

THE DEPUTY MASTER N.O

Versus

BARBRA LUNGA N.O

(in her capacity as the Executrix Dative
of Estate late Mariana Moyo)

AND

ESTATE LATE MARIANA MOYO

IN THE HIGH COURT OF ZIMBABWE

BERE J

BULAWAYO 11 APRIL 2017 & 16 JANUARY 2020

Opposed Application

L Chimire, from the applicant's office
Professor W Ncube, for 1st respondent

BERE J: The late Mariana Moyo died intestate prompting the administration and management of her estate to be placed in the hands of the 1st respondent as the Executrix Dative on 19 March 2012. It would appear that the appointment of the 1st respondent was brought about by the deceased's relatives together with the beneficiaries of the estate. This estate appears to be facing a number of challenges as evidenced by this application.

The challenges bedeviling this estate have been fairly detailed by both the applicant and the 1st respondent with none of the two parties prepared to shoulder the blame. There has been serious allegations and counter-allegations thrown at each other by the two parties, which scenario I view as very toxic given the undeniable fact that under normal circumstances the two are supposed to create a conducive working relationship to enable the smooth winding up of this estate.

Initially there was an attempt to unlawfully revoke the first respondent's letters of the administration of this estate by the applicant. However I am not going to dwell much on this issue since the bringing of this application is confirmation that the applicant appreciated the folly of his initial conduct.

This application purports to have been made in terms of section 117 (1) (b) and 1 (d) of the Act¹ (the Act) and is supported by the applicant's founding affidavit which comprises of three pages only.

The basis of the application is a well documented complaint by the beneficiaries of the estate against the first respondent. The beneficiaries have listed a litany of allegations against the first respondent. The allegations range from wanton disposal of estates assets (immovable properties) without their consent, the delay in winding up the estate, abuse of rentals collected from leased estate properties and lack of financial and or medical support to one of the beneficiaries' siblings who is a mental patient. They also cited the estate's failure to pay for one of the estate beneficiaries studying in Cyprus.

In unison, the beneficiaries pleaded with the applicant to have the first respondent recalled as the Executrix to their estate.

In support of his application the applicant attached the letters of complaint from the beneficiaries dated 3rd and 19th of June 2013 as annexures.

In addition the applicant also attached correspondence from a law firm called Hara and Partners which was approached by the beneficiaries to take over the administration of the estate, as additional annexures.

The written responses from the first respondent were also attached as annexures to the application.

When served with the application whose affidavit comprised of barely three typed pages the respondent filed a notice of opposition comprising twelve typed pages. She opposed the application but grudgingly offered to relinquish her position provided certain conditions were met.

In addition, the first respondent also attached several annexures whose relevance and significance I will deal with later in this judgment.

Point in limine.

¹ Chapter 6:01

Before we could deal with the matter on merits, *Mr W Ncube* who appeared for the first respondent sought to have the application dismissed for failing to comply with section 117 of the Act. Counsel's argument was that the act allows the applicant to file a chamber application for the removal of an executor and not a court application like the one filed in this matter. Owing to this anormally Counsel sought to have the matter dismissed arguing the omission was fatal.

Mr L Chimire, from the applicant's office indicated to the court that the point *in limine* be dismissed since the first respondent had not given the applicant prior warning that this preliminary point would be raised.

I do not wish to be detained by the technical argument raised in this case. A proper reading of rule 117 (1) of the Administration of Estates Act does not seem to me to carry out the interpretation attributed to it by first respondent's counsel. The rule is framed as follows:

"117 (1) The Master may apply to a judge in chambers for the removal of an executor or curator " (my emphasis)

The rule clearly does not make it mandatory for the applicant to initiate the process by way of a chamber application as argued by Counsel for the first respondent. A court application may suffice as long as it can be demonstrated that there is no prejudice suffered by the respondent.

Indeed, when I sought clarification Mr Ncube instinctively responded that his client had not been prejudiced by the Court application filed.

I therefore move to determine the case on merits.

As earlier on indicated, the applicant's application was anchored on numerous complaints raised against the first respondent by the beneficiaries to this estate.

It will be noted that section 116 of the Act enjoins the Master to supervise executors, tutors and curators to ensure among other issues maximum protection of estate assets. Once a

complaint is made against an executor, the Master must investigate the conduct complained of before he/she takes appropriate remedial action.

Consequently, when the applicant received a complaint against the first respondent he did what the law required him to do, to investigate same by seeking the first respondent's response.

The first respondent was simply asked to respond or comment on the allegations raised against her by the estate beneficiaries. The first respondent's response is of concern to this Court. It projects her in bad light. Instead of giving a simple response, the first respondent chose to start by putting on her fighting gloves ready for a fight. This is how she opened her response on 19th June 2013:

"The Deputy Master

.....

Dear Sir

.....

I would like to comment as follows:

First and foremost my work place is 7th Floor Fidelity Life Centre, Office 701. I did not go out to invite Beatrice Malaba and Admire Moyo to my office. They came to seek professional advice without a cent. Why didn't they come to the Assistant Master's office if they knew what they were supposed to do?

How do they explain the word "short change" I am not a conman, can they elaborate that word explicitly for me to get sense of it.

They came with nothing as evidenced by the inventory. There is no cash in the estate. Actually when they came I did assist to pay ZESA bill for electricity which was disconnected for non payments. I advertised for the edict and debtors meeting just to mention a few things.

For me to work and pay administration expenses, I need money. I am not a charitable organization

She went on to explain in her response how some of the beneficiaries had gone on to loot estate property. This is despite the fact that the first respondent had all the ammunition at her disposal to effectively deal with looters of estate property.

The tirade tone of the first respondent's letters to the applicant is evident in almost every letter she wrote to the applicant. It gets worse even in her notice of opposition to the application where she chose to go on a lecture to the applicant on the law on estate administration and how well schooled she was in estate administration.

Even more shocking was that before the Master had concluded his investigations on the allegations raised by the beneficiaries, the first respondent literally 'galloped' to dispose of one of the estate properties without the consent of the Master (given that there was a mentally challenged beneficiary amongst the beneficiaries).

Mr Chimire from the applicant's office submitted that there was overwhelming evidence that the first respondent had violated the provisions of section 120 of the Act in disposing of the estate property without the consent of the Master. In so arguing, counsel relied on the ratio in the case of *Kizito Mutsure versus Ichabod Muringisi*² where NDOU J put the position of the law as follows:

"In terms of section 120 of the Administration of Estates Act (Chapter 6:01), the approval of the Master of High Court is required for such agreement of sale of a immovable asset of the estate. This is a condition precedent which suspended the operation of all obligations flowing from the agreement until the approval of the Master."

Applicant's representative also argued that the mere fact that three out six beneficiaries may have orally consented to the sale of the property did not give the first respondent the right to sell the property. I entirely agree with this position.

Mr Chimire further argued to the Court's conviction that in estate administration one does not start to dispose of estate property without the knowledge and approval of the Master because such conduct seduces fraud.

It was further argued for the applicant that the first respondent had also set her fees at 6% as opposed to 4,3% of the gross value of the estate, which the beneficiaries felt was too high and actuated by greed.

² HB 20/19 at page 2

Finally, *Mr Chimire* argued that the first respondent had failed to file either the first or final distribution account of the estate account within the time stipulated by the Act and that she had not formerly sought an extension of the time so laid down.

Mr Chimire argued that the cumulative effect of the conduct of the first respondent justified that the first respondent be removed from the executorship of this estate.

Mr Ncube who appeared for the first respondent sought to counter each and every allegation leveled against the first respondent by arguing that everything she did was done in terms of the law and that the issues raised by *Mr Chimire* had not been pleaded in the founding affidavit.

Respondent's counsel further argued that section 120 of the Act is only set into motion where an executor requires to sell estate property by private treaty and that sale by public auction did not require the Master's consent.

When this matter was argued I did not believe that some of the issues like the 6% fees which the applicant admitted was charging was going to attract a justification because at the relevant time the first respondent's fees were pegged at 4.3 % of the gross value of the estate. Such fees were supported by the relevant Statutory Instrument (SI 54 of 2007). So on her own admission made in her opposing papers, the first respondent was overcharging the estate and this was one of the reasons why the beneficiaries had raised alarm with the applicant.

The lack of good faith by the first respondent is demonstrated by the fact that whilst the applicant was investigating her conduct which included among other wrongful or unlawful disposal of estate assets, the first respondent appeared to have been in a hurry to quickly dispose of one of the estate properties without either consulting the beneficiaries or even obtaining the consent of the applicant. That conduct on its own, in my view did not project the first respondent in good light.

The conduct becomes even more questionable given that the curatorship issue which had to do with the mentally challenged beneficiary was yet to be finalized. In other words the

first respondent wanted to dispose of the estate property without even the curator *ad litem* being aware of that development.

It will also be noted that the estate property, *viz*, stand 631 Gwanda Township, was being sold not by public auction but by private treaty as evidenced by the sale agreement on page 11 of the consolidated index. The sale was conditional upon the first applicant's consent in terms of section 120 of the Act but before the consent was granted and in the middle of the applicant's investigations on the complaints raised against the first respondent, a sale had been quickly concluded.

The reason why the Master's consent is sought is because the Master is required to consider whether among other things the proposed sale is in the interest of the estate. The first respondent seemed to have this misconception that the Master's consent merely meant an automatic ratification of the sale without further ado. This is apparent from the tone of the letters to the applicant from the first respondent that literally demanded his consent in terms of section 120 of the Act. Again, the letters clearly showed the contempt with which the first respondent treated the applicant's office.

As CHITAKUNYE J observed in the case of *Kudzanayi Frank Katsande v Raymond Katsande and Three Others*³ "It is pertinent to note that the Master's office needs to awaken to the serious duties and responsibilities bestowed on that office in deceased's estate Section 120 of the Administration of Administration of Estates Act enjoins the Master to do an inquiry in order to be satisfied that the request being made would be to the advantage of the persons interested in the estate to sell the property. Due inquiry connotes that the Master takes active or positive steps to verify the contents of the application before granting consent."

But in the instant case, the first respondent could have none of this. To her the Master needed to just blindly grant her authority to sell the property. She had a negative attitude and this gave weight to the complaints made against her by the beneficiaries to this estate.

If there was any doubt on the impropriety of the conduct of the first respondent, one needs to merely go through her notice of opposition which largely confirms that she had failed in her duties as an executrix of the estate.

³ HH 113-2010 at page 7

There is overwhelming evidence that the first respondent was on a serious collision with the beneficiaries of the estate due to her improper conduct in the administration of the estate. The beneficiaries had completely lost confidence in the conduct of the first respondent. In my view, no law must compel beneficiaries to remain in bed as it were with an executor or executrix with whom the relationship has become toxic as in this case.

It is not accidental that the first respondent was unable to attach any supporting affidavit from any one of the six beneficiaries of the estate. The answer must be an obvious one. None of the beneficiaries needed her to continue administering the estate for reasons already outlined.

Taking a holistic view of this matter I am of a very firm view that the first respondent is a danger or a threat to the 2nd respondent. She must not continue to lay her hands on this estate.

In the result it is ordered:

1. That the first respondent be and is hereby removed as the Executrix Dative of the estate of the late Mariana Moyo.
2. That the beneficiaries of the estate be and are hereby authorized to appoint another Executor/Executrix of their choice failing which the applicant shall appoint one.
3. That the first respondent be and is hereby ordered to pay costs.

Messrs Coghlan and Welsh, first respondent's legal practitioners