

JOSEPH BELLODI

SHAYLEE MARIA BELLODI

Versus

LOVENESS MANALA MOTSI N.O

AND

**ASSISTANT MASTER OF THE HIGH COURT
OF ZIMBABWE, BULAWAYO N.O**

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 16 & 19 MARCH 2020

Opposed Application

*Ms J Mugova, for the applicant
G Sengweni, for the 1st respondent*

MAKONESE J: This is an opposed application for the removal of 1st respondent as the executor (Executrix Dative) in the estate of the late Grace Bellodi under DRB 283/17.

Factual background

The late Grace Bellodi (hereinafter referred to as the “deceased”) passed on, on the 5th March 2017. She died intestate. She and the 1st applicant had been married out of community of property under then Marriages Act (Chapter 37). She is survived by a widower, Joseph Bellodi, the 1st applicant. The 2nd applicant is a daughter of the deceased. The deceased is also survived by a child from another marriage, Alroy Dexter Rajah, a major. Upon the death of the deceased and the filing of a Death Notice in terms of section 5 of the Administration of Estates Act (Chapter 6:01) on the 28th of March 2017, it became necessary to have an Executor appointed in terms of section 25 of the Act. It appears from the Master’s Report that the filing of the Death Notice by one Mildred C Wilson (hereinafter referred to as Ms Wilson), who was the sister in law to the deceased opened a pandorax’s box in the administration of estate. The 1st applicant wrote numerous times to the Master complaining about Ms Wilson and alleging theft of estate property and dereliction of duty.

The deceased's mother one Lizzie also wrote to the Master laying a claim against the estate. An edict meeting was held on 5th June 2017. An independent Executor from Upperlink Executors, one Manala Motsi was appointed as Executrix on 3rd August 2017.

From the date of the appointment of the Executrix it is clear that very little was done by way of winding up the estate. On 23rd January 2018, 1st applicant's legal practitioners wrote to the Executors registering their client's dissatisfaction with the pace at which the estate was being administered and wound up. The letter highlighted the fact that even the publication of the creditor's and debtor's notice had not been done and that 1st applicant was contemplating having the executor removed. On the 31st January 2018 the 1st applicant's legal practitioners wrote to the Master registering their dismay with the manner in which the executors were administering the estate. 1st applicant brought it to the attention of the Master that the executors had to that date not responded to the letters written to them and requested that the executor steps down and another appointed. Subsequent to that, a number of letters were exchanged between the executors and 1st applicant's legal practitioners. The executor sought to justify the delay. 1st applicant sought further clarification from the executor on what exactly had been done in winding up the estate. The executor, under pressure from 1st applicant's legal practitioners published a notice to creditors and debtors in the Chronicle Newspaper on the 16th of February 2018. Upon further enquiry by the Master on the progress in winding up of the estate the 1st respondent filed an inventory on 10th August 2018.

Aggrieved by the manner in which the estate was being handled by the 1st respondent, this application was filed on the 3rd of August 2018. The substance of the application is that 1st respondent through acts of commission and omission has become unsuitable to continue as executor of the estate. The applicants contend that since her appointment as Executrix Dative on the 8th of August 2017 it took her a period of one and half years to advertise for creditors and debtors. The applicants further aver that 1st respondent failed to furnish a report her alleged efforts to recover assets of the estate. The applicants contend that 1st respondent failed for a period of more than ten months after her appointment, and after being called upon to do so by the Assistant Master, to file an inventory of the assets. It is argued on behalf of the

applicants that 1st respondent has not made further progress in the winding up of the estate since advertising for debtors and creditors and has failed to account for and collect cash in respect of monies paid as rentals for immovable property belonging to the estate. In essence she has not protected the interest of the estate. In direct response to the allegation of delay, *Mr Sengweni*, appearing for the 1st respondent indicated that 1st respondent was involved in a car accident and that for the greater part of 2018 and 2019 was indisposed. *Mrs Mugova*, appearing for the applicants drew the court's attention to the detailed report by the Master which sets out the gravamen of the complaints against the 1st respondent. These are the following:

- (a) 1st respondent took 6 months to advertise for debtors and creditors from the time of her appointment in August 2017. The advertisement was only lodged in February 2018.
- (b) 1st respondent failed to file an inventory for 10 months even after having been called to do so by the Master.
- (c) 1st respondent has not made any further progress on the estate since advertising for claims against debtors and creditors.
- (d) 1st respondent has failed to account for and or collect money paid for rentals for immovable property belonging to the estate.
- (e) 1st respondent had vaguely responded to the applicants' correspondence expressing their dissatisfaction in the manner in which 1st respondent was administering the estate.
- (f) 1st respondent no longer retains trust of the applicants due to her conduct in delaying to wind up the estate within the stipulated 6 months and such delay is prejudicial to the estate and renders the 1st respondent unsuitable to remain executrix dative.

The thread that runs through the record is that the applicants no longer have trust in the manner which the estate is being handled. In opposing the application, the 1st respondent argued that her achievements include identifying debtors, filing an inventory of household goods and effects and undertaking investigations into the location of the properties belonging to the estate. 1st respondent has contended that her efforts to wind up the estate had now been

impeded by the Assistant Master who has raised complaints against her and filed an adverse report.

WHETHER APPLICANTS HAVE ESTABLISHED A CASE FOR THE REMOVAL OF THE EXECUTOR

The court will not lightly interfere with the duties of an executor nor order the removal of an executor, except in situations where it is clearly established that the executor is grossly negligent in the execution of his duties. To my mind, the removal of an executor should be ordered where there is not only a dereliction of duty, but where the conduct of the executor is detrimental to the effects of the estate. In other words, the conduct complained of must be of such serious degree that if the executor is allowed to continue with the administration of the estate, the estate would not be protected and further, there would be prejudice to the interests of the beneficiaries.

See: *Bonsma and Meaker, N O and Others* RLR 1973 16 and *Sackville West v Norse and Another* 1925 AD 516 at p527.

In *Katirawu v Katirawu and Others*, HH 58/17, the court took the view that the position of a trustee in insolvency is analogous to that of a trustee, administrator or executor in a deceased estate. The court held as follows:

“He occupies a position of trust. Under the insolvency laws it is his function to liquidate the insolvent estate and account to creditors and the insolvent for his administration. In this respect, his fiduciary position differs little from that of an executor or administrator of the estate property. In my view, the court has at common law the same power to remove a trustee in an insolvent estate as it has respect of a trustee, or guardian or administrator in a deceased estate.”

In *Fey NO and Whitefield NO v Serfontein and Anor* 1993 (2) SA 605 the court held that an executor holds a position of trust. Where such trust has been breached by failure to administer the estate, she may be removed from such position.

GROUND FOR REMOVAL OF AN EXECUTOR UNDER COMMON LAW

At common law the courts have inherent power to remove a trustee from office. Executors like the trustees are not lightly removed from office. The courts do have the power and discretion to remove the executor from office where his conduct adversely affects the interests of the estate. In the present case the court shall be guided by the detailed

observations made by the Assistant Master in her report. The fiduciary relationship that exists between the executrix and the beneficiaries will be affected where the executrix acts in a manner that is not transparent. The delays in the winding up of the estate have not been adequately explained by the executrix. In many ways, the executrix's explanation is incomprehensible. In attempting to explain the delay of at least two years in the winding up of the estate, the executrix indicates that she registered the estate on the 28th August 2017. She then tried to "gather" the estate assets. Several months later, the inventory was filed on 10th August 2018. The advertisement for creditors and debtors was only published on 16th February 2018, after several inquiries by the applicant's legal practitioners on why there was no movement in the winding up of the estate. An additional ground for the removal of the executrix is that she has had a clear fall-out with the beneficiaries, a situation not consistent with a person administering an estate and acting in trust on behalf of the beneficiaries. The executor has not produced any statement of income reflecting the amount of rentals collected from the immovable property of the estate. This lack of transparency is not acceptable and wholly inconsistent with the functions of an executor. The first and final distribution account of account filed by the executrix has not been explained to the satisfaction of the Assistant Master. The executrix is expected to provide the court with a full account in her stewardship of the estate affairs in a clear and unambiguous manner. Whilst it is alleged that the rentals due to the estate have not been properly accounted for, there are further allegations of missing property and cash belonging to the estate. This court cannot ignore the observations made by the Assistant Master in her supervisory role on the activities of the 1st respondent. In my view, therefore, a combination of factors must be considered in determining whether the executrix should be removed. These factors may be conveniently summarised as follows:

- (a) The explanation for the delay in winding up the estate.
- (b) The size and complexity of the estate.
- (c) The steps taken to date in winding the estate.
- (d) The relationship between the executor and the beneficiaries
- (e) Whether the executor has taken adequate steps to protect the estate.
- (f) The report by the Master and his/recommendations.
- (g) Generally whether the executor has acted diligently in the protection of the assets of estates.

DISPOSITION

I am satisfied from the foregoing that it has become undesirable for the 1st respondent to continue as Executrix Dative in the estate of the Late Grace Bellodi owing to her unsatisfactory conduct in administering the affairs of the estate. First respondent has not specifically denied the alleged acts of commission and omission which make her unsuitable to remain as executrix. The first respondent has clearly failed to conduct the affairs of the estate satisfactorily. Long delays have not been explained. The failure by first respondent to timeously wind up the estate is prejudicial to the estate. Failure by first respondent to properly identify the deceased's assets as at the time of her death for the purposes of valuing the estate is extremely harmful to the estate. The prejudice to the estate caused by the negligence of the executrix warrants the removal of the first respondent as Executrix Dative. In terms of the common law, the applicants are entitled to approach this court for an order for the removal of the executrix. It is trite that an estate should be wound up within a reasonable time and failure to do so on the part of the first respondent, amongst other acts of commission and omission, cumulatively leads to a conclusion that it is no longer desirable for first respondent to continue as Executrix Dative.

In the result, in my view, the applicants have made a case for the removal of the Executrix Dative. I would accordingly make the following order:

1. The first respondent be and is hereby removed as an Executrix in the Estate of the Late Grace Bellodi (DRB 283/17).
2. The first respondent be and is hereby ordered to return to the second respondent, the Letters of Administration issued to her.
3. The first respondent be and is hereby ordered to pay the costs of this application.

Messrs Calderwood, Bryce Hendrie and Partners, applicants' legal practitioners
Sengweni Legal Practice, 1st respondent's legal practitioners