ROBERT MALCOM MACGILLIVARY BOWES

And

ESTATE LATE DR. JOHN JOSEPH MANOLAKAKIS

And

ESTATE LATE EVANGELINA PATRINOS

And

IONNIS IOANNIDIS

And

CONSTINDINOS PARTINOS

And

DEPUTY MASTER, HIGH COURT, BULAWAYO

Versus

MARIA MANOLAKAKIS

IN THE HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 21 JULY 2011

Ms N. Ncube for the applicant
N. Siphuma for the respondent

MATHONSI J: The late doctor John Joseph Manolakakis was a Greek medical doctor practicing medicine in Zimbabwe. He died on 2 July 2006 in Bulawayo, Zimbabwe at the age of 72 leaving behind flats number 1703 and 1704 Kenilworth Towers, Ascot, Bulawayo and some household furniture and personal effects according to the inventory submitted upon registration of his estate as DRB 611/06.

The late doctor did not leave behind any children and is survived by his mother, the respondent in this application. It would appear that at the time of his death he had a "living in

partner", Evangelia Patrinos (nee Ktistakis), the mother of Ioannis Ioannidis and Constandinos Patrinos, who are cited in this application as 4th and 5th applicants.

Evangelia Patrinos also died on 8 March 2008 in Greece at the age of 62 and is survived by the 4th and 5th applicants. Her estate, DRB 587/08 is cited in these proceedings as 3rd applicant while that of the late Dr Manolakakis is 2nd applicant. According to the inventory submitted in DRB 587/08, Evangelia Patrinos' estate has no assets in Zimbabwe at all except the claim to the estate of Dr Manolakakis and her death records show that she was a Greek national as well.

4th and 5th applicants are also foreign nationals currently based in Athens, Greece and Lincolnshire, England respectively. Clearly therefore 3rd, 4th and 5th applicants are, for all intents and purposes *peregrini* and not *incola* applicants at all.

In case number HC 2226/08 the respondent, who herself is a *peregrinus* based in Greece, brought an action against the applicants seeking the nullification of a will purportedly drawn by the late Dr Manolakakis. In that action the plaintiff, who is respondent in the present application, alleges that the said will was drafted by Evangelia Patrinos who went on to forge the erstwhile doctor's signature. The claim has been contested and at the pre-trial conference of the parties only one issue was identified for trial namely, "whether or not plaintiff did comply with the Wills Amendment Act No. 21/98"

After the matter was referred to trial, this application was made for an order directing the respondent, as a *peregrinus*, to pay the sum of US$29 150,00 as security for costs and costs of the application on an attorney and client scale. The basis of the application is that the respondent does not have assets in this country as would provide security for the costs of the applicants in the event of a successful contestation of her action.

It has been argued on behalf of the respondent that, while 6 applicants are cited in the application, there is in actual fact only one applicant who is 1st applicant. Before her death, the late Evangelia Patrinos was appointed executrix dative in the estate of the late Dr Manolakakis by letters of administration issued on 23 August 2006. When she died, the 1st applicant was appointed executor dative of her estate by letters of administration issued on 9 March 2008.

However, up to now the 6th applicant has not appointed an executor dative to replace the late Evangelia Patrinos in the estate of the late Dr Manolakakis. For that reason I agree that the 1st applicant cannot purport to represent the 2nd applicant, the estate of the late Dr Manalakakis. He can only represent the 3rd applicant, the estate of the late Evangelia Patrinos

who was herself a *peregrinus* and whose estate has nothing in this country other than the contested claim in the estate late Dr Manolakakis.

I have already stated that 4th and 5th applicants are also foreign nationals based in Greece and England. They are therefore not *incola.* In addition to that, 1st applicant does not purport to make the application on their behalf. The 1st applicant in fact states in his founding affidavit that he makes the application in his capacity as the "director of National Executor and Trust (Pvt) Ltd". This is not helpful at all because he holds letters to administer the 3rd applicant's estate in his personal capacity. He can only bring an application on behalf of the 3rd applicant.

This is particularly so as none of the other applicants have given him authority to make the application and they have not deposed to affidavits in support of the application. It is inconceivable that the 6th applicant would have given 1st applicant authority to bring this application on his behalf.

I therefore come to the conclusion that there are only 2 applicants in this matter, the 1st and 3rd applicants with the 1st applicant only acting in a representative capacity as the executor of the 3rd applicant. The merits of the application will be considered on that basis alone.

The basis of the rule requiring a *peregrinus* to provide security for the costs of an *incola* defendant was set out by SANDURA JP (as he then was) in *Zendera* v *McDade & Anor* 1985 (2) ZLR 18 (H) at 20A-D as follows:

> "The issue relating to the furnishing of security for costs by a plaintiff who is a *peregrinus* is discussed by the learned authors of *The Civil Practice of the Superior Courts of South Africa* 3rd ed at p 25. There the learned authors have this to say:
>
> > 'A *peregrinus* who initiates proceedings in our courts must, as a general rule, give security to the defendant for his costs, unless he has within the area of jurisdiction of the court immovable property with a sufficient margin unburdened to satisfy any costs which may arise.
> >
> > The presence of immovable property is a defence to a claim for security, but the doctrine has not been extended to include movable property.
> >
> > The court has, however, a discretion to dispense with security in exceptional cases but should exercise its discretion sparingly.'
>
> The rule requiring a *peregrinus* to give security for the defendant's costs was laid down as far back as 1828 in *Witham* v *Venables* (1828) 1 Menz 291 and subsequently

explained in *Lumden* v *The Kaffrarian Bank* (1884-5) 3 SC 366. The object of the rule is to make sure that an *incola* will not suffer any loss if he is awarded the costs of the proceedings. The rule exists primarily to protect the interests of an *incola* who is sued by a *peregrinus*." (The underlining is mine)

It is important to note that the protection of provision of security for costs is only available to an *incola* of this country. An *incola* is not, as a general rule, required to provide security for costs. Writing about that issue the learned authors Herbestein and Van Winsen, *The Civil Practice of the Superior Courts in South Africa*, 3rd ed at p 251 stated:

"The burden of proving that the respondent is a *peregrinus* lies on the applicant, i.e. the defendant, but if it appears that until recently the plaintiff has been an *incola* of some foreign country, the onus is on him to show that he has changed his domicile and has become an *incola* of the Republic. In such a case, it is not sufficient for him merely to make a statement to the effect that he has changed his domicile but he should place before the court facts from which it is able to judge of the reliance to be placed upon his statement. The court will scrutinize such evidence closely, but if the court is satisfied that there is nothing improbable in the evidence and that it would not be justified in declining to accept it, an order for security for costs will be refused even where the respondent has come to this country for the express purpose of instituting an action."

By parity of reason, a party seeking the remedy of security for costs must satisfy the court that it is *incola* before the protection can flow to it. Clearly such status is not acquired merely by having a claim within Zimbabwe which claim is the subject of the dispute, no matter how substantial the property is. *Ginsberg* v *Estate Kulf* 1924 SWA 1 at p 2. *Incola* connotes the element of residence, not temporary residence but it constitutes domicile in this country.

In Zimbabwe there are no rules providing for an order for security for costs. The issue of security for costs arises out of judicial practice. The court however retains the exclusive discretion to make such order or not to. In my view in exercising its discretion the court is guided first and foremost by the provisions of section 18(1) as read with section 18 (9) of the constitution of Zimbabwe namely that "every person" is entitled to the protection of the law and to be afforded a fair hearing within a reasonable time by an impartial tribunal in the determination of the existence or extent of his civil rights or obligations *Zietman* v *Electronics* 2008 (4) SA 1.

In casu, virtually all the interested parties, except for the estate of the late Dr Manolakakis which is effectively not a party to this application, are foreigners cherishing their domicile elsewhere. (*Voet 2.8.1*) They therefore do not have an automatic right to security for

costs in this jurisdiction. In addition to that, the respondent is an extremely elderly woman who has not been shown to have sufficient means to pay the costs in question.

The respondent should not be denied justice by unreasonable obstacles being placed in the way of persons seeking redress. As stated in *G.R.E. Insurance* v *Chisnall* 1981 ZLR 551 at 559H and 560A, the fact that the respondent has immovable property situated within the country is not the only ground for refusing to grant security for costs.

I take the view that it would be a judicious exercise of my discretion not to order security to be paid. Having come to that conclusion, it is not necessary for me to examine whether the quantum of the costs claimed is reasonable for purposes of proving the single issue that has been referred to trial. I have in mind the fact that the applicants propose to bring witnesses all the way from Greece and South Africa at very high cost merely to prove that the disputed signature belongs to the late Dr Manolakakis. On the evidence available it has not been shown that the proposed costs are reasonable.

In the result, the application is dismissed with costs to be costs in the main action.

Lazarus & Sarif, applicants' legal practitioners
Sansole & Senda, respondent's legal practitioners