BABRA CHIPERE
and
GETRUDE CHIPERE
and
DAVID CHIPERE
versus
OLIVER NAKOMA
(in his capacity as the Executor Dative
In the ESTATE OF THE LATE ABEL CHIRARA DR 169/14
And in his capacity as Executor Dative
In the ESTATE OF THE LATE LOISE CHIPERE DR 168/14
and
PAUL CHIRARA
and
ENNIE CHIRARA
and
MASTER OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
NDEWERE J
HARARE, 28 July 2015 & 28 January 2016

Opposed Matter

S Mpofu, for the applicants
C Mutandwa, for the respondents

NDEWERE J: On 30 January 2015, the applicants filed an application for condonation of late filing of an application for review of the Master's decision in the Estate of the late ABEL CHIRARA.

The background of the matter is that the applicants' mother, Loise Chipere married Abel Chirara customarily in 1981 and in 1993, they solemnized their marriage in terms of the Marriage Act, [*Chapter 5 : 11*]. At the time of their marriage, Loise Chipere had three children, the applicants, while Abel Chirara had one child, Paul Chirara. Loise and Abel were involved in a car accident in South Africa on 24 December 2013, and they both died on the spot. Their

deaths were registered in South Africa on the same day with No 180306 being Abel's Death Certificate while No 180307 was Loise's Death Certificate. The actual time of death of either of the deceased is not known.

The Estates of the deceased persons were later registered with the Master of the High Court, Zimbabwe as DR 168/14 for Abel Chirara and DR 169/14 for Loise Chirara.

The deceased persons left Wills which were purportedly signed by them, but they were not witnessed. The Wills bear the same date and have similar provisions in that they left their estates to each other and to David Chipere. Both were not witnessed. The Wills were duplicate Wills and the originals could not be found. The Master rejected the Wills on 20 May 2014 and decided that the estates should be dealt with as intestate.

The applicants intend to have the Master's decision to reject the wills reviewed but because they are out of time, they have started by applying for condonation. The first respondent who is the Executor Dative for both Estates opposed the application.

The first respondent took issue with the inclusion of the third applicant as a party to the proceedings when the third applicant has not given any supporting affidavit or any authority to the first and second applicant to represent him. The applicants conceded this point and the third applicant was struck off as an applicant, leaving only the first applicant and the second applicant as the applicants.

The first respondent also submitted that the applicants accepted the Master's decision to reject the Wills after the Master held meetings with members of the families of both deceased persons.

In their Heads of Argument, the applicants took issue with the first respondents' failure to index his opposition papers. There is merit in the criticism of the first respondent by the applicant. However, in the interest of resolving the real dispute within the two families, the court decided to exercise its discretion in favour of the first respondent in terms of r 4C of the High Court Rules.

On the merits of the application for condonation, in terms of Order 3 r 259 of the High Court Rules 1971, review proceedings shall be instituted within eight weeks of the termination of the suit, action or proceeding in which the irregularity or illegality complained of is alleged to have occurred, provided that the court may for good cause shown, extend the time.

In the present case, the Master's decision to reject the Wills was on 20 May 2014. The applicants application was on 30 January, 2015. Instead of applying within eight weeks, the applicants applied within 8 months. So the applicants really need to show good cause why their delay should be condoned.

The applicants' counsel referred to the case of *Bishi* v *Secretary for Education* 1989(2) ZLR 240 (H) where the factors for consideration in an application for condonation were summarised as follows:

a) the degree of non-compliance with the rules
b) the explanation thereof
c) the prospects of success on the merits
d) the importance of the case
e) the convenience of the court and
f) the avoidance of unnecessary delay in the administration of justice.

In my view, the delay is very long. A matter which was supposed to be reviewed within eight weeks is now to be reviewed after the lapse of eight months. So the degree of non-compliance with the rules is great indeed. It is not a border line case were someone delayed by just a few days.

The explanation for the delay is not convincing. In para 17 of her Founding affidavit, the first applicant says;

> "From that day onwards, I have sought advice from different forums and particularly from WLSA"

We know about Women in LAW in Southern Africa (WLSA) which advised the applicant to litigate, but the applicant did not bother to name the different forums she refers to or obtain supporting affidavits' from them. All we have is her bare assertion that she approached "different forums". If the first applicant spent eight months seeking advice from different forums, the court would expect those forums to be named and supporting documentation obtained from them before the court is expected to accept such an assertion. In para 18 she proceeds to say,

> "It is then that I was advised of the need to file a court application challenging the decision of the Master."

Again, she does not tell the court the date that she received this advice from WLSA, yet when you are dealing with explanations for delays, dates are very important. In this instance, we are left wondering when, within that eight months period, she finally received advice from WLSA. The letter from WLSA which is in the record is dated 15 December, 2014. So we can conclude that the applicants got the advice from WLSA around 15 December, 2014. But we still do not know what the applicant did from 20 May 2014, to 15 December 2014 a period of 7 months, because she has been economic with the factual information. How then can the court exercise its discretion in the applicant's favour when it feels that the applicants' explanation has some gaps?

The next factor to consider in an application for condonation for late noting of a review are the prospects of success on the merits. The applicants have accused the Master of failing to take the two pronged approach in assessing the validity of the Wills. They refer to s 8 (5) of the Wills Act Chapter which states as follows:

> "Where the Master is satisfied that a document or an amendment of a document which was drafted or executed by a person who has since died was intended to be his will or an amendment of his will, the Master may accept that document, or that document as amended as a will for the purposes of the Administration of Estates Act [*Chapter 6:01*]even though it does not comply with all the formalities….."

I have underlined the words satisfied, and may accept, for ease of reference. The starting point is for the Master to be satisfied. I fail to see any prospects of success by the applicants in challenging the Master's decision because his decision clearly shows that he was not satisfied that the Wills were done by the deceased persons not just after looking at the duplicates but also after holding meetings with the deceased couple's families.

The first meeting by the Master's office with the family was on 7 March 2014, [p 52 of the application]. That meeting was adjourned to allow the late Abel Chirara's children to attend. A dispute arose during that meeting, which appears in the last paragraph of the minutes. The Will purported to be Abel Chirara's had said David was his son (not stepson) and this was disputed at the meeting of 7 March 2014 and the Master was told that Abel's children were Paul and Ennie, who were not mentioned in the Will at all. The meeting was then adjourned to allow Paul and Ennie to attend. The next meeting was on 22 April 2014. The parties failed to agree on an executor. The one nominated by the applicants was rejected and the meeting agreed on a neutral executor.

The minutes of 22 April 2014, went further, on p 54 of the record. The issue about Abel's real children took centre stage. David, who was mentioned in the Will was given his proper place as a step child of Abel, not son as in the Will. Abel's relatives also disputed Abel's Will. They said the signature thereon was not his and they did not accept the Will as his. But the applicants and the second applicant's grandson said the Will was Abel's.

As regards Loise Chipere – Chirara's Will, again there was a dispute (p 63 of the record). The Chiraras disputed the Will while the Chiperes said the Will was genuine.

The above shows that the Master was not confronted with just two unwitnessed Wills, he also had to consider the views of the families. So how can the applicants succeed in upsetting the Master's decision on review in view of such contestations? In my view, the applicants have no prospect of success because contrary to what they allege, the Master considered all the circumstances of the "Wills" and in the end, he was not satisfied that the documents were genuine Wills of the deceased.

The first applicant actually caused more confusion by suggesting that her mother's name is Loise Chipere and not Loise Chirara when the Will was in Loise Chirara's name. That is a factor which would also cast doubt on the validity of the Will. If Loise wrote the Will freely and voluntarily, why did she not use her actual official name? If Abel wrote the Will freely and voluntarily, why did he refer to David as his son instead of his step-son? So the Master's decision in refusing the Wills's took into account more than just the absence of witnesses, but all the factors around the Wills. The applicants therefore have no prospects of success on review.

On the importance of the case, the applicants have argued that our jurisprudence need to develop in cases involving simultaneous deaths. That may be so, but the challenge with the present case is that the time of death was not given for either deceased, making any argument on who died first still born. In my view, the present case cannot lead to a development of the law in that area because of the missing vital information on the time of death because it is the time of death which will inform us of who died first. In addition, that issue was never raised in the founding affidavit. It is trite that an application stands or falls on what is in the founding papers. So that issue is not properly before the court and cannot assist the applicants.

On the avoidance of unnecessary delay in the administration of justice, I am of the view that since the applicants initially accepted the Master's decision as per their communication in

the first applicant's letter of 26 November 2014; the applicants should allow the estate to be finalized. On p 59 of the record, the first applicant wrote as follows:

> " Firstly, we appreciate that as we are two families, we accept the 50/50 sharing of the estate".
>
> And on p 61,
>
> "We want to buy out the estate"

The applicants should respect the position they took in the above communication and not cause any further delays in the finalization of the estates.

Since the application for condonation failed to meet all requirements as outlined above, the application for condonation for late noting of review of the Master's decision to reject the Wills is hereby dismissed, with costs.

Munangati & Associates, applicants' legal practitioners
Machinga & Partners, respondent's legal practitioners