

(1) ISAAC CHIDUKU (2) JOKONIAH CHIDUKU (3) NOREEN
CHIDUKU
v
AMOS CHIDUKU

**SUPREME COURT OF ZIMBABWE
MAKONI JA, MATHONSI JA & MUSAKWA JA
HARARE: 09 MAY 2024**

B. Magogo, for the first, second and third appellants

T. Magwaliba with *C. Madhlave*, for the respondent

MATHONSI JA: This is an appeal against the whole judgment of the High Court (the court *a quo*) delivered on 17 January 2024, in terms of which it declared the respondent the holder of a fifty percent undivided share of certain piece of land in Hartley called Swallowfield of Johannesburg, Norton, measuring 127, 6238 hectares, held under Deed of Transfer Number 5157/99.

The Court *a quo* also declared that the ownership rights held by the respondent were held in his personal capacity and not in trust on behalf of the second and third appellants herein. It granted costs of suit in favour of the respondent.

This Court heard the appeal against the court *a quo*'s judgment lodged by the appellants on 9 May 2024 at the end of which the following order was issued:

"1. The appeal is allowed with costs.

2. The judgment of the court *a quo* in case number HCH 5999/23 be and is hereby set aside and substituted with the following:

- ‘a. the points *in limine* be and are hereby upheld.
- b. the application and counter application are stayed pending the determination of the arbitration proceedings.
- c. costs shall follow the cause.’”

At that stage the court promised to avail the reasons for judgment in due course. What follows hereunder are those reasons.

THE FACTS

The parties to this case, and one Josiah Chiduku who is not part of these proceedings, are siblings, the progeny of the late Tapfumaneyi Mushore Chiduku, who died intestate at Harare on 26 December 1991 and had the presence of mind to leave behind for inheritance by his surviving family, four immovable properties. These properties include what I shall refer to in this judgment as the Norton farm, situated in what is present day Chegutu District. It is that farm which forms the basis of the dispute between the parties.

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By what they christened a Re-Distribution Agreement, signed by the five siblings and their mother Miriam Chiduku (she later passed on) on 27 May 1994, and in the process of winding up the estate of the late Tapfumaneyi Mushore Chiduku, they distributed the estate. The farm was to be transferred to the names of Isaac Chiduku, the first appellant herein, and Amos Chiduku, the respondent herein, to be held “in equal undivided shares, subject to a life usufruct in favour of Miriam Chiduku,” the widow.

Stand 8540 Highfield Township Harare was to go to Jokoniah Chiduku, the second appellant. Stand 1999 Highfield Township Harare was to go to Josiah Chiduku, while

Stand 11821 Salisbury Township commonly known as No 8 Moeketsi Crescent, Beatrice Cottage, Mbare was to go to Noreen Moyo (nee Chiduku), the third appellant herein.

I mention in passing that stand 8540 Highfield Township, Harare was subsequently sold with the authority of the Master of the High Court, to liquidate the debts of the deceased estate. It is not clear from the record what became of the immovable properties other than the farm in respect of which the parties are litigating. Whatever it is that became of those properties falls outside the scope of the present inquiry.

Be that as it may, even though the Norton farm was transferred into the names of first appellant and the respondent on 25 June 1999 by Deed of Transfer NO 5157/99, the five siblings subsequently signed another agreement on 21 September 2021. The preamble to that agreement states in part:

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“WHEREAS after the administration and distribution of other assets of the estate of the late Tapfumaneyi Mushore Chiduku, the immovable property was transferred and was to be held in trust in the joint names of Amos Chiduku and Isaac Chiduku for the benefit of all the estate beneficiaries....”

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In terms of that agreement, the parties agreed that the title holders of the Norton farm would relinquish their title and interest in it to make way for its equal sharing amongst the five of them. Clause 8 of that agreement is an arbitration provision. It reads:

“8. JURISDICTION

The parties have agreed that in the event of a breach or dispute of this agreement the powers to adjudicate upon this agreement shall be in the hands of an arbitrator appointed by the Commercial Arbitration Centre. It is also recorded that either party, may in the event of a dispute, refer the same to the Commercial Arbitration Centre. A single Arbitrator shall preside over the dispute and the seat of arbitration shall be Harare.”

Earlier on, the Norton farm had been the subject of a development contract entered into on 25 April 2018 between the registered title holders and a developer known as Drowack Investments (Pvt) Ltd, for the subdivision of the farm into residential stands for sale. The developer and the Chiduku siblings soon came on a collision course following a series of minuted meetings which established that the developer was in breach of the development contract.

The clash with the developer became a source of conflict between the siblings as the respondent decided to side with the developer and took the view that his siblings were interfering unduly in his relationship with the developer. There was a flurry of litigation in the High Court between the siblings themselves and against the developer over cancellation of the development contract.

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The respondent addressed a letter to his siblings on 12 December 2022 accusing them of teaming up to stall and interrupt the development project at the farm. In that letter he sought to “revoke and withdraw” from the family agreement signed on 21 September 2021. It is significant that, in doing so, the respondent did not disown the agreement on the basis that he had entered into it while in a state of mental incapacity, as he later sought to do.

Quite to the contrary, the respondent exalted the agreement in the opening paragraph of the letter, which reads:

“In good faith and out of magnanimity, myself and Isaac, being the ones with the Norton property in our names, we saw it fit to consider you, our siblings and come up with a Memorandum of Agreement that would accommodate everyone. This meant that all of us (the five siblings) were to benefit from the property that myself and Isaac hold title to, being Swallowfield farm, Norton. We came up with the document of 21 September 2021.”

As litigation between the siblings simmered, the appellants obtained a provisional order against the respondent on 28 December 2023 in HC 8561/22, interdicting him from holding himself out as a holder of a fifty percent undivided share in the farm or unilaterally dealing with the Norton farm.

In July 2023 the appellants invoked the provisions of Clause 8 of the 21 September 2021 agreement by referring the dispute to the Commercial Arbitration Centre. As a result, Mordecai Pilate Mahlangu was appointed to arbitrate the dispute. Correspondence between the arbitrator and the parties shows that the arbitration process commenced as the parties filed statements of claim, the arbitrator fixed his arbitration fee and invited the parties to an arbitration management meeting.

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The respondent would have none of it. Turning a blind eye to the arbitration process, he filed an application on 8 September 2023 for a declaratory order in terms of s 14 of the High Court Act [*Chapter 7:06*]. He sought an order declaring himself the holder of a fifty percent undivided share of the Norton Farm, and that his ownership rights were held in his personal capacity and not in trust on behalf of the second and third appellants.

In his founding affidavit, the respondent stated that the Norton farm devolved to him and the first appellant when the estate of the deceased was wound up. He stated further that, in the exercise of his property rights, he had executed a development contract with Drowack Investments (Pvt) Ltd in April 2018 which contract he co-signed with the first appellant.

The respondent went further to state that he, together with his other four siblings, executed the 21 September 2021 memorandum of agreement whose effect was to give each of them a twenty percent share of the Norton farm. He qualified his execution of the agreement by saying that he did so when his “mental faculties were not in the right place” because, prior to that, he had tested positive to Covid-19 as a result of which he was admitted at a medical institution from 10 to 26 July 2021.

According to the respondent, the effects of the Covid-19 infection were that he did not “comprehend some complex issues.” He posited that he was made to believe that the property was registered in both his name and that of the first appellant in trust for all his siblings “during (his) period of weakness.”

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The respondent added that the first appellant later pitched camp with the other siblings and started interfering with the execution of the development contract thereby stalling progress in the subdivision. He asserted that, having regained his mental faculties, he realised he had been conned and withdrew from, revoked and cancelled the 21 September 2021 agreement. Except that the said agreement did not have a cancellation clause but an arbitration one, in the event of a dispute.

For what he regarded as unlawful and unjustified meddling conduct of his siblings which breached his absolute right of ownership of the Norton Farm, the respondent sought a declaratory order referred to above.

In opposing the application, the appellants drew attention to the fact that, prior to the filing of the application, the dispute had already been referred to arbitration and that

Mordecai Pilate Mahlangu was already seized with the matter. In fact an arbitration management meeting had been set for 27 September 2023. In the appellants' view, the institution of proceedings in the court *a quo* was therefore pre-mature, regard being had to the fact that domestic remedies had not been exhausted. To prove that arbitration proceedings had commenced, a number of e-mails between the arbitrator and the parties were attached showing, *inter alia*, that a meeting was due on 27 September 2023.

On the merits of the matter, the appellants disputed that the 21 September 2021 agreement was executed when the respondent had lost mental capacity. They referred to a subsequent agreement, also signed by the respondent on 13 January 2022, which reiterated that both the respondent and the first appellant held title to the Norton farm "in trust."

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They asserted that the respondent signed the agreement long after he had fully recovered from Covid-19 infection at a time when he was in a sound state of mind and ably assisted by his legal practitioners. The appellants also referred to the letter of 12 December 2022, which is cited above, in which the respondent made it clear that he had executed the agreement "in good faith and out of magnanimity," to debunk the notion that the respondent did not appreciate what he was doing. Accordingly, the appellants held the respondent to the terms of the agreement.

The appellants also filed a counter application seeking a declaratory order that the 21 September 2021 agreement was valid. Opposing the counter application, the respondent maintained his stance that he lacked the requisite mental capacity to contract

owing to the effects of Covid -19 infection. He denied ever holding the half- share of the Norton farm in trust for all the siblings.

At the hearing of the application before the court *a quo*, the appellants took the preliminary point that the respondent had not exhausted domestic remedies. They submitted that, having invoked clause 8 of the agreement by referring the dispute to arbitration, the matter was pending before the arbitrator. The appellants insisted that the matter was *lis pendens* for that reason.

Arguing on the merits, the appellants took the view that the respondent and the first appellant always held the farm in trust and that the 21 September 2021 agreement re-distributed their late father`s estate. In respect of the respondent`s alleged mental incapacity, it was submitted on behalf of the appellants that in two previous court cases, he had not raised that issue at all.

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In dismissing the preliminary point, the court *a quo* stated that no record of the arbitration proceedings was attached. It therefore found that the preliminary point was unsubstantiated and threw it out. The court *a quo* then proceeded to determine the matter on the merits. It found that the matter before it was for a declaratory order which only the High Court could determine. In the court *a quo*`s view, the arbitrator lacked jurisdiction to hear and determine an application for a declaratory order.

The court *a quo* found the agreement between the parties to be irrelevant to the determination of the dispute because it did not form the basis of the cause of action against the appellants. In its view, the matter fell to be decided solely on the registration of title in the names of the respondent and the first appellant.

After embarking on a long and circuitous route tying itself in several knots and bundles the court *a quo* finally concluded:

“As alluded to and conceded by both parties the cause of action is the right of ownership. The applicant wants (to be) declared the title holder and the siblings want this Court to hold that the agreement is valid. As reiterated before a title deed is an announcement to the whole world as to the proof of ownership of the said farm which gives rise to real rights. The said agreement can only give rise to personal rights and once declared the owner one is entitled to deal with his property as they deem fit as long as it does not fall foul of the law. In this case the issue of title has not been meaningfully challenged but emphasis is being put on the agreement of September 2021. The cited authorities in this judgment do give an insight as to the sanctity of binding contracts. Let me hasten to say that this agreement is flowing from the title held by the applicant. The cause of action on the counter claim cannot therefore be separated from the *declaratur*. Without the title the agreement would have nowhere to stand. In the absence of any other evidence affecting this title of 50% of undivided shares, I do not see how this Court (can) decline the *declaratur* sought.”

The logic of the above passage in the judgment *a quo* presents some challenges and constitutes a strain to the mind. Be that as it may, the Court *a quo* granted relief in favour of the respondent which riled the appellants.

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The appellants filed an appeal against the judgment of the Court *a quo* initially on nine grounds of appeal. The validity of those grounds of appeal was strongly challenged by Mr *Magwaliba* who appeared for the respondent. Following submissions made by counsel for both sides and concessions made, the court struck out grounds 3, 4 and 5 as not being valid grounds of appeal. This left grounds 1, 2, 6, 7, 8, and 9 which read;

- “1. The court *a quo* erred and misdirected itself in finding that the appellants’ counsel had not filed with the court evidence and papers for arbitration when there was indisputable documentary evidence before the court *a quo* that the matter of the dispute relating to the 21st September 2021 agreement of the parties was pending finalization before the appointed Arbitrator, Mr Mordecai Mahlangu.

2. The court *a quo* erred and misdirected itself on the law and the facts by holding that the points *in limine* relating to *lis pendens* and non-exhaustion of domestic remedies had been withdrawn when in fact no such withdrawal had been made.
3. The court *a quo* erred and misdirected itself on the law and the facts when it granted the declarator sought by respondent without paying proper and due regard to the totality of the evidence showing that the respondent had subordinated his 50% ownership rights reflected in the Deed of Transfer to the agreement of the parties of 21 September 2021.
4. The court *a quo* erred and misdirected itself in failing to decide the pleaded issue of the legality or otherwise of respondent's purported cancellation of the agreement of 21 September 2021.
5. The court *a quo* erred and misdirected itself on the facts in finding that the respondent's mental capacity had been so seriously impaired as to vitiate the written agreement of 21 September 2021 to the extent that such impairment vitiated his capacity to contract in circumstances where;
 - (a) in his letter of 12 December 2022, the respondent had not placed any reliance on mental incapacity as a ground for resiling from the agreement.
 - (b) the court *a quo* had not conducted an inquiry into his mental capacity on the date of signature and then basing its decision on the conclusions of such an inquiry more so when there was no medical evidence placed before the court showing any mental incapacity as of the date of signature or for that matter on any other date.
6. The court *a quo* erred and misdirected itself in failing to appreciate that in the light of its own Judgment No. HH 215/23 the issue of the respective shares of the parties in the disputed farm was *res judicata* and that therefore the court could not make a declaratory order whose effect was the reversal of Judgment No. HH 215/23 for such an order was incompetent."

Notwithstanding the multiple grounds of appeal, only one issue is dispositive of this appeal. It is whether the court *a quo* erred in determining a matter that was pending before the arbitrator.

Mr *Magogo*, who appeared for the appellants, submitted that the dispute between the parties arose as a result of the agreement signed between them on 21 September 2021 which agreement has an arbitration clause. In terms of Clause 8 thereof, the power to adjudicate any dispute rests with an arbitrator appointed by the Commercial Arbitration Centre. He submitted further that the appellants had already invoked that provision and referred the dispute to arbitration.

Counsel for the appellants drew attention to a series of correspondence between the parties and Mordecai Mahlangu, the appointed arbitrator, Judgment No. SC 56/24 that, by the time the respondent filed the application in the court Civil Appeal No. SC 60/24 already set a date for a management meeting. In his view, the respondent having conceded that there were arbitration proceedings pending, it was improper for the court *a quo* to ignore those proceedings and determine the matter.

Per contra, Mr *Magwaliba* for the respondent submitted that the application before the court *a quo* was a completely different can of fish from the dispute before the arbitrator. Counsel took the view that it was possible for arbitration to continue notwithstanding the declaratory order of the court *a quo*. He went on to argue that the court *a quo* was seized with an application for a declaratory order made in terms of s 14 of the High Court Act, which only the court *a quo* had jurisdiction to entertain. The arbitrator did not have such jurisdiction and for that reason, the court *a quo* properly exercised its discretion by determining the matter notwithstanding the pending arbitration proceedings.

THE LAW

What is clear is that the respondent attempted to resile from the agreement entered into between the parties and proceeded to seek an enforcement of ownership rights by virtue of the Deed of Transfer in his name and that of the first appellant.

The unyielding principle of sanctity of contracts confines the courts only to interpreting a contract and not creating one for the parties. It entails that the courts should respect the contract made by the parties and give effect to it. See *Alliance Insurance v Imperial Plastics (Pvt) Ltd & Another* SC 30/17 where the following passage in *Book v Davidson* 1988 (1) ZLR 365 (S) at 378G-379C was referred to :

“There is, however, another tenet of public policy, more venerable than any thus engrafted onto it under recent pressures, which is likewise in conflict with the ideal of freedom of trade. It is the sanctity of contracts’ (*Rofley v Catterall Edwards & Goudre (Pty) Ltd* 1977 (4) SA 494 (N) at 504 – 505E)

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‘If there is one thing which more than any other public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice. Therefore you have this paramount public policy to consider that you are not lightly to interfere with this freedom of contract. (*Printing and Numeric Registering Co v Sampson* (1875) LR 19 Eq 462 at 465) ...’

‘To allow a person of mature age, and not imposed upon, to enter into a contract, to obtain the benefit of it, and then to repudiate it and the obligations which he has undertaken is, *prima facie* at all events, contrary to the interests of any and every country. (*E Underwood and Son Ltd v Barker* (1899) ICH 300 (CA) at 305)’”

It is important to give effect to the intention of the parties to a contract. The golden rule, applicable to the interpretation of all contracts, is to ascertain and to follow the intention of the parties and if the contract affords a definite indication of the meaning of the contracting parties, such must be given effect. See *Joubert v Enslin* 1910 AD 6 at 37 – 8.

Where a party seeks to be excused from the consequences of a contract they entered into on the basis of mental incapacity, they bear the onus to prove such incapacity. As stated by the learned author, J.T.R Gibson, *South African Mercantile and Company Law*, 8th ed, Juta & Company Ltd, at p 25:

“All persons are presumed to be sane, unless they have been declared mentally disordered or defective in terms of the Mental Disorders Act 38 of 1916, or mentally ill under the Mental Health Act 18 of 1973. The burden is on the person who claims to be excused from liability to prove that he could not understand and appreciate the nature of the transaction, or that his consent was by a delusion” (The underlining is for emphasis)

In the context of this matter, which was referred to arbitration prior to the filing of the application for a declaratory order, Article 8 (1) of the First Schedule to the Arbitration Act [Chapter 7:15] is apposite. It provides:

“A court of law before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, stay those proceedings and refer the parties to arbitration, unless it finds that the agreement is null and void, inoperative or incapable of being performed.”

See *Conplant Technology (Pvt) Ltd v Wentspring Investments (Pvt) Ltd* HH 965/15 where at p 3 MAFUSIRE J stated:

“In my view, and in my own words, it is now settled that a clause in a contract to refer a dispute to arbitration is binding on the parties. A party is not at liberty to resile from that clause any time he may wish to do so. In terms of Art 8 of the Arbitration Act, where a party makes a timeous request for referral to arbitration, the court has to stay the matter and refer the dispute to arbitration unless the agreement is null and void, is inoperative or is incapable of being performed ...”

In our jurisdiction, courts are slow to exercise jurisdiction in situations where litigants have not exhausted domestic remedies available to them. A litigant is expected to exhaust available domestic remedies before approaching the courts except where good cause for making an early approach is shown. See *Chawora v Reserve Bank of Zimbabwe* 2006 (1)

ZLR 525 (H); *Tuso City of Harare* 2004 (1) ZLR 1 (H); *Moyo v Forestry Commission* 1996 (1) ZLR 173 (H).

EXAMINATION

It is common cause that the parties are the surviving children of the late Tapfumaneyi Mushore Chiduku and that at the time of the winding up of the deceased's estate the Norton farm was transferred into the names of the respondent and the first appellant. That they thereafter held title by Deed of Transfer No. 5157/99 is a fact which scarcely needed a declaratory order.

Significantly however, it is also common cause that, notwithstanding registration of title aforesaid, the parties entered into a redistribution agreement on 21 September 2021 in terms of which they agreed to share the Norton farm at the ratio of 20% for each of the five siblings. It is that redistribution agreement which provided a dispute resolution mechanism in the form of arbitration and nothing else. A contract, once reduced to writing, becomes the testament recording, not only the agreement of the parties, but also their intention. Courts of law have to resort to the written treatise in order to ascertain the intention of the parties. See *Delta Beverages (Pvt) Ltd v Blackey Investments (Pvt) Ltd* SC 59/22. More importantly, it is not open to the courts to make a contract for the parties. All they are required to do is to give effect to the existing contract.

In the present case, once the respondent admitted having entered into the 21 September 2021 redistribution agreement, *prima facie*, he admitted having compromised his title to the Norton farm as provided for in that agreement. A dispute arising out of that agreement, like the respondent's attempt to repudiate the agreement for whatever reason, fell

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for resolution by the dispute-resolution mechanism agreed upon by the parties, namely referral to arbitration.

If the respondent insisted on a right to “withdraw” from the agreement by virtue of an alleged incapacity to contract, which would render the contract unenforceable or invalid, the law is clear that he bore the onus to prove such incapacity. If he was under a delusional constraint, it is to the arbitrator that he would be expected to prove that.

As if that was not enough, to the extent that the dispute was already pending before arbitrator Mahlangu at the time the application was filed on 8 September 2023, this brought into effect the provisions of Art 8(1) of the First Schedule to the Arbitration Act [Chapter 7:15]. It enjoins a court of law before which proceedings are brought in a matter which is the subject of an arbitration agreement to stay those proceedings and allow the arbitration to continue.

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In fact, the court *a quo* had long pronounced itself on that issue, per MAFUSIRE J in *Conplant Technology (Pvt) Ltd, supra*. By operation of the doctrine of *stare decisis*, the court *a quo* was required to follow that reasoning. Unfortunately, it did not even make reference to the earlier judgment decided eight years earlier. If indeed, it saw it fit to depart from it, the court *a quo* should have at least given reasons for doing so. What was clearly improper was to pretend as if the *Conplant Technology (Pvt) Ltd* judgment did not exist.

Whatever the case, ploughing into the merits of the application for a declaratory order brought solely for the purpose of circumventing an arbitration process which was already underway, was a misdirection of gigantic proportions. It calls for interference on appeal.

DISPOSITION

The principle of sanctity of contracts is time honoured in our jurisdiction. Courts of law are very slow to disregard provisions of a contract entered into freely and voluntarily by parties of full legal capacity. The courts are duty bound to give effect to the dispute resolution process agreed upon by the parties in the 21 September 2021 agreement by deferring to arbitration.

In any event, the parties were bound by Clause 8 of that agreement to proceed by way of arbitration and a timeous request for arbitration was made. It was brought to the attention of the court *a quo* which erroneously refused to accede to it.

Regarding the costs of the appeal, no reason whatsoever was advanced for departing from the norm, that costs follow the result. It is for the foregoing reasons that the Court issued the order quoted above.

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MAKONI JA : I agree

MUSAKWA JA : I agree

Messrs Zvavanoda Law Chambers, appellants' legal practitioners

Messrs Hove Legal Practice, respondent's legal practitioners

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