ALLEN TANDAZANI VAKAI MASAWI
versus
CLEVER MANDIZVIDZA N.O
and
THE MASTER OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
CHIRAWU-MUGOMBA J
HARARE, 19, 26, 27, 29 November 2018

OPPOSED MATTER

N. Chikono, for the applicant
First respondent in person
No appearance for second respondent

CHIRAWU-MUGOMBA J: The adage, "rest in peace", expressed as R.I.P is often used when a loved one passes on. I have often wondered whether it is always appropriate in all instances given the nature of disputes that will be simmering during the life time of the deceased which often turn into an all-out-battle after death. In the process, estates are not finalised in the expected six months period. As a matter of fact, some estates take years to be finalised as in this present matter in which the deceased passed away on the 21st of March 2001. Letters of administration were issued on the 26th of February 2003 to the applicant. As at the date of hearing of this matter, it has been sixteen years and counting, a situation that clearly flies in the face of the succession and inheritance laws of Zimbabwe in particular the Administration of Estates Act [*Chapter 6:01]*, " the Act".

In *casu,* the applicant seeks the following relief by way of a declaratur:-

1. That the appointment of the first respondent as the executor of Estate late Titus Japajapa Masawi DR 3711/02 be and is hereby held to be unlawful and wrongful.

2. That the appointment of the applicant as the executor of Estate late Titus Japajapa Masawi DR 3711/02 be and is hereby confirmed to be in terms of the law and valid for purposes of administering the estate in question.

3. The first respondent is ordered to pay costs of suit on a client-attorney scale.

The applicant's version in support of the application is as follows: - His father Titus Japajapa Masawi (the deceased) passed away testate on the 21st of March 2001. The applicant was appointed executor dative. The applicant's sister one Gift Masawi and her children have caused many disputes in the estate and as a result, there has been no finality in terms of winding it up. In 2012 (a period of ten years) down the line, applicant battled with the interpretation of the will and he was advised by the second respondent to engage the first respondent so that the estate could be 'solved as soon as possible'. Applicant engaged the services of the first respondent who caused him, (applicant) to sign an affidavit whose contents he was not aware of. Applicant later discovered that the first respondent had been appointed executor without him being consulted. He contends that he is still the executor because the second respondent did not withdraw his appointment. The major bone of contention is a property known as 63 St Patricks Road, Hatfield measuring about 12200 where the applicant has been staying even during the deceased's lifetime. The property has now been subdivided and sold to third parties to the detriment of the applicant. The subdivision and sale has not been sanctioned by the applicant.

In response the first respondent averred as follows; - He was approached by the applicant who indicated that the requirements for estate winding up were too complex. To that end, applicant addressed a letter of engagement to the first respondent dated the 6th of February 2013. He advised the applicant that he needed a power –of –attorney which the applicant duly furnished him with on the 14th of February 2013. Applicant has written to the first respondent many times averring that he is the sole beneficiary. The first respondent was then appointed executor to the estate of the deceased at an edict meeting after other beneficiaries had challenged the applicant's continued executorship. Applicant wrote and indicated to the second respondent that he was renouncing his executorship. He denied that his appointment was arbitrary as alleged by the applicant. First respondent is sub-dividing the property as per a redistribution agreement between the beneficiaries.

In response, the applicant filed a voluminous answering affidavit raising issues that were not in his founding affidavit. It is pertinent to note that the applicant went on to file a notice a notice of withdrawal of this particular answering affidavit and substituted it with another one dated the 23rd of August 2018 although it was sworn to on the 28th of February 2018. Attached were certain documents.

At the hearing, *N Chikono* for the applicant averred as follows: - that applicant was duly appointed as an executor dative at an edict meeting. The letters of administration issued to him are still extant since they have not been revoked. The applicant has not been removed as an executor in terms of section 117 of the Act. The applicant merely appointed the first respondent as his agent to execute the duties that he applicant should be executing. There existed an agent-principal relationship and the applicant has since terminated the relationship. The first respondent averred as follows: that the applicant has failed to prove his case due to his failure to attach the letters of administration which he states were issued to the first respondent and yet he seeks that same be declared unlawful. On that basis alone, the application should be dismissed. He admitted that initially an agent-principal relationship had been created but this was terminated at the point that the applicant renounced his appointment and letters of administration were granted to him at an edict meeting convened by the second respondent on the 30th of August 2013. The applicant has turned against the first respondent because the latter has refused to unduly favour the applicant as there are other beneficiaries involved. In matters where an executor has renounced agency, it is not necessary to make an application for removal. In any event, the applicant is conflicted since he has a claim against the estate. The beneficiaries have since entered into a redistribution agreement and obtained consent to sell from the second respondent in terms of section 120 of the Act. The applicant is misguided in his assertion that he wants to first 'interpret' the will before distribution can take place. In response, *N Chikono* averred that even if the applicant renounced appointment, the law permits him in certain circumstances to retract. In any event, there is no evidence attached of renunciation of appointment.

The second respondent submitted a report in terms of R248 of the High Court Rules, 1971. A Mr *Madi* from the second respondent's office confirmed that the applicant was once appointed as executor dative to the estate. He later renounced his appointment resulting in an edict meeting at which the first respondent was appointed. The alleged affidavit by the applicant renouncing his appointment was not attached as averred. According to various correspondence between the applicant and first respondent that has also been filed with the second respondent, the two parties were working well together. The second respondent observed that the applicant is conflicted because he also has a claim against the estate and such claims are placed for consideration by the executor. In this instance at the time he was appointed, the applicant became both a claimant and an executor which led to him being compromised. The second respondent denied the assertions by the applicant that his office

had advised the him to engage the services of the first respondent. After the appointment of the first respondent, the beneficiaries, including the applicant entered into a redistribution agreement which the applicant seeks to renege from. The second respondent however will abide by the court's decision.

Before delving into the merits of the matter, it is prudent that I deal with preliminary matters relating to the 1st answering affidavit which the applicant purportedly withdrew. He then proceeded to file another one without leave of the court. The other issue relates to the attachment of annexures to an answering affidavit.

Herbestein and Van Winsen- *The Civil Practice of The High Courts and the Supreme Courts of Appeal of South Africa*: 5th Ed at p 429 outline the purpose of an answering affidavit as follows:-

> "The primary purpose of the replying affidavit (answering affidavit) is to put up evidence which serves to refute the case made out by the respondent in the answering affidavit (notice of opposition)."

In *Kaskay Properties (Pvt) Ltd* v *Minister of Lands and Rural Resettlement and others*,[1] MANGOTA J stated as follows;

> "A litigant who makes a conscious decision to sue through motion, as opposed to action, proceedings is enjoined to anticipate the respondent's defence. Having anticipated such, he must include in his founding affidavit all the evidence which supports his case including such evidence as will rebut the respondent's defence. Where he adopts the stated line of reasoning, the court will not find him wanting when he restates his position in the answering affidavit as he will merely be confirming what he has already told the court. A litigant in other words, should not leave material facts which support his case or rebuts the respondent's case to the answering affidavit. Where he does so, he runs the risk of the court not taking into account new evidence which he places in the answering affidavit as the respondent would not have had an opportunity to make any comments on the new evidence which he includes in the answering affidavit."

In M*ilrite* F*arming* (P*rivate*) L*imited* v *Porusingazi and others*, [2] HLATSHWAYO J (as he then was) stated as follows-

> "The basic rule pertaining to application procedures is that the applicant's case stands or falls on averments made in the founding affidavit and not upon subsequent pleadings. The rational for the rule is quite clear. It is to avoid the undesirable effect of litigation assuming a snowballing character, with fresh allegations being made at every turn of pleadings. Thus, the fresh allegation contained in the answering affidavit must be ignored, leaving the same cause of action and substantially the same facts in both the first and second applications.*"*

[1] HH-762-18

[2] HH-82-10

The basic rule therefore is that an application stands or falls on its founding affidavit and an answering affidavit can only respond to issues raised and not raise new ones. The follow up question becomes this- is this rule cast in stone? This issue received attention in the South African case of *Faber* v *Nazerian* [3] as follows:-

> "The general rule which is well established in our law is that in motion proceedings, the applicant is required to make his or her case in the founding affidavit and not in the replying affidavit.[4] This rule is based on the principle that the applicant stands or falls by his or founding affidavit.[5] The rule is also based on the procedural requirement of the motion proceedings which requires that the applicant should set out the cause of action in both the notice of motion and the supporting affidavit. The notice of motion and the founding affidavit form part of both the pleadings and the evidence. The basic requirement is also that the relief sought has to be found in the evidence supported by the facts set out in the founding affidavit.[6]
>
> The exception to this rule is found in Body Corporate, Shaftesbury Sectional Title Scheme, (supra) where the Court in upholding what was said in *Shephard* v *Tuckers Land and Development Corporation (Pty) Ltd*,[7] and after confirming the general rule applicable in motion proceedings, held that the rule was not absolute and that the Court has a discretion to permit new material in the replying affidavit.[8]
>
> In considering whether to allow new material introduced for the first time in the replying affidavit, the Court has a judicial discretion to exercise. The indulgence of allowing new material in the replying affidavit will generally be allowed when warranted by special circumstances. It is important to note that the rule does prohibit the applicant to explain matters stated in the founding affidavit.[9] The Court may also, after permitting the use of new material in a replying affidavit, allow for further answering affidavit by the respondent. The new issue/s in a replying affidavit will generally be allowed in circumstances where the applicant could not have known of such issues at the time of deposing to the founding affidavit. In other words, the Court will not permit or will strike out new issues raised in a replying affidavit if the applicant knew or ought to have known of the existence of such issues but failed for whatever reason to raise them in the founding affidavit.[10]
>
> The approach to adopt, in considering whether to allow new matter in the replying affidavit, received attention in *Juta and Co Ltd and Others* v *De Koker*,[11] where the Court accepted and quoted with approval what was said in the headnote in *Shakot Investment (Pty) Ltd* v *Town Council of Borough of Stanger*,[12] where the Court held that:

---

[3] South Gauteng High Court Case no. 2012/42735

[4] See *Kleynhaans v van der Westhuizen* NO 1970 (1) SA 565 (O) at 568E, where the Court in dealing issue of inserting new facts in the replying affidavit had the following to say: 'Normally the Court will not allow the applicant to insert in a replying affidavit which should have been in the petition or the notice of motion.'

[5] See *Director of Hospital Services v Mistry* 1979 (1) SA 626 (A) at 645H.

[6] See *Kleynhaans v van der Westhuizen* (supra)

[7] *1978* (1) SA 173 (W) at 177G–178A.

[8] *Body Corporate, Shaftesbury Sectional Title Scheme* above n 3 at 6D-F.

[9] See *Nedbank Ltd v Hoare* 1988 (4) SA 541 (E) at 543E.

[10] See *Bayat and Others v Hansa and Another* 1955 (3) SA 547 (N) and *Dawood V Mahomed* 1979 (2) SA 361 (D).

[11] 1994 (3) SA 499 (T) at 510F-H.

[12] 1976 (2) SA 701 (D).

> 'In consideration of the question whether to permit or strike out additional facts or grounds for relief raised in the replying affidavit, a distinction must, necessarily, be between a case in which the new material is first brought to light by the applicant who knew of it at the time the when his founding affidavit was prepared and a case in which facts alleged in the respondent's answering affidavit reveal the existence of a further ground for relief sought by the applicant. In the latter type of case the Court would obviously more readily allow the applicant in his replying affidavit to utilise and enlarge upon what has been revealed by the respondent and to set up such additional ground for relief as might arise therefrom.'

Apart from the fact that the discretion can only be exercised upon an application which the applicant did not make, there are no special circumstances that warrant allowing new evidence in the 1st answering affidavit to stand. As observed already, this estate has been outstanding for sixteen years and the information was well within the applicant's knowledge. The fresh matters brought about in the answering affidavit will therefore be disregarded by the court. The 2nd answering affidavit filed without leave of the court is expunged from the record.

On the merits of the matter, despite the voluminous affidavits filed of record, the three issues that emerge are as follows:-

a. Can an executor dative renounce appointment?

b. Did the applicant renounce his appointment as executor and if so what are the legal consequences of the renunciation?

c. If a finding is made that the applicant renounced his appointment, should he be permitted to retract his renunciation?

A consideration of the above will determine whether the applicant will be entitled to the relief that he seeks.

The Act *in* sections 23, 24; 25, 26, 27, 28, 29 and 29A deal with appointment of executors testamentary and dative and the issuance of letters of administration. Section 29 permits the appointment of a new executor for reasons stated as death of the originally appointed executor or their incapacitation or removal from office by a judge or court. This means that the law recognises that in certain instances, there might be need to appoint another executor. The act does not have a specific section dealing with renunciation. In my view, there is no law prohibiting renunciation by an executor dative. I am also mindful of the fact that the estate *in casu* is testate, save for the fact that the deceased did not appoint an executor in his will.

In *casu,* what the court needs to consider as already stated is whether or not there was renunciation of appointment. The first respondent attached to his affidavit, a letter dated the 6th of February 2013 from the applicant which clearly states that, "I *have decided to hand to you the executorship of this estate'.* In addition, the applicant furnished the first respondent with a power of attorney which specifically authorised him to manage and transact all his affairs in the estate of the deceased in which he was executor dative in terms of letters of administration granted to him by the Master of the High Court. On the 23rd of July 2015, the applicant addressed a letter to the first respondent thanking him for the effort he was putting in getting the deceased estate to finality. The applicant who seems to have a passion for writing stated in that letter, *"I am sure yourself as the present executor you can do so'.* The tone and contents of the letter is that of a person who appreciated the work being done by the first respondent. In another letter which is not dated but handwritten the date 13/4/16, the applicant stated, *'When I **was** still executor'.* In a letter dated the 22nd of January 2016 addressed to the first respondent by the applicant's then legal practitioners, it is pertinent to note that they stated as follows:

> *On the issue of ZESA, it is your duty **as the executor** to attend to the problem as the problem is a result of the serious misunderstanding in the estate for **which you are the executor**.*

Another letter dated the 21st of June 2017 was addressed to the first respondent. To note is that it referred to him as, "the executor".

In a letter dated the 27th of November 2014 addressed by the applicant to the executor, he referred to him as Mr Mandizvidza (executor). Instead of addressing these issues and averments raised in the opposing affidavit , the applicant in his answering affidavit instead went on what can be described as a 'rant' against the 1st and second respondents. The correspondence addressed to the 1st and second respondent by the applicant and his erstwhile legal practitioners in many respects shows confusion and a misunderstanding of the law of succession, for instance by way of a letter dated the 21st of June 2017, the applicant's erstwhile legal practitioners stated as follows, *"We have noted that you have chosen to ignore all the demands to cease your duties as the executor, which duties were given to you by our client on whose instructions you are executing your duties".* The second respondent is entrusted with supervising the work of all executors as per section 116 of the Act. Section 117 gives the second respondent authority to apply for the removal of an executor. The

assertion that it was the applicant who gave the first respondent duties apart from admitting that the first respondent was indeed perceived by the applicant as the executor, is misplaced as he (applicant) has no legal authority to 'appoint' and 'supervise' executors. To note also is the fact that the redistribution plan which appears as annexure E to the first respondent's opposing affidavit dated the 3rd of May 2013 indicates that the first respondent's role then was that of representative of the executor dative that is the applicant. Minutes of a meeting held on the 11th of May 2013 also show the first respondent appearing as chairman of the executor that is the applicant. This supports the first respondent's version that initially he was appearing as an agent and that this relationship was terminated upon him being granted letters of administration.

The report from the second respondent is especially compelling. In it, the second respondent states that the applicant renounced his appointment by way of an affidavit. This report juxtaposed with the evidence from the first respondent points to the fact that the applicant renounced his appointment. The applicant's founding affidavit is very economical with details and had it not been for the fact that both the 1st and second respondents confirmed the first respondent's appointment as the executor, the applicant had not even attached the letters of administration and yet he seeks an order that the appointment should be declared unlawful. He cannot be heard to claim that the respondents refused to give him the copy of the letters of administration. The office of the second respondent is a public one and documents are available to litigants who wish to use them. If the applicant had been denied access to the letters of administration, he could also have approached this honourable court for an order compelling the second respondent to avail him a copy. The applicant does not give details in his founding affidavit on why he states that the estate could not be finalised due to disputes. He claims to have been battling with the interpretation of a will in 2012, a period of ten years. He does not state what action he took in relation to the interpretation. The averment that the applicant is a lay person is neither here nor there. Applicant brazenly claims that he is still the executor through advice from his legal practitioners and yet those are the same practitioners who addressed the 1st applicant as the executor.

Having found that the applicant renounced his appointment as the executor, the second respondent was in terms of section 29 of the Act entitled to appoint the first respondent as the new executor. The assertion by the applicant that the second respondent did not withdraw applicant's authority as executor or apply for his removal is misplaced. He seems to be harbouring under a fallacy that there ought to have been a process or an

application for his removal. The applicant became incapacitated by reason of his renunciation and hence the appointment of the first respondent as the executor.

I find it prudent to deal with a common misconception on the appointment of executors by the second respondent. In his founding affidavit, the applicant claims that the appointment of first respondent as executor by the second respondent was done arbitrarily, in other words, without consulting the applicant. Section 24 of the Act deals with appointments and issue of letters of administration to an executor testamentary. Section 25 deals with the appointment of an executor dative.

Section 25 of the Act reads as follows:-

> **25 Appointment of executor**
> (1) When any person has died without having by any valid will or codicil appointed any person to be his executor, or where any person duly appointed to be the executor of any deceased person has predeceased him or refuses or becomes incapacitated to act as such, or within such reasonable time as the Master considers sufficient, neglects or fails to obtain letters of administration, then and in every such case the Master shall cause to be published in the *Gazette*, and in such other manner as to him seems fit, a notice calling upon the surviving spouse, if any, and the next of kin, legatees and creditors of the deceased to attend at his office, at the time therein specified, to see letters of administration granted to such person or persons as may then be appointed by him executor or executors, to the estate of such deceased person.

An interpretation of section 25 shows that;

1. If a person dies intestate or has not nominated an executor in their will; and or
2. The person so nominated in a will has predeceased the testator or refuses or becomes incapacitated to act as such, or;-
3. The person so appointed in a will neglects or fails to obtain letters of administration within a reasonable time as the Master may determine;
4. The Master shall cause a notice to be published in a the gazette or through any other means, call upon the surviving spouse if any, the next of kin, legatees and creditors
5. The purpose of this meeting (known as an edict meeting) is for those notified to ***see letters of administration granted to such person or persons as may be appointed by him (The Master) as executor or executors to a deceased estate.*** (My emphasis)

The authority as to who to appoint therefore lies with the Master of the High Court.

Section 26 deals with instances where there is **competition** for appointment as executor. The Master is guided by section 26 which reads as follows:-

26 Competition for the office of executor dative
In every case in which a competition takes place for the office of executor dative the surviving spouse, or failing him or her the next or some of the next of kin, or failing him or them a creditor or creditors, or failing him or them failing a legatee or legatees, shall be preferred by the Master to the office of executor:

This section gives a rank of preference where there is a competition for appointment as follows;-

a. Surviving spouse, or failing him or her;

b. The next or some of the next of kin, or failing her/him or them;

c. A creditor or creditors, or failing her/him;

d. A legatee or legatees

The authority on who to appoint still remains vested in the Master of the High Court and any person having an interest in the estate may apply for a review of the appointment.

Having disposed of the 1st and 2nd issues, I now turn to the 3rd issue, that of retraction. In *Drummond* v *The Master of the High Court and anor,* 1990(2) ZLR 227, the issue at hand was the renunciation by an executor testamentary and his subsequent retraction. In that matter, it was held that the High Court is entitled in a proper case to permit a retraction. In *Drummond* v *De Haast,* 1991(2) ZLR 303 (SC), the court gave two instances where renunciation may be permitted. It is critical to note that the onus is on an executor who wishes to retract to prove that:-

1. The desire to retract is not based purely on a change of heart- an appreciation that he had made a mistake in renouncing. Good and persuasive cause must be shown in the sense, perhaps that the renunciation was the result of his having been misled or misinformed in some way as its effect; or that subsequent thereto unforeseen circumstances had arisen that made him more suitable than anyone else to assume appointment. See *In the Goods of Gill* (1873) LR 3P &D 113 at 115; *In the Estate of Amy Heachote* (1913) P42

2. It is for the benefit of the estate or those interested under the will of the deceased. See *Drummond* v *The Master and Ors supra* at 453 E: Williams on *Executors and Administrators* 14 ed vol 1 at 48: Tristram and Cootes's *Probate Practice* 27 ed at 444.

As I have already observed, the estate *in casu* is testate save for the fact that the deceased did not appoint an executor in his will. The application to have the appointment of first respondent declared unlawful is based on change of heart on the part of the applicant. As already stated, his erstwhile legal practitioners addressed a letter to the first respondent dated the 22nd of January 2016 acknowledging that the first respondent was the executor. Almost 17 months later by way of a letter dated the 8th of June 2017, addressed to the Master, they referred to the first respondent as the purported executor in contradiction to the earlier letter. They called on the second respondent to convene a special meeting. In the letter dated the 21st of June 2017, the applicant's erstwhile legal practitioners demanded that the first respondent call a special meeting within 72 hours to 'clarify' issues failure of which they would approach the court for relief. The assertion by the first respondent that the applicant kept on making demands which were impractical was not seriously refuted by him. It was actually supported by the letter from the applicant to the first respondent dated the 27 of April 2014.

Permitting applicant to retract his renunciation and therefore granting his application will prejudice the estate and other beneficiaries. For a period of ten years, applicant was unable to complete winding up the estate contrary to the dictates of the Act. He has a claim against the estate (page 37 of the record) in which he is claiming a total sum of $84 100 and if he is returned to the position of executor dative, he will be compromised as he would have to assess the claim and either accept or deny the claim. The beneficiaries have already entered into a redistribution agreement. There has been progress in the winding up of the estate which has even been acknowledged by the applicant. There are indications that some land has been disposed of to third parties whose rights may also be compromised given the stance of the applicant.

The inescapable conclusion is that the applicant has failed to make a case for a declaratur.

In passing, let me state that the office of the second respondent needs to be stricter in its supervision of executors. That is not to suggest that all those with an interest in an estate should be discouraged from approaching the courts for relief. In this estate, by the time that the applicant renounced his appointment, it was a period of ten years. since his appointment. There is no indication that there was litigation in this court during that period which could have held the winding up process. Any delay in winding up an estate has consequences. The fiscus is deprived of much needed revenue in the form of estate related fees, beneficiaries

may pass away without enjoying their legacy or inheritance and those left behind may end up in bruising battles over one estate. The Master is empowered in terms of the Act especially sections 53, 116 and 117 to act on errant executors and s/he should be seen to be acting so that the integrity of estate administration in Zimbabwe is protected.

The Registrar of the High Court is directed to bring this judgement to the attention of the Master of the High Court.

Disposition

1. The application be and is hereby dismissed.
2. The applicant shall pay the costs

Ngarava, Moyo and Chikono, applicant's legal practitioners