

**BAMBAZONKE MOTORS P/L**

**And**

**MANATSAWANI MUTASA**

**Versus**

**JUGATE INVESTMENTS P/L**

**And**

**THE MASTER OF THE HIGH COURT N.O.**

IN THE HIGH COURT OF ZIMBABWE  
NDOU J  
BULAWAYO 18 AND 25 JANUARY 2007

*H Shenje* for applicants  
*J Tshuma* for the respondents

Urgent Chamber Application

**NDOU J:** The applicants seek a provisional order in the following terms:

**“Terms of the final order sought**

1. That 1<sup>st</sup> and 2<sup>nd</sup> respondents be and are hereby ordered to cease handling the business affairs of the 1<sup>st</sup> applicant or in anyway hindering, interfering or obstructing the running of the 1<sup>st</sup> applicant’s business affairs.
2. That 1<sup>st</sup> respondent be and is hereby ordered to render an account to the 1<sup>st</sup> applicant in respect of the period it was in charge of the business affairs of the applicant [*sic*].

**Interim relief sought**

- (a) That 1<sup>st</sup> and 2<sup>nd</sup> respondents be and are hereby interdicted from running the business affairs of the 1<sup>st</sup> applicant.
- (b) That the 1<sup>st</sup> and 2<sup>nd</sup> respondents be and are ordered to restore vacant and peaceful possession of the 1<sup>st</sup> applicant’s business premises to the 1<sup>st</sup> applicant’s management including the 2<sup>nd</sup> applicant [*sic*].
- (c) That 1<sup>st</sup> respondent pays costs of this application on the attorney and client scale.”

It is not clear why costs are being sought as part of the interim relief and not as part of the final order. I will revert to this issue only in the event of the provisional order being granted. The salient facts of the matter are the following:

The late Abishai Chimbadzwa Mutasa was married to Ida Lindiwe Mutasa. The couple had the following children:

- a) Thembeke Carol Nyika (nee Mutasa) born 2 January 1950;
- b) Tendai John Buyan Mutasa (also known as Tendai Chifambausiku Mutasa) born 20 September 1951 and died on 6 March 2006;
- c) Nomhle Paridzai Mabvurira (also known as Paridzai Helen Mabvurira) (nee Mutasa) born 9 March 1954;
- d) Ida Spiwe Tapiwa Makadho (nee Mutasa) born 17 October 1956;
- e) Manatsawani Abishai Chimbadzwa Mutasa born 31 March 1959 [2<sup>nd</sup> Applicant];
- f) Farai Jonathan Masawara Mutasa born 1 March 1963;
- g) Fungai Gwinyai Mutasa, born 3 May 1969;
- h) Siyai Mutasa (also known as Siyai Rebecca Mutasa), born 26 September 1974.

The late Abishai Mutasa died on 21 November 1994. His estate was registered in the Master's Office in 1998 as DRB 2864/98. Before his death, the late Abishai Mutasa was the majority shareholder of the 1<sup>st</sup> applicant, a private limited company registered with the Registrar of Companies. The Master accepted the last Will and Testament executed by the late Abishai Mutasa on 29 January 1999. The surviving spouse was appointed executrix testamentary. She, however, failed to wind up the estate within six months from the date of issuance of letters of administration.

From the facts, she has not been in control of assets as is required by law resulting in the estate being open to abuse owing to lack of accountability. Some of the beneficiaries prematurely assumed control of assets and benefited at the expense of others before the confirmation of the

distribution of assets (as stated by the Will) by the Master. As custodian of the estate, the Master, was concerned by the lack of progress in the winding of the estate. As a result, he called a special meeting at his office in Harare on 2 November 2006. The meeting was attended by the beneficiaries (inclusive of the executrix and the 2<sup>nd</sup> applicant). There was lack of unity amongst the beneficiaries who argued and exchanged harsh words. The 2<sup>nd</sup> applicant eventually walked out of the meeting protesting that he no longer wished to be associated with the estate. But, the Master viewed the meeting as a very important one as its objective was to restore order and sanity in the estate and beneficiaries and expedite the winding up of the estate. At the end of the meeting the Master directed as follows:

“... I direct that the following be done with immediate effect:

- a) That Mr Manatsawani Mutasa (2<sup>nd</sup> applicant) and other beneficiaries should account for the assets they have been in possession of with a view to handover same to the executrix c/o Mr L P Madura of Combined Executor Services [i.e. the agent of the executrix who also attended the meeting];
- b) That Mrs Ida Lindiwe c/o Mr L P Madura assumes control of all the deceased's assets and proceed to administer the estate in terms of the Will and relevant statutes governing administration of deceased estates in Zimbabwe. And that the winding up of the assets be completed within 60 days from the 2<sup>nd</sup> of November 2006.
- c) That all the beneficiaries/interested parties should fully co-operate with the executrix or her agent failure of which they risk facing serious law action as police may be asked to intervene.
- d) That any illegal change of ownership or registration that might have been done should be reversed and be properly done as required by law.”

These directives were brought to the attention of all the beneficiaries (and their agents, where applicable). It is against this background that the application *in casu*, has been filed. Mr *Shenje*, for the applicants argues that it is not an application for review. He, however, cannot clearly say what it is if it is not an application for review of the decision by the Master. Put in another way, minus the decision by the Master, the 2<sup>nd</sup> applicant would still be running the business operations of the 1<sup>st</sup> applicant without any hindrance. It is this decision that stopped

him. The order he seeks is the reversal of this directive. 2<sup>nd</sup> applicant alluded to this in paragraph 4 of his founding affidavit in the following terms:

“... The Master has been cited for the simple reason that 1<sup>st</sup> respondent’s actions do appear to have apparent sanction from the Master’s office but only in respect of the estate of the late Abishai Chimbadzwa Mutasa. It seems to me that both the Master’s office and that of the 1<sup>st</sup> respondent are confused as to what constitutes the estate of the late Abishai Mutasa, hence this excess in the execution of powers...”(emphasis added).

The emphasised words capture the cause of action in this matter. Having found that this is an application for review it has to be instituted in terms of Order 32 and 33 of the High Court Rules, 1971. The phrase “hence this excess in the execution of powers” simply means that the Master made a decision outside the powers of his authority i.e. he acted *ultra vires*. The applicants seek that I review the decision of the Master in terms of section 26 of the High Court Act [Chapter 7:06] – *Mahlangu v Murandu & Ors* SC 101-93. I now consider the points *in limine* raised by the respondents in this regard.

This application for review suffers from a number of defects. First, the applicants failed to cite interested parties i.e. the widow, who is, after all, the majority, if not sole shareholder in the 1<sup>st</sup> applicant according to clause (a) (iv) of the Will. She

should have been cited, and not her agent, Jugate Investments (Pvt) Ltd t/a Combined Executors Service. Even if I accepted the applicants’ case that the 1<sup>st</sup> applicant is a separate entity, it is still estate property. This is accepted by the 2<sup>nd</sup> applicant in paragraph 6 of his founding affidavit as follows: “... It suffices to say Abishai Mutasa was its (1<sup>st</sup> applicant) majority shareholder.” The papers do not show who were the other shareholders, and the 2<sup>nd</sup> applicant does not aver that he is a shareholder himself. 2<sup>nd</sup> applicant’s interest in 1<sup>st</sup> applicant is not even averred. He merely says he is a director in 1<sup>st</sup> applicant. Other interested parties the applicants should have cited are the other beneficiaries. In terms of the Will, they hold equal shares in the residue and remainder of the estate. Failure to cite an interested party as required by Order 33

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Rule 258 is a fatal defect – *Malambo v City of Harare* 2001(2) ZLR 545(H). Second, there was no compliance with Rule 257, as the application did not give a short and clear statement of the grounds relied. This court now insists that this rule be observed and complied with – *Malambo v City of Harare, supra*; *Dandazi v Wankie Colliery Co Ltd* 2001 (2) ZLR 298 (H) at 299E-300B and *Chataira v ZESA* SC 83-01. In this case all sorts of grounds are lumped together in the body of the founding affidavit, making it very difficult for the respondents to determine the grounds upon which the matter is to be reviewed. Third, this being a review application, it should have been filed as a court, and not chamber application – *Dzora & Anor v Judge President of the Court Martial & Anor* HH-234-93.

Enough warnings have been given about the consequences of failure to observe the rules of court, and it is time that such defective applications be visited with dismissal without considering the merits. If I am mistaken in my determination of the above point *in limine*, I would still dismiss the application on the question of

the *locus standi*. The 2<sup>nd</sup> applicant's authority to represent the 1<sup>st</sup> applicant is being challenged.

In the circumstances he was required to prove such authority by producing a company resolution to that effect – *United Associates (Pvt) Ltd v Estate Ncube & Ors* HB-29-03; *Unlawful Occupiers of the School Site v City of Johannesburg* [2005] 2 ALL SA 108 (SCA); *Nyamandlovu Farmers Assoc v Minister of Lands & Anor* HB-19-03 and *Air Zimbabwe Corporation & Ors v Zimbabwe Revenue Authority* HH-96-03. The exception outlined in the latter case does not apply to the facts of this case. Instead of filing such authority or proof of directorship the 2<sup>nd</sup> applicant filed annexure “H” which appoint him to “manage my company” written by the widow i.e. the executrix. This appointment is not a resolution done by the 1<sup>st</sup> applicant as a company. It is a mere note by one of its directors. The other directors were not involved. Even on this ground, the application would fail.

Accordingly, the application is dismissed with costs on the legal practitioner and client scale

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and such costs to be borne by the 2<sup>nd</sup> applicant.

*Shenje & Co*, applicants' legal practitioners

*Webb, Law & Barry*, 1<sup>st</sup> respondent's legal practitioners