E. PFUGARI PROPERTIES (PRIVATE) LIMITED
and
EDDIES PFUGARI (PRIVATE) LIMITED
and
ROCKNEY INVESTMENTS (PRIVATE) LIMITED
versus
THE MASTER OF THE HIGH COURT
and
CLEVER MANDIZVIDZA N.O
and
STERN MUFARA N.O
and
REGISTRAR OF COMPANIES

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 18 and 26 May 2021

Opposed application

T. Mpofu with *T. Kachara*, for applicants
N. Musviba, for 2nd respondent

TAGU J: This is an application for setting aside the interim liquidation and distribution accounts pertaining to the Applicants which were lodged by the second respondent in the estate late Edward Nyanyiwa, DR471/19. The accounts were confirmed by the 1st Respondent.

The facts are that the late Edward Nyanyiwa who died on the 10th of February 2019 held shares in several companies which include Applicants. The Applicants are companies engaged in the business of property development. The 2nd Respondent was appointed as the Executor Dative. The 1st Applicant owns immovable properties at Whitecliff in Harare as well as at Brockdale Farm in Bindura. The total cost of servicing both the residential and commercial stands at Whitecliff and Brockdale Farm is estimated at over US$8 071 731.00. These liabilities were not taken into account when the deceased's shares in the 1st Applicant were valued by the 2nd Respondent and confirmed by the 1st Respondent.

The 2nd Applicant developed the sprawling suburb of Knowe in Norton and at Alphaerton in Mutare. Again the costs of servicing the Knowe suburb and Alphaerton were not taken into account by the 2nd Respondent when determining the value of the deceased's shares in the 2nd Applicant when the 1st Respondent confirmed the shares.

The 3rd Applicant is undertaking a housing development in Gweru. The intrinsic liabilities, costs and endowment fees due to the Gweru Municipality were also not taken into account by the 2nd Respondent when the 1st Respondent confirmed the deceased's shares.

On 2 September 2020 the Applicants objected to the interim liquidation and distribution accounts. The objection was dismissed by the 1st Respondent on the 12th of October 2020. The Applicants now pray that the decision of the 1st Respondent be set aside on the basis that it is grossly irregular as it overstated the value of the shares held by the deceased in the Applicants' companies. They now seek the following order-

"IT IS ORDERED THAT

1. The first respondent's decision to confirm the second respondent's interim liquidation and distribution accounts pertaining to the applicants in the estate late Edward Nyanyiwa is hereby set aside.
2. The interim liquidation and distribution accounts filed by the second respondent in the estate late Edward Nyanyiwa pertaining to the applicants are hereby set aside.
3. The first respondent shall appoint an impartial person to determine the value of the shares held by the late Edward Nyanyiwa in the applicant companies, within ten days of being served with this order.
4. The costs of suit shall be borne by the estate late Edward Nyanyiwa."

Only the 2nd Respondent Clever Mandizvidza N.O, the Executor Dative of the estate late Edward Nyanyiwa (senior) filed a Notice of Opposition to the application. The 1st Respondent who is the Master of the High Court filed a Master's Report in terms of Order 32 Rule 248 of the High Court Rules 1971 as amended.

The counsel for the 2nd Respondent raised two points *in limine*. The first one being that there is no founding affidavit and she prayed that this application be dismissed. The second point *in limine* being that this application has been pre-maturely filed and must be dismissed. Both points *in limine* were opposed by the counsels for the Applicants. It is necessary that I dispose of the points *in limine* first before dealing with the merits of the application.

1. THERE IS NO FOUNDING AFFIDAVIT

The counsel for the 2nd Respondent submitted that there is no application before the court because there is no founding affidavit. She said the 2nd Respondent was appointed by all Applicants who have brought the matter to court. She further submitted that the one who purports to be the deponent was also present. She made reference to **annexure 1** which shows that it is a resolution and she challenged that.

Counsels for the Applicants disputed the averments by counsel for the 2nd Respondent and referred the court to page 3 of the record where they pointed out that there was a founding affidavit. They further referred the court to pages 11 to 13 where there are extracts of meetings of Board of Directors of Applicants where they resolved to litigate. They therefore prayed that this point *in limine* be dismissed.

The court indeed looked at page 3 of the record. On that page is a founding affidavit deposed to by one Edward Nyanyiwa (junior), employed as a director in the three Applicant companies. He referred to the resolutions authorizing him to depose to the affidavit attached as annexures "A1" to "A3". At pages 11 to page 13 are extracts of minutes of meetings of the Board of Directors of E. Pfugari Properties (Pvt) Ltd, Eddies Pfugari (Pvt) Ltd and Rockney Investments (Pvt) Ltd respectively, held at Bentley House, 56 Robson Manyika, Harare on the 9th of April 2019. For avoidance of doubt the three resolutions read as follows-

"**IT IS RESOLVED THAT:**

EDWARD NYANYIWA (JNR) is hereby authorized to sign all necessary documents on behalf of the company and to represent the company in all court proceedings and instruct the company's legal practitioners. He shall sign all necessary affidavits and documents in connection with the institution or defending of any court proceedings by or against the company.

Certified as a true copy of the original resolution.

Dated at Harare this 9th day of April 2019.

SIGNED J MUZWA

SECRETARY"

A look at page 119 of the record is **annexure 1** referred to by the counsel for the 2nd Respondent. It is not a resolution authorizing the 2nd Respondent to represent the companies in litigation. The annexure 1 reads as follows-

> "**EXTRACT FROM THE MINUTES OF A MEETING OF THE SHAREHOLDERS OF COMPANIES CONTROLLED BY THE LATE EDWARD NYANYIWA WHO DIED AT HARARE ON THE 10TH FEBRUARY 2019 AND WHOSE ESTATE IS BEING ADMINISTRERED UNDER MASTER'S RECORD DR471/19 HELD AT HARARE ON THE 9TH OF APRIL 2019**.
>
> Whereas the Shareholders and Beneficiaries of the Estate Late Edward Nyanyiwa considers that it is in the best interests of all parties and in compliance with the Companies Act (Chapter 24:03) to appoint replacement Directors to companies which were controlled by the late Edward Nyanyiwa most of which were left with one surviving director Edward Nyanyiwa (Jnr) after the demise of Edward Nyanyiwa (Snr)
>
> **IT IS RESOLVED** that:
>
> 1. For administrative purposes and for purposes of convening meetings, all companies controlled by the late Edward Nyanyiwa be dealt with as single economic unit.
> 2. Mr. Clever Mandizvidza (ID 80- 052938-M-800 be appointed Director of all companies which were controlled by the late Edward Nyanyiwa(snr).
> 3. Mr. Stern Mufara (ID 22-124604-G-04) be appointed Director of Eddies Pfugari Properties Ltd.
>
> **Dated at Harare this 23 Day of April 2019**
>
> **CERTIFIED THAT THE FOREGOING IS A TRUE AND CORRECT EXTRACT FROM THE MINUTES AFORESAID:**
>
> Signed …….
>
> **(DIRECTOR)/(SECRETARY)"**

It cannot be said by any stretch of imagination that **annexure 1** was a resolution to litigate but was meant for purposes of appointing Directors. What is clear is that there is a founding affidavit to the application and resolutions authorizing the deponent to represent the companies in this application. The first point *in limine* therefore lacks merit and is dismissed.

2. APPLICATION PRE-MATURELY FILED

The contention by the counsel for the 2nd Respondent was that this application has been pre-maturely filed. She said the liabilities were not taken into account because the account has not been confirmed by the Master of the High Court. She said in terms of s28 of the Estate Duty Act [*Chapter 23.03*] the Applicants were supposed to object to the Master first or appeal in terms of s 29 of the Estate Duty Act first before bringing this matter to court. She argued that valuations were done as they stand without taking into account the liabilities. According to her no loss or prejudice will be incurred by the Applicants.

In opposition to the second point *in limine* the counsels for the Applicants submitted that the application before the court is not premature. According to them the Master of the High Court has already approved the accounts and there was an objection lodged with the Master which the Master dismissed. So s 28 of the Estate Duty Act is not applicable.

A reading of the file shows that the counsel for the 2nd Respondent got the facts of this matter all wrong. She did not notice that the Master confirmed the accounts without taking into account the liabilities of the companies. Pursuant to that the legal practitioners representing the Companies wrote a letter objecting to the confirmation of the accounts dated 2 September 2020 which is on page 90 of the record. The Master in a letter dated 12th October 2020 which is on page 94 of the record dealt with the objection and dismissed it. This caused the Applicants to then approach this Honourable Court. As the facts stand s 28 of the Estate Duty Act is not applicable and the application is properly before the court. The application was not pre-maturely made. The second point *in limine* is dismissed.

AD MERITS.

In this application for review, the main issue for determination is whether the 1st Respondent's decision to confirm the interim liquidation accounts containing certain valuations of the Late Edward Nyanyiwa's shareholding in the Applicants must be reviewed, and consequently

set aside. The secondary issue for determination is whether the 1st Respondent should be ordered to appoint an independent person to determine the value of shares held by the estate of the late Edward Nyanyiwa in the Applicant companies. The second issue falls to be resolved on the basis of the main issue in that if the Applicants succeed on the first issue, it would follow as a matter of course that a new valuation must be carried out.

What is critical in this application is that the decision of the 1st Respondent is being impugned in these proceedings as being grossly irregular and manifestly unreasonably and should not stand.

The brief facts are that the 1st to 3rd Applicants own certain real estate. They subdivided, serviced, developed and sold the subdivided properties (stands). The late Edward Nyanyiwa (Snr) held 50% of the shareholding in the three companies. Those shares have now been transmitted to the 2nd Respondent who is the executor of his estate. In the course of the administration of the estate of the late Nyanyiwa it became important that interim liquidation and distribution accounts be prepared, taking into account the value of the deceased's shareholding in the three Applicants. The 2nd Respondent chose the party tasked with preparing the valuation. He chose Real Estate Agents whose valuation he made use of in preparing the interim liquidation and distribution accounts. The valuation appears at pages 82-89 of the record. It is apparent that this is a valuation of immovable properties and not shares. Further, it is apparent that the valuation is of the subdivided stands and not of the parent properties as they appear on the title deeds. No liabilities are taken into account by the Real Estate Agents in arriving at the assigned values. The Applicants objected to such valuations supposedly in terms of s 52 (8) of the Administration of Estates Act [Chapter 06.01] but the 1st Respondent confirmed the same as reflected in the prepared interim liquidation and distribution accounts in terms of s 40 of the Administration of Estates Act and said he was now *functus officio*. Hence the present application for review.

The arguments submitted by the Applicants is that the false valuation would lead to the liquidation of the Applicants and would involve them in various breaches in respect of purchasers of stands who justifiably expected completion of the servicing thereof.

The Applicants sued the Master of the High Court as a substantive respondent. He is cited in this application as the 1st respondent. The Master of the High Court opted not to file any Notice of Opposition. He in fact filed a report. The counsels for the Applicants submitted that the Master

of High Court should have filed a Notice of Opposition because it is his decision which is in issue. They submitted that the report must be struck off the record because Rules of this Honourable Court do not allow that. For that contention they relied on the case of *Harare Motorways (Private) Limited and African Banking Corporation of Zimbabwe Limited t/a BANC ABC* v *The Sheriff for Zimbabwe N.O and Doves Funeral Assurance Company Limited and Bluestar Logistics (Private) Limited and The Registrar of Deeds N.O HH 769/19*. In that case The Sheriff for Zimbabwe was cited as a substantive respondent and the decision that was under review was that of the Sheriff. The Sheriff did not file a Notice of Opposition but instead filed a report. DUBE J in dealing with the same issue had this to say at pages 8-9 of the cyclostyled judgment -

> "As regards the Sheriff's report, my view is that this is a matter best left to be dealt with elsewhere, however I could not resist making the following observations. The Sheriff is an officer of this court. A judicial sale is a court managed sale. When the Sheriff conducts a judicial sale, he does so on behalf of the court. Where the Sheriff is sued over the manner in which he conducts a sale in execution, he may choose to either defend proceedings or elect to abide by the decision of the court, in which case he is not required to file a notice of opposition and opposing affidavits. The rules do not make provision for the filling of a report by the Sheriff to to the court. The Sheriff did not oppose these proceedings choosing instead to compile a report which he filed with the court. The report was not prepared in terms of the rules. Of note however, is that the report simply captures the events that led to the Sheriff confirming the sale and does not deal with the merits of the matter. As I have already noted, the report was not filed in terms of the rules of court. Perhaps it is time our rules made provisions for the filling of a Sheriff's report where he has conducted a sale and does not wish to oppose legal proceedings challenging a sale he conducted. The purpose of the report would clearly be to give insight to the court regarding the conduct of the sale and would be of great assistance to the court. Nothing stops the court from requesting a report from the Sheriff in a matter such as this."

Having clearly stated that the report was not filed in terms of the rules, the learned judge did not spell out clearly whether the report should be struck out or not. In casu the Master's report is submitted in terms of Order 32 Rule 248 of the High Court Rules 1971 as amended. My assumption is that in the case dealt with by DUBE J the report did not specify under which rule it was being filed. Be that as it may. In the present case the Rule under which the Master of the High Court compiled the report reads as follows-

> **"248. Application involving Deceased Estates, Liquidators or Trustees.**
>
> (1) In the case of any application in connection with -
> (a) the estate of a deceased person, or
> (b) the appointment or substitution of a provisional trustee in insolvency or a provisional liquidator of a company or of a trustee of other trust funds;

> a copy of the application shall be served on the Master not less than ten days before the date of set down for his consideration, and for report by him if he considers it necessary or the court requires such a report.
>
> (2). In any application referred to in subrule (1), where the name of any person is to be suggested to the court as curator of property, such name shall be referred to in the application or otherwise submitted to the Master for his approval."

While the report captures the events leading to how the Master confirmed the accounts, I do no find the relevancy of the Rule under which the report was made and whether it should be struck out or not hence it is an issue that will be determined on another time. What is clear is that the Master did not file a notice of Opposition. He left the other parties who prepared the valuations to explain what they did and he denied that his conduct was unreasonable as he acted on what was placed before him.

Of the four respondents only the 2nd Respondent (Executor Dative of the estate of Late Edward Nyanyiwa) filed a Notice of Opposition in this case. In his Notice of Opposition as amplified in his heads of argument the 2nd Respondent among other things said that the three Applicant companies are not beneficiaries to the estate of the late Nyanyiwa. He said the only beneficiaries of the estate are those mentioned in the interim distribution accounts at pages 76 to 77 of the application. He reiterated that the Applicants have no locus standi in this matter since the Applicants are all companies in which the late Nyanyiwa held shares. His argument being that the companies are not beneficiaries of the estate of the late Nyanyiwa. According to him the point of law that arises is whether the Applicant companies have interest in the estate of their shareholder, where they do not hold any claim against the deceased shareholder's estate.

Coming to the 1st Applicant he argued that the costs for servicing Whitecliff cannot be characterized as a liability where the identity of the creditor owed such obligations/performance is not identified. Further, he said there is no evidence of such alleged liabilities having existed as a matter of both fact and law as at February 10, 2019. To him the amount sought to be included is an estimate. He therefore denied that Annexure "C" is evidence of any specific liability by any of the 1st Applicant towards Zvimba council. As to the 2nd Applicant he said no specific amount is given as to what is needed for the development of Knowe, Norton. To him Annexure "D1" is evidence of obligations owed in terms of a judgment that has superannuated by lapse of time. Lastly he said there are no meaningful documents submitted in respect of 3rd Applicant. The allegation that the 3rd Applicant is undertaking a housing development in Gweru is inadequate for

purposes of proving ignored liabilities. Finally he denied the allegation by the Applicants that the decision by the 1st Respondent is grossly unreasonable and that failure to take into account liabilities inflated values of the shares. He therefore prayed that the application for review be dismissed.

ANALYSIS OF THE SUBMISSIONS

The decision at issue in these proceedings was taken by the 1st Respondent. That decision can be challenged in terms of the law. The 1st Respondent has been substantively cited. The 1st Respondent has not substantially opposed the application by which the vacation of his decision is sought by filing a Notice of Opposition. While the 2nd Respondent undoubtedly has an interest in this matter, he can only raise issues under circumstances where the substantive respondent has opposed the matter. This application assails the exercise of a public and not private power. The 2nd Respondent has already prepared his accounts. He has defended those accounts before the 1st Respondent. What now needs to be defended is the 1st Respondent's decision in this review application. 1st Respondent's decision appears difficult to uphold in his absence on the basis of the position taken by the 2nd Respondent of not filing a notice of opposition.

FACTS I FOUND TO BE COMMON CAUSE

It is common cause that Whitecliff, the property owned by the 1st Applicant has created a number of residential and commercial stands which are in the process of being serviced. It is these stands that were valued by the Real Estate Agents. Brockdale is also owned by the 1st Applicant and has been subdivided into various stands. The endorsement fees and servicing costs of these stands have not been taken into account. In my view the fact that endorsement fees are due means the original property no longer exits. It is common cause that 3rd Applicant has a property in Gweru. The property has been subdivided and endorsement fees are due. The same applies to properties held by the 2nd Applicant. What these facts show is that the liabilities are current, some were paid and were in existence as at the date of death of the late Edward Nyanyiwa. The valuations show that only stands were valued yet there cannot be stands without corresponding financial liabilities. It is common cause the valuation report shows that Real Estate Agents predominantly used the market approach in arriving at the value of the land. That approach related to the

subdivisions only yet all the subdivisions had intrinsic liabilities attached to them. There was therefore no valuation of the shares.

What the late Edward Nyanyiwa owned were shares and not only the stands. What the 2nd Respondent had the right to deal with are shares and not the stands. There was no valuation of the shares. See *Salomon* v *Salomon & Co. Ltd* [1897] AC 22(HL) and *Dadoo Ltd & Others* v *Krugersdorp Municipal Council* 1920 AD 530 at 550.

It is also not in dispute that the valuation was not done in terms of statute. Section 128 of the Administration of Estates Act provides as follows-

> "(1) The Master may call upon such and so many persons as to him seem fit to value any assets and property, the valuation of which becomes necessary for the purposes of this Act.
>
> (2) Every such person shall, in respect of every valuation made by him, be entitled to demand and receive a reasonable compensation to be assessed and taxed by the Master."

Again s 6 of the Estate Duty Act (Chapter 23.03) provides that-

> "(1) The value of any property included in the estate of any person shall be-
>
> (a)……..;
>
> (g) in the case of shares in any company not quoted in the official list of a securities exchange registered under the Securities Exchange Act (Chapter 24.25) or on any securities exchange outside Zimbabwe, the value of such shares in the hands of the deceased at the date of his death as determined, subject to section nine, by sworn valuation by some impartial person appointed by the Master, subject to the following provisions, that is to say…."

What the above provisions mean is that a valuation of shares must be done by a person appointed by the Master. *In casu* the valuation was done by a person appointed 2nd Respondent and is invalid on that score. Secondly, what is valued are shares. The Master cannot appoint someone to value the property owned by a company. He has no jurisdiction to do so. What requires to be valued in this case are shares.

With respect, it was irregular and unreasonable in the extreme for the 1st Respondent to accept anything other than a valuation of shares. To make it into an interim liquidation and distribution account, a valuation must relate to the asset owned by the deceased. However, before this court, the 1st Respondent does not explain even in his report if it were to be accepted, why he accepted a valuation of immovable properties and not shares, other than that he merely took into account what was presented to him by those who did the valuations. The 1st Respondent also did

not explain why statute was not complied with. What is clear however, is that if there has been a failure to comply with statute, invalidity ensued. *York Timbers Ltd* v *Minister of Water Affairs & Forestry & Anor* 2003 (4) SA 477 (T). *Hamilton –Browning* v *Denis Baker Trust* 2001 (4) SA 1131 (N) at 1135, *Schierhout* v *Minister of Justice* 1926 AD 99, at 109 where the court held that-

> "It is a fundamental principle of our law that a thing done contrary to the direct prohibition of the law is void and of no force or effect…And the disregard of a peremptory provision in a statute is fatal to the validity of the proceedings affected."

See also *Metro Western Cape (Pty) Ltd* v *Ross* 1986 (3) SA 181 (AD) at 188-189.

On the basis that there has been no valuation of shares the review must succeed. The court has no equitable discretion to dispense with strict compliance with statute. The 2nd Respondent may argue that the shares or liabilities were not quoted and known. But the law is however, clear on how unquoted shares are valued. In *Administration of Estates and Drafting of Wills*, 4th Ed, Juta, LA Kerrnick at p 113 paragraph 106 says-

> "Note, however, that shares in an unquoted company are for estate duty purposes always valued at the author's valuation."

CONCLUSION

Having made the above analysis it can safely be concluded that the liabilities for servicing the Whitecliff area arising from the subdivision permit were not taken into account when the deceased's shares in the first Applicant were valued by the 2nd Respondent. 2nd Respondent did not take into account the costs of servicing residential and commercial stands at Brockdale Farm in Bindura. The costs of servicing the Knowe suburb in Norton were not taken into account when determining the value of the deceased's shares in the 2nd Applicant. The expenses for servicing and developing at Alphaerton in Mutare were not taken into account. Neither were the intrinsic liabilities, serving cost and endearment cost due to Gweru Municipality were taken into account. The liabilities ought to have been taken into account when determining the fair value of the shares held by the deceased. I believe that in valuing the shares the 2nd Respondent ought to have taken into account the liabilities because these are directly tied to the net value of the lands in question and ultimately the value of the deceased's shares. In this case the value of the shares was overstated because the liabilities were downplayed. The effect of the inflated value of the deceased's shares is that the estate is saddled with inflated bills for the Master's fees and executor's fees. The net

effect would be that the Applicants would risk being rendered insolvent if the 2nd Respondent's accounts are not rectified, and this will have a negative bearing on the beneficiaries of the estate of the late Edward Nyanyiwa (Snr) hence the relief sought ought to be granted.

IT IS ORDERED THAT

1. The 1st Respondent's decision to confirm the 2nd Respondent's interim liquidation and distribution accounts pertaining to the Applicants in the estate late Edward Nyanyiwa is hereby set aside.
2. The interim liquidation and distribution accounts filed by the 2nd Respondent in the estate late Edward Nyanyiwa pertaining to the Applicants are hereby set aside.
3. The 1st Respondent shall appoint an impartial person to determine the value of the shares held by the late Edward Nyanyiwa in the Applicant companies, within ten days of being served with this order.
4. The costs of suit shall be borne by the estate late Edward Nyanyiwa.

Scanlen and Holderness, applicants' legal practitioners
DNM Attorneys, 2nd respondent's legal practitioners.