a declaratory order in circumstances where the underlying facts are in dispute would not only undermine the inherent judicial process but also risk glossing over issues that have far-reaching implications for the rights of the beneficiaries and the proper management of the estate. The Court's inherent jurisdiction in vindicatory actions, as established in both Zimbabwean and South African jurisprudence, is not intended to serve as a shortcut for resolving disputes that require the full development of evidence at trial. As the case of *Telecel Zimbabwe (Pvt) Ltd v Postal & Telecommunications Regulatory Authority of Zimbabwe (PORTRAZ) & Ors* HH446/15 illustrates, the Court must exercise its discretion in a manner that preserves the integrity of its process and ensures that all factual disputes are given the opportunity to be fully examined. In that case, the Court reiterated that a vindicatory action, being based on common law, cannot be defeated by counterclaims or pending disputes in other fora.

The Applicant's attempt to utilize the declaratory process as a "quick fix" is therefore untenable. A declaratory order is designed to clarify legal rights and obligations where the factual context is clear and uncontested. In the present matter, however, the factual disputes are neither peripheral nor trivial. They strike at the very core of the dispute, including the question of whether the 3rd Respondent had the legal capacity to execute the sale and whether the necessary statutory procedures were observed. It is precisely these material disputes that necessitate a full trial, where evidence can be properly tested and the conflicting narratives can be reconciled.

In light of the foregoing, the Court is compelled to conclude that the application for a declaratory order and an order in *rei vindicatio* must be referred to trial. The applicant's reliance on a summary adjudication procedure in the face of significant and genuine factual disputes is misplaced. The historical attempts to cancel the agreement and to resolve the matter by deed of settlement further underscore that the issues in dispute are complex and require the full benefit of a trial. To allow the matter to be determined on the papers would be to deny the parties the opportunity to have their evidentiary submissions fully scrutinized, and it would risk rendering a judgment that does not reflect the true state of the dispute.

The respondents have persuasively demonstrated that the factual discrepancies are such that no unequivocal decision can be reached without further evidence. It is not for this Court, in a declaratory application, to resolve contentious factual issues that are inherently suited for trial. Instead, the Court's role in such circumstances is to direct that the matter be tried in the

appropriate forum where all disputed facts can be resolved through the presentation of comprehensive evidence.

In reaching this conclusion, the Court is guided by the detailed reasoning in the aforementioned cases. In *Zimbabwe Educational Scientific Social and Cultural Workers Union v Claud Kaharo supra*, the Court emphasized that a declaratory order must not be granted where factual disputes remain unresolved, and in *Grain Marketing Board v Albert Mandizha supra* the Court was explicit in stating that when the parties' averments leave the Court "riddled with doubt and uncertainty," summary relief is not available. Likewise, the South African decision in *Soffiantini v Mould*, 1956 (4) SA 150 (ED) at 154, clearly indicates that the presence of disputed facts that are material to the outcome precludes the issuance of a declaratory judgment.

Moreover, in *Masukusa v National Foods Limited & Anor*, 1983 (1) ZLR 233 at 234, the principle was reiterated that a declaratory judgment may only be granted where the facts are beyond dispute. Here, the multifaceted and interwoven factual issues—ranging from the legal capacity of the third respondent to the conduct of the negotiations and the subsequent proposals for a deed of settlement—make it abundantly clear that a full trial is the only appropriate forum for resolving the dispute.

The Court also considers the implications of allowing a declaratory order to stand in such a complex factual matrix. To do so would be to effectively permit the applicant to bypass the necessary and indispensable process of evidentiary hearing, thereby undermining the fundamental principles of natural justice. The integrity of the judicial process demands that all parties be afforded a full opportunity to present their evidence and to challenge the evidence of their opponents. In this instance, the declaratory process would have deprived the parties of this essential opportunity.

Having considered the submissions of counsel for all parties, the historical context of the dispute, the detailed analysis of the relevant case law, and the inherent deficiencies in the Applicant's case, the Court is satisfied that justice requires that the matter be referred to trial because there are material disputes of fact that cannot be resolved on the papers. Having so found, it is no longer necessary to consider the issue of estoppel and *lis pendens*.

Accordingly, the Court makes the following order:

1. That the matter be and is hereby referred to trial.

2. That the court application shall stand as the summons and the applicant is granted leave to file its declaration within 10 days from the date of this order.
3. That the notices of opposition shall stand as the notices of appearance to defend and the respondents shall file their pleas in terms of the rules.
4. The matter shall thereafter proceed in terms of the rules.
5. Costs shall be costs in the cause.

MAMBARA J:.....

Gunje Legal Practice, applicant's legal practitioners

Lawman Chimuriwo law Chambers, first and second respondents' legal practitioners