FEDERATED PROPERTIES (PRIVATE)

LIMITED

versus

O MASOMERA

(In his capacity as the executor of the Estate

Late Selestino Chada)

and

HARARE MUNICIPALITY

and

MASTER OF THE HIGH COURT

HIGH COURT OF ZIMBABWE

MAKONI J

HARARE, 1 December 2011

**Opposed Matter**

*M Mavhunga*, for the applicant

*S Chatsanga*, for the first respondent

MAKONI J: At the hearing of this matter, I dismissed the application with costs and advised that the reasons will follow later. These are they:

The applicant approached this court seeking an order that the agreement of sale entered into by Miriam Chada (Miriam) acting as Executor of the Estate late Selestino Chada be declared valid, that the second respondent be ordered to effect cession of house number 727 Glen Norah A (“the property”) into the applicant’s name and that the respondents pay costs of suit.

The background to the matter is that upon the death of Selestino one Miriam Chada (Miriam) was appointed executrix of the Estate. She was appointed on 1 May 2008. On 2 and 3 June 2009, Miriam entered into an agreement of sale of the property, with the applicant.

On 24 September 2009 one Ropafadzo Chada (Ropafadzo) instituted proceedings in HC 4474/09, claiming the removal of Miriam as executrix of Estate late Selestino Chada, that a fresh edict meeting be convened for the appointment of a neutral executor, that records DRH 625/08 and DR 521/09 be married together for purposes of the edict meeting and that the first respondent pays costs of the application.

Miriam and Ropafadzo were both married to the late Selestino in terms of the African Marriages Act [*Cap 238*]. They both had children with Selestino.

The basis for Ropafadzo’s application was that Miriam misrepresented facts at the registration of the Estate by excluding her children and herself as beneficiaries of the estate and that she was not acting in the interests of the beneficiaries to the estate. On the day of hearing, the first respondent defaulted and default judgment was entered against her. The current executor was then appointed.

 It is the applicant’s contention that at the time it entered into the agreement of sale with Miriam, she was the duly appointed executor and had authority to represent the estate until that authority was annulled by the court.

The agreement is therefore valid and binding on the estate. The only remedy available to the first respondent would be to sue the previous executor as she is personally liable for her own acts.

The application is opposed on three main grounds. Firstly that the sale of an estate property was made by Miriam in her personal capacity. If it is found that she was selling it on behalf of the estate then she did not have the requisite authority from the third respondent in terms of s 120 of the Administration of Estates Act [*Cap 6*:01] (the Act). Secondly the appointment of Miriam as executrix was fraudulent as she misrepresented the number of surviving spouses and children. Thirdly, she sold the property without the consent of the other surviving spouse, i e Ropafadzo.

It was also further submitted that copy of the agreement of sale does not mention that the property being sold was part of a deceased’s estate. The agreement is silent on whether Miriam was acting in her capacity as Executrix dative.

It is common cause that Miriam was removed as executrix of the Estate on the basis of fraud. This is contained in a court order HC 4474/09 which is extant. Miriam has not taken any steps to challenge that order. In my view, the issue then would be what is the effect of her removal on acts that she conducted during her time as the executrix.

The same issue, among others, came up for determination in this court in *Katirawu* v *Katirawu & Ors* 2007 (2) ZLR 64 (H). In this matter, MAKARAU JP (as she then was) having made a determination that the appointment of the first respondent as executor was procured by fraud she proceeded to remove the first respondent as executor commenting that:

 “for nothing logical can flow from a fraud. His appointment was null and void *ab initio* on account of the fraud. It is as if it was never made. It is nothing and upon which nothing of consequence can hang.”

She then concluded that the rights of the second respondent (“the purchaser”) believed to have purchased and acquired from the first respondent are tainted by the same illegality and amount to nought by token of the same reasoning.

The same fate should befall the agreement of sale between the applicant and Miriam. The appointment of Miriam as Executrix was procured by fraud. It is tainted with illegality and is a nullity. What LORD DENNING said in the *McLoy* v *United Africa Company Limited* (1961) 3 ALL ER 1169 (PC) at 1172 sums it all up:

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more acts, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

Having made the above determination, it is, in my view not necessary to deal with the issue of whether Miriam entered into the agreement in a representative capacity or in her personal capacity and whether she had the requisite authority from the Master of the High Court in terms of s 120 of the Act.

The applicant cannot therefore succeed in the relief that it seeks. I will therefore make the following order:

1. The application is dismissed.
2. The applicant to pay the first respondent’s costs.

*Mavhunga & Sigauke*, applicant’s legal practitioners

*Robinson & Makonyere*, 1st respondent’s legal practitioners