

**AMON KILLION MHLANGA**

**Versus**

**SIMILE NDLOVU**

IN THE HIGH COURT OF ZIMBABWE  
NDOU J  
BULAWAYO 17 MARCH AND 8 APRIL 2004

*E Marondedze* for applicant  
*S Ndove* for respondent

Urgent Application

**NDOU J:** The applicant is the executor dative of the estate of the late Sibusani Mhlanga who died in Bulawayo on 23 May 2003 and he applies in that capacity. The late Sibusani Mhlanga was his son. The applicant was appointed by the Assistant Master of this court by Letter of Administration on 14 January 2004. The applicant published the requisite notices in the Chronicle Newspaper and the Government Gazette as required by the Administration of Estates Act [*Chapter 6:01*].

In the course of his mandate of winding up the estate, it came to the attention of the applicant that the late Mhlanga purchased a Toyota Cressida motor vehicle registration number LMN 431 GP from a Zimbabwe Revenue Authority (ZIMRA) organised public auction for \$2 200 000,00 on 14 March 2003. A receipt which evidenced these facts, number 087808 is filed. The applicant saw the vehicle at Dick's Motors, Plumtree. It is common cause that the respondent, who was a friend to the late Mhlanga in his life time, took the disputed motor vehicle from Dick's Motors to his place. The respondent claims that the vehicle belongs to him. He, in fact, has already filed his proof of claim in response to the applicant's advertisement.

He avers that he attended the above mentioned ZIMRA auction for impounded vehicles. He

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developed an immense interest in participating in the auction sale and to enhance his chances of winning in the bids, he asked the late Mhlanga to bid on his behalf. He also personally made another bid. He avers that he had in fact asked other persons to also bid on his behalf. He agreed with the late Mhlanga that if he won, he would give him an agreed amount as a consideration. The late Mhlanga's bid for the disputed vehicle was successful. He gave the late Mhlanga the purchase price and the latter paid for the vehicle. He then paid him for his efforts. In the circumstances, even if the vehicle is not in his (respondent's) name, he claims that he is in fact the owner thereof. This vehicle is also not registered in the name of the late Mhlanga except that the documents, prima facie, show that he bought it from ZIMRA auction as I have alluded to above. The applicant seeks an order in the following terms:

**“Terms of order final order sought: (sic)**

It is ordered that:

That you should show cause to this honourable court why a final order should not be made in the following terms:

1. The respondent be and is hereby ordered to surrender to the applicant motor vehicle registration number LMN 431 GP upon service of this order on him, failure of which the Deputy Sheriff or his lawful assistants be and is hereby authorised to collect the vehicle and deliver it to the applicant.
2. The respondent shall pay costs of this application on an attorney-client scale.

**Interim Relief sought**

That pending confirmation or otherwise disposal of this provisional order:

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3. the deputy Sheriff or her lawful assistants are hereby authorised to forthwith seize vehicle registration number 431GP (sic) from the respondent and deliver it to the applicant or his lawful representative.”

In his submission, Mr *Ndove*, for the respondent, says the opposition is based on the suspicion that the respondent harbours. Respondent does not trust the applicant so he prefers to have custody of the vehicle until the determination of the ownership issue. He doubts the capabilities of the applicant as the executor. What the respondent is saying, in essence, is that although the applicant was properly and lawfully appointed as executor dative by the Master of this court he has no confidence in his objectivity and fairness. On that account he refuses to surrender the disputed motor vehicle. The question is whether the respondent can lawfully resist the authority of the applicant as the executor on account of this reason. The executor of an estate has certain rights and powers in connection with the liquidation and administration of the estate and also certain duties to perform. What they consist of is to be found both in common law and the Administration of Estates Act, *supra* – and *The Law and Practice of Administration of Estates* (5<sup>th</sup> Ed) by D Meyerowitz at page 107 and *Fischer v Liquidators of Union Bank* 8 SC 46. What must be noted is that the applicant, as executor, is legally vested with the administration of the estate. He is not a mere procurator or agent for the heirs. In *The Law and Practice of Administration of Estates, supra* the learned author correctly observed on page 123 –

“A deceased estate is an aggregate of assets and liabilities and the totality of the rights, obligations and powers of dealing therewith, vests in the executor, so that he alone can deal with them. He has no principal and represents neither the heirs nor the creditors of the estate ...” – *Malcomess NO v Kuhn*

1915 CPD, *In re Brown* 7 SC 237; *CIR v Emary* NO 1961 (2) SA 621 AD and *Goosen v Bosch and The Master* 1917 CPD 189.

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It is the duty of the executor to liquidate the estate and the estate is liquidated when it is reduced into possession, cleared of debts and so left free for the enjoyment by the heirs. In other words, he has to obtain possession of the assets of the deceased including rights of action, realise such of them as may be necessary for payment of the debts of the deceased, taxes, costs of administration and winding-up etc – *Locklhat's Estate v North British & Mercantile Insurance* 1959 (3) SA 295 (AD) at 302 and *Bruxmann's Executor v The Master* 1932 CPD 241. Upon his appointment the executor becomes entitled to deal with all the assets of the estate and it is his duty to recover all assets, in whatever form they may be, which belong to the estate but which are in the hands of, or may be owed by, third parties. It is for him to decide whether the estate has any claim against a third party and the advisability of instituting action to recover. It is only the executor who can vindicate the assets of the estate – *The Law and Practice of Administration of Estates supra*, p 127 –8 and *Clark v Barnade* NO 1958 (3) SA 41 (SR)

In addition to the above common law position the Administration of Estates Act, *supra*, provides in section 42 –

“Every person not being the executor of the estate of a deceased person duly appointed in Zimbabwe who has or comes into possession or custody of any property or asset belonging to such estate shall forthwith either deliver such property or asset to the duly appointed executor, if any, then being in Zimbabwe or report the particulars thereof to the Master; and such first mentioned person fails to do so, or parts with any such property or asset to any person not authorised by the Master by letter of administration or other direction to receive the same, he shall, apart from any other liability he may incur thereby, be liable for all dues payable to the public revenue in respect of such property or asset.”

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In light of the above, the respondent cannot choose to undermine the authority of an executor who has been lawfully appointed in terms of the Act on the basis that he has no confidence in his ability to carry out his duties.

The motor vehicle in question, according to the only documents of its acquisition was bought by the deceased. Whether the respondent trusts him or not is irrelevant because the applicant has been lawfully appointed by the Master. The respondent has not even sought to have applicant removed from that position. All that the respondent is entitled to do is, as he already done, to apply to prove his claim. The applicant has made out a case for the interlocutory relief sought. I accordingly grant the order in terms of the above mentioned draft order.

*Maronedze, Nyathi, Majome & Partners*, applicant's legal practitioners  
*Hara & Partners*, respondent's legal practitioners