TAWINEYI KUNAKA
versus
MASTER OF HIGH COURT N.O.
and
EXECUTIVE DATIVE
PETRONELLA NYAMAPFENE N.O

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 19 January 2022 & 15 May 2023

Opposed Court Application

B Chideme, for the applicant
No appearance for the respondents

CHITAPI J: This is an application for a declaratur. Such an application is provided for under s 14 of the High Court Act, [*Chapter 7:06*]. The background facts giving rise to the application are not in dispute. They can be summarized as hereunder.

The applicant was on 23 August 2019 and by issue of the Letters of Administration appointed the Executor Dative of the deceased estate of the late Mapfumo Kunaka who died at Harare on 3 November 2001. The estate file reference issued by the first respondent is DR 1467/16. The applicant was however removed as executor dative of the said estate by note of revocation of the Letters of Administration dated 18 December 2019. By Letters of Administration issued on the same date the second respondent was appointed the executor dative to replace the applicant.

The applicant was aggrieved by her removal as Executor Dative. The applicant averred that he was clandestinely removed from his position of Executor Dative. He averred that the first respondent did not have power to "clandestinely" revoke the Letters of Administration. He averred that there was a purported meeting to enquire into the administration of the estate held on 13 September 2013 and that the applicant was purportedly removed as executor dative by consent of all interested parties. The applicant alleged that he failed to attend the meeting due to circumstances beyond his control. He did not detail the circumstances.

In relation to the process to remove him, the applicant attached a copy of a letter by the second respondent dated 27 September 2019. It reads as follows:

> "27 September 2019
> Titan law
> Cnr Piers Road -Fisher Avenue
> Borrowdale
> **Harare**
>
> Dear Sir/Madam
>
> re: ESTATE LATE MAPFUMO KUNAKA
>
> The above matter refers.
>
> At an enquiry held on 13 September 2019 in terms of section 116 of the Administration of Estates Act, [*Chapter 6:01*], it was resolved with the consent of interested parties that the Master appoints a professional executor. It is against this background and we call upon your Mr Tawanda Maguhudze to call in an take up appointment as an independent executor.
>
> Meanwhile interested parties are by copy of this letter advised of your appointment."

A copy of the letter was directed to the applicant who obviously was an interested party as the executor dative affected by the decision to revoke his appointment and the appointment in his place of another executor dative. The person referred to in the letter aforesaid did not appear to have taken up the offer to be the successor executor dative. The second respondent was then appointed as the executor dative on 19 December 2019.

The applicant in contesting his removal as the executor dative averred that he had a substantial if not direct interest in the subject matter of the application and that his interest related to an existing right being the position of executor dative of the estate in issue. The applicant contended that an executor could only be removed by order of court. The applicant also averred that no one had filed a motion in court for his removal. In paragraph 12.3 of the founding affidavit, the applicant deposed as follows:

> "12.3. The power to remove or suspend an executor is clearly reposed in the High Court of Zimbabwe by way of motion and without any order of the High Court or judge thereof, there cannot be a valid and competent removal of an executor."

The applicant further averred that even though he failed to attend the enquiry at which the decision to remove him as executor was reached, such default did not clothe the first respondent with power to remove the applicant as executor because the power to do so resided in the High Court.

The applicant averred that the appointment of the second respondent as executor dative was irregular because it was founded upon an invalid removal of the applicant as executor dative. The applicant averred that he only became aware of the appointment of the second respondent as executor in the applicant's place upon receiving a letter dated 29 October 2020 from the second respondent which directed tenants occupying an estate property situate at Chikwanha Shopping Centre, Chiutungwiza to now pay rentals to the legal practitioners chosen by the second respondent to act for her in her capacity of execution dative of the estate in question.

The applicant thus seeks the relief of a declaratory order as set out in his draft order which he couched as follows:

"IT IS ORDEERED THAT:

1. The appointment of the 2nd respondent as executor dative in the Estate of late Mapfumo Kunaka DR 1467/16 by the 1st respondent be and is hereby declared null and void.
2. Any and all acts purportedly performed by the 2nd respondent consequent to the invalid appointment be and are hereby declared null and void.
3. The applicant be and is hereby declared to be the duly appointed executor in the Estate of the late Mapfumo Kunaka DR 1467/16 as per letters of administration dated 23 August 2016.
4. Any party who opposed this application shall pay costs of suit."

The second respondent did not oppose the application. The first respondent filed a Master's report and indicated that the report was being filed pursuant to the provisions of Order 32 r 248 of the High Court Rules 1971 (then in force0. The applicant filed an answering affidavit in which he objected to the first respondent's report on the basis that the first respondent was in this instance the principal respondent as opposed to him/her having been cited in a nominal capacity to comply with order 32 r 248. The applicant averred that since the first respondent had not filed an opposing notice and opposing affidavit as required of him/her it meant that there was no valid opposition filed by the first respondent. The applicant contended that the application ought to be treated as unopposed and the order sought be in consequence granted.

I deal with the issue of whether or not there was a valid opposition to the application filed by the first respondent. It is clear from the application that the first respondent was cited as the principal wrongdoer whose actions in revoking the letters of administration issued to the applicant are challenged on review. The notice of court application called upon the first and second respondents if they intended to oppose the application "to file a notice of opposition in Form No. 29A, together with one or more opposing affidavits with the Registrar of the High Court at Harare within 10 days after the date on which notice was served" upon them. It is noted that the first respondent filed a report which he purportedly compiled in terms of order 32 r 248. The first respondent did not file a notice of opposition or an opposing affidavit.

The applicant took up the issue of the invalidity of the Master's Report standing alone as a purported opposition to the application. The issue here is whether or not the first respondent ought to have filed a formal opposition in the form of a form 29A notice of opposition and an opposing affidavit. In this regard, note should be made that the principal basis of seeking the setting aside of the revocation order of the applicant's letters of administration is that the first respondent exercised a *quasi*-judicial power that he does not have. Specifically, the applicant averred that the provisions of ss 116 and 117 of the Administration of Estates Act. The applicant therefore impugns an alleged irregular act committed by the first respondent in the exercise of functions given to him by statute. The first respondent does not or should not take sides where his decision is under challenge as to do so would be construed as being partial towards one party against the other. The other point of not is that the first respondent in the absence of any provision of the law which allows for a revisitation of his order would have become *functus officio* upon making his determination. Therefore, he cannot be required to answer a review application upon the pain of being barred and/or having a default judgment entered against him.

In my understanding and generally speaking and in the absence of any law to the contrary or permitting, the maker of a reviewable decision is cited as a party on review not because he is under sanction to respond or face consequences of default but because the law requires that such decision maker should be cited. Rule 62(1) of the High Court Rules, 2021 provides as follows:

> "62(1) Save where any laws otherwise provides, any proceedings to bring under review the decision or proceedings of any inferior court or any tribunal, board or officer performing judicial quasi-judicial or administrative functions, shall be by way of court application directed and delivered by the party seeking to review such decision or proceedings to the magistrate,

> presiding officer or chairperson of the court, tribunal or board or to the officer as the case may be and to all other interested parties."

Sub-rule (5) of s 62 reposes upon the clerk of court whose proceedings are brought on review or the tribunal, board or officer who exercised the *quasi*-judicial functions to be reviewed to prepare and transmit the record of proceedings to the reviewing court withing twelve (12) days of service of the review application. It would appear obvious that r 623(1) requires that the application for review should be directed and delivered on the presiding officer because it is his or her duty in the case of the magistrate's decision being placed on review to ensure that the clerk of court and in any other case the determining board, tribunal or officer to forward the record of proceedings on review as the reviewing court would not be having the record. Put simply by directing and serving the application, the rationale is not to require the determining body to defend its determination but to enable the process of having the proceedings sought to be reviewed being prepared for review as opposed to supporting or justifying his decision.

In the case of *Crispen Chiremba* v *Superintendent Chiroodza & Commissioner of Police* HH 163/18 MANGOTA J in noting that a person who is dissatisfied with the discussion of a court has right to appeal against it or seek its review rightly stated that it was improper to compel the decision maker to defend this decision. The learned judge also noted that the decision maker should not be cited as a substitute for the parties who were the proponents in the proceedings before him. It is noted that the learned judge referred to two advantages of citing the judicial officer as being firstly, that the judicial officer becomes aware that his decision is to be reviewed and secondly that it gives him an opportunity to make comments; or to clarify aspects of the judgment for the benefit of the reviewing court. All that needs to be emphasized though is that the decision maker is not under any legal obligation to make comments, clarifications or oppose or support the review application.

The judgment of the Supreme Court quoted by MANGOTA J in the *Chiremba case*, (*supra*), being *Joram Mupambirei & Ors v Zvarivadza & Ors* SC 94/96 where KORSAH JA, stated:

> "The Minister as an arbiter in the proceedings, is firstly, not a party to the dispute, and, secondly is not adversely affected by the quasi-judicial findings he makes. He ought not to have been made the substantive party in proceedings where his own decision was being challenged…."

And in *Blue Ribbon Foods Ltd* v *Dube N.O & Anor* 1993(2) ZLR 146 at 150B, where MCNALLY JA stated:

> "In review proceedings, allegations of procedural impropriety or bias are commonly made (those being the common grounds which justify review) the presiding officer whose conduct in question, may if he wishes, file an affidavit to clarify such matters as he may wish to clarify. And in a proper case, though I think exceptional case, he may be represented by counsel but only on that issue. It is not for him to enter into the merits of the case or defend his decision. That is the function of counsel for the respondent's employer or the respondent's employee as the case may be."

are instructive. In the latter case, the learned judge did not give an example of an exceptional circumstance which would require the engagement of counsel by the decision maker whose decision is brought on review. I am not going to hazard a guess. The crux of the matter remains that the judicial officer is not compelled to respond to the application and where he does so, it should be to clarify material points without inclining to support any of the parties who were before him. Where the decision maker cannot do so without being dispassionate, then he should be guided as in the *Leopard Rock case* (*supra*) where the learned judge stated that:

> "The second choice of the arbitrator or umpire when served with the notice of motion for his removal or to set aside his award is to take no action and abide by the court's decision."

In casu, as clearly alluded to, the first respondent prepared a report. Albeit it is noted in the *Leopard Rock* judgment by the Supreme Court that the presiding officer whose decision is on review may file an affidavit to clarify such matters as he may wish to clarify, it should be noted that such an affidavit is neither an opposing affidavit nor a consent to the order sought. In this respect the criticism of the applicant's counsel that the first respondent failed to comply with the requirements of Form 29A and filed a report instead does not hold water. It has been discussed that despite r 62(1) of the High Court Rules providing for directing and delivering the application on the decision maker, in reality, the decision maker is not the principal respondent but the other respondent affected by the decision brought on review. It is therefore the parties who were the protagonists before the decision maker who argue in support of or against the decision rendered.

The next issue is whether I can have recourse to the Master's report. It is not an affidavit. I did not read the judgment of the Supreme Court in the Leopard Rock case to hold that the review court cannot have regard to any representations made by the decision maker in any other form, save by affidavit. If I am wrong in so holding, then I still note that the application involving deceased estates are specially catered for in the rules. The first

respondent acted in terms of Order 32 r 248 of the High Court Rules, 2021. It provides as follows:

> "61(1) In the case of an application in connection with
> (a) The estate of a deceased person; or
> (b) ……
> a copy of the application of the application shall be served on the Master not less than 10 days before the date of set down for his or her consideration; and for a report by him or her if he or she considers it necessary or the court requires such a report."

The applicant averred that the first respondent was misdirected to file the report because he was the principal respondent who should have filed a notice of opposition and opposing affidavit and was therefore barred. The applicant had moved for judgment in his favour on the basis that the application was not opposed by the respondent. It is correct that the second respondent did not oppose the application. The first respondent correctly filed his report because r 61(1) permits him to do so where any application involving a deceased estate is served upon him. The fact that the review application concerned a decision which the first respondent had made did not matter because the review application remains an application as envisaged in r 61(1). This is so because the rule does not distinguish the type of application it envisages. A review application is an application contemplated by the rule. The first respondent was properly advised to prepare and file a report.

Rule 61(1) in my respectful opinion provides an answer on whether the decision maker whose decision has been taken on review and considers as stated by the Supreme Court in the *Leopard Rock case* that he wants to file an affidavit to clarify issues he may with to. I consider that the *Leopard Rock case* should be read as laying out a general direction. However in applications involving a deceased estate, the law is therefore clear as espoused in r 61(1) that the Master may on his own initiative if he considers it necessary or upon direction by the court, file a report. There is no provision that the report should take the form of an affidavit. At the same time there is no provision that such a report should not be in affidavit form either. The applicant's contrary view that the first respondent ought to have filed an affidavit fails again upon a consideration of r 61(1).

In preparing the report as he did, it was however important for the first respondent to appreciate the nature of the review application. The main basis of the review was that the first respondent acted unlawfully in revoking the appointment of the applicant as executor dative of the estate concerned and appointing the second respondent in place thereof. The reading of the report shows that the first respondent was justifying his decision. He outlined the background

facts which led to the making of his decision. He then interrogated the purport of s 116(1) of the Administration of Estates Act to justify that he was correct to remove the executor without reference to the High Court contrary to the applicant's position that only the High Court had the power to remove an executor. The first respondent stated as follows in para(s) 2.2 and 2.3:

> "2.2 In terms of s 116(1) the Master is required to take such action as he deems expedient after considering the circumstances of the matter. The 'action' to be taken by the Master is not defined and thus we believe same extends to removal of executors.
> 2.3. Furthermore, in the case of *Matsind*e v *Nyamukapa* HH 106/06, MAKARAU J, as she then was highlighted that:
>
> "I pause to observe that the removal of an executor dative should primarily be done by the Master on good grounds shown. The appointment of an executor is an administrative function in the hands of the Master. It is therefore to him that allegations of unbecoming conduct by an executor should be made in the first instance. The decision of the Master to remove or retain the executor after complaints have been lodged with him is then brought on review to this court on the recognized ground of review of an administrative decision. (My emphasis)
>
> Considering the above pronouncements by the court, we do not believe we erred in removing applicant from office."

The first respondent therefore justified his decision. He did so by arguing a point of law. I do not believe that interpreting a provision of the law in the first respondent's understanding amounts to be partiality. The second respondent in any event not having opposed the application, the first respondent could not be said to have been partial in his report wherein he simply explained the reason why he came up with the decision which he reached. The expression that he believed that he did not err in removing the applicant from office was an opinion which does not affect or influence a proper determination of the case.

I should also observe that in the *Blue Ribbon case*, the learned judge MCNALLY JA did not give a blanket right of the presiding officer whose decision is brought on review to file an affidavit of clarification. The learned judge singled out cases where on review allegations of "bias" or "impropriety" are made against the presiding officer as the cases where the presiding office may elect to file an affidavit to clarify issues. It is therefore not in every case that the learned judge gave the opening for a presiding officer to respond. The learned judge did indicate that arguments on the correctness or otherwise of proceedings on review are for parties to advance. My view is that the presiding officer whose decision is on review must generally refrain from commenting on the proceedings except in circumstances where there is a personal attack of bias or impropriety on his part. *In casu*, the applicant based his attack on the decision brought on review upon the alleged failure of he first respondent to properly interpret the law which is not the same as alleging bias or impropriety. The *Blue Ribbon case* should be read in

the context of what the learned judge explicitly stated to be the instances where a presiding officer may file an affidavit of clarification. *In casu* I consider that the report clarified the legal basis on which the first respondent made his decision.

The issue that remains is to answer the question whether the first respondent had legal power to remove the executor. The provisions of ss 116 and 117 of the Administration of Estates Act deal with the question. The provisions read as follows:

"**116 Supervision of executors, tutors and curators**

(1) If it appears to the Master that any executor, tutor or curator is failing or neglecting to perform satisfactorily his duties or to observe all the requirements imposed upon him by law or otherwise in regard thereto, or if any complaint is made to the Master by any creditor, legatee or heir in regard thereto, the Master shall inquire into the matter and take such action thereon as he shall think expedient.

(2) For the purposes of any inquiry under subsection (1), the Master may –

(a) Require the executor, tutor or curator concerned or any other person to furnish him with such information as he may require and to produce for examination by the Master or by any person appointed by him for that purpose at a time and place specified by the Master any deeds, plans, instruments, books, accounts, stock lists or documents which the Master may specify:

(b) Serve a written notice upon the executor, tutor or curator concerned requiring him to attend at a time and place to be specified by the Master for the purpose of being examined on oath by the Master of by any person appointed by him for that purpose respecting any transactions or matters affecting the estate which such executor, tutor or curator is administering.

(3) Any executor, tutor or curator called upon to be examined in terms of this section may be represented at such inquiry by an accountant or by a legal practitioner.

(4) Any executor, tutor or curator or other person who –

(a) fails to comply with the requirements of the Master in terms of subsection (2); or

(b) fails to attend at the time and place specified by the Master in terms of subsection (2); or

(c) refuses to answer any question put to him by the Master or by any person appointed by him in terms of subsection (2) otherwise than on the grounds the answer may tend to incriminate him;

shall be guilty of an offence and liable to a fine not exceeding level four or to imprisonment for a period not exceeding three months or to both such fine and such imprisonment.

(Section amended by section 4 of Act 22 of 2001.

117 Master may apply for removal of executor, tutor or curator from office

(1) The Master may apply to a judge in chambers for the removal of an executor, tutor or curator from his office on the ground –

(a) that he was not qualified for appointment to such office or that his appointment was for any other reason illegal; or

(b) that he has failed to perform satisfactorily any duty or requirement imposed upon him by or in terms of any law; or

(c) that he is mentally or physically incapable of performing satisfactorily his duties; or
(d) that in his opinion such person is no longer suitable to hold such office;

and the judge may, upon such application, remove the executor, tutor or curator concerned from his office or make such other order as he sees fit."

A close analysis of s 116 simply gives power to the first respondent to enquire into the issues to do with the failure by an executor tutor or curator to satisfactorily perform his duties or to observe requirements of the law reposed on the office aforesaid. Section 117 provides for instances when the first respondent may apply to the court for the removal of the executor, tutor or curator from his office. In particular para (b) of subs. (1) of the s 117 deals with the removal of an executor, curator or tutor on grounds mentioned in s 116 as matter upon whose reporting, the first respondent would be required to investigate, enquire into the matter and take such action as he or she shall think expedient.

Reverting to s 116 in particular, it deals with supervisory powers of the first respondent. The first respondent is given wide powers in conducting an investigation of the performance of the executor, curator or tutor where due performance of his functions. These include requiring the executor, tutor or curator to produce "deeds, plans, instruments, books, accounts, stock or other documents" as the first respondent may specify. The first respondent may hold a formal enquiry at which the executor, curator or tutor as the case may be is required to give evidence on oath surrounding the transactions or any matters which affect the estate under administration by that executor, curator or tutor. So serious is the enquiry when one is held that the executor, curator or tutor who may be represented by a legal practitioner may be liable to criminal sanction that includes being fined, imprisoned or both in the event of committing any of the conduct set out in para(s) (a-c) of subsection 4 of s 116.

The first respondent in the event of the executor, curator or tutor having committed any of the conduct aforesaid will be the complainant who reports to the police and the criminal process ensues culminating in the trial of the executor, curator or tutor by a court with criminal jurisdiction. The first respondent it must be emphasized does not have power to hold a trial of or pronounce any guilty verdict on the executor, curator or tutor. I say so deliberately although it may appear to be obvious because the first respondent in his report averred that in the absence of s 116 which gives him power to do anything expedient, he believes that such power would include a revocation of letters of administration and removal of the executor.

In his report, the first respondent as I noted found refuge to support his actions to remove the applicant as executor in s 116(1). The error which he made was to consider s 116(1) as a stand-alone section. He did not consider that s 117 is the one which specifically provided for and reposed the power of removal of an executor, curator or tutor in a judge of the High Court in chambers upon application by the first respondent for such removal.

A reading of s 117(1) sets out the grounds upon which the executor, curator or tutor may be removed from office. There are four such grounds which are listed (a) to (d) as quoted. Where the first respondent in the discharge of his supervisory powers of the administration of a deceased estate has cause upon an investigation and fact finding that an executor, curator or tutor ought to be removed from office for any or more or all of the grounds listed (a) to (d) then the first respondent may make or file a chamber application for the removal of the executor, curator or tutor. The judge upon considering the application may then remove the executor, curator or tutor from office or makes such order as the judge deems fit, which means that the judge may refuse to grant the relief of removal and grant such order as considered appropriate the main consideration being to ensure the due and proper administration of the estate in issue in accordance with the dictates of the law.

The first respondent's attention is also referred to the provisions of subs. (2) of s 117. The provisions thereof are very clear that the first respondent is required by law to revoke the letters of administration or confirmation or the case maybe only upon removal of the executor, curator or tutor by the judge pursuant to an application made in terms of s 117(1) as discussed (*supra*).

It is important that when one interprets the provisions of a statute, notwithstanding whatever school of statutory interpretation is approached one adopts, one considers the language and structure of the statute first. There is convergence of consensus that a statute be read harmoniously as one and individual parts be interpreted in a broader statutory context. Simply put the first respondent ought to have read s 116 in harmony with s 117. If the legislature had intended that upon the exercise by the first respondent of the power granted to him in s 116(1), the first respondent could remove an executor from office, then the legislature would not have by the same token provided for removal of an executor by chamber application initiated by the first respondent. When ss 116(1) and 117(1) are read in harmony, the correct construction to be given is that the express mention of the removal of the executor being granted to the judge upon application by the first respondent of necessity means that such power is

excluded from any powers which the first respondent may exercise in terms of s 116(1) which provides that the first respondent may do anything expedient in the exercise of his supervisory power over matters therein provided. The expression or rule *expressio unius est exclusic alterius* (the expression of one thing is the exclusion of the other) as an aid to try and establish the intention of the legislature when it is not clearly manifest comes into play. The first respondent can therefore in terms of s 116 do what he considers expedient in the exercise of supervisory power over an executor, curator or tutor. This however excludes removal of that person from office. In the case of *Eagle Insurance Co. Ltd* v *Grant* 1989(3) ZLR 278(S) at 280F, the learned KORSAH JA stated:

> "A rule which is variably resorted to in the interpretation of statutes, the *expressio unius* rule – is that the mention of one or more things of a particular class may be regarded as silently excluding all other member of the class."

See *Godfrey Tapedza & 9 Ors* v *Zimbabwe Energy Regulatory Authority & Anor* SC 30/20.

To conclude, the applicant has made a proper case for the setting aside of the revocation of the letters of administrators issued to the applicant. Although the applicant avers that he seeks a declaratur to the effect that he is the duly appointed executor of the estate of the late Mapfumo Kunaka, there is no need for a declaratur to be pronounced. Once it is determined that the actions of the first respondent in revoking the applicant's letter of administration were a nullity, nothing arises from them. See *Folly Cornishe (Pvt) Ltd* v *Taponwa N.O & Ors* SC 26/14, *Macfoy* v *United Africa Company Ltd* (1961) 3 All ER 1169. The situation that necessarily obtains is that the applicant until properly removed from office of executor dative of the estate in issue remains properly appointed and retains his letters of administration.

The last issue concerns costs which the applicant claims from a respondent or anyone who opposes the relief sought. The prayer for costs in this matter is misplaced. The first respondent did not oppose the application. He compiled a report as permitted by law and filed it. The fact that the applicant may differ with the first respondent upon the interpretation of the law as per the first respondent's report is no ground to hold that the applicant has succeeded and the first respondent's defence has failed. No defence was filed by the first respondent. The second respondent did not oppose the application. I refuse to grant a costs order against the first respondent whom I determined in any event to be a nominal respondent.

In the result, the following order is made, **IT IS ORDERED THAT**:

1. The purported revocation by the first respondent of letters of administration issued to the applicant on 23 August 2016 in the Estate of the late Mapfumo Kunaka DR 1467/16 is set aside.
2. The letters of administration in the same estate issued to the 2nd respondent on 19 December 2019 are set aside.
3. For the avoidance of doubt, nothing in this judgment shall be construed as barring the first respondent from properly and lawfully exercising the powers granted to him in terms of ss 116 and 117 of the Administration of Estates Act, [*Chapter 6:01*].
4. There is no order as to costs.
5. The Registrar must serve copy of this judgment on the Master.

Mavhunga & Associates, applicant's legal practitioners