

NDABEZINHLE MKWANANZI

And

THOKOZILE MKWANANZI

Versus

ANGELUS MKWANANZI

And

ASSISTANT MASTER OF THE HIGH COURT

IN THE HIGH COURT OF ZIMBABWE

NDOU J

BULAWAYO, 7 NOVEMBER 2005 AND 16 NOVEMBER 2006

R Moyo-Majwabu, for the applicants

Advocate P Dube, for 1st respondent

Opposed Matter

NDOU J: The 1st and 2nd applicants seek an order in the following terms:

“It is ordered that:

1. The Memorandum of Agreement entered into between first and second applicant on the one hand and first respondent on the other, on 15 January 2003 be and is hereby declared to be binding on the parties.
2. The appointment of first respondent by second respondent be and is hereby set aside.
3. Second respondent be and is hereby directed to appoint Richard Moyo-Majwabu as the executor dative of the estate of the late Clement Mkwanzani.
4. First respondent is to pay the costs of these proceedings.”

The salient facts of the matter are the following. The 1st and 2nd applicants are children of the late Clement Ndanisa Mkwanzani who died on 25 December 2002.

The 1st respondent is the widow or surviving spouse of the late Clement Mkwanzani and as such, a step-mother to 1st and 2nd applicants. The 1st respondent got married to the late in 1999. Prior to his marriage to 1st respondent, the late Clement Mkwanzani

executed a will on 27 August 1996. After the death of the late Clement Mkwanzani, a meeting was held of the Mkwanzani family. Among the people who took part in that meeting were 1st respondent, applicants' uncle Reverend Mkwanzani and the applicants. This family meeting considered the late Clement Mkwanzani's will and his alleged wishes which he said before his death. At the end of this meeting those in attendance "agreed" to "rearrange" the distribution plan. It was agreed to go to a legal practitioner (i.e. the applicants' legal practitioner of record) to have the agreement in writing. A memorandum of agreement was drafted and signed by the applicants and 1st respondent. The material part of the agreement is as follows:

"NOW THEREFORE these presents witness the following:

1. That the parties hereto being fully aware of the legal position and provisions of the Will and the wishes of the deceased expressed to the said children, other relatives and the widow, hereby agree that this agreement shall override the provisions of the said Will to the extent that deceased's estate will now devolve in terms hereof.
2. That the widow shall continue to reside at stand 326 Matheumhlophe, Bulawayo (hereinafter referred to as "the property") for her natural life or until she remarries or otherwise voluntarily decides to vacate the said property for any reason whatsoever, it being agreed that the said property shall be inherited by the children in equal shares.
3. The property shall be used by the widow only as a residential property and not part of it shall be rented out serve [sic] for the existing cottage which will continue to be rented for the benefit of the widow.
4. That Siphon Mkwanzani and Thokozile Dlamini (nee Mkwanzani) who are children of the deceased, shall be awarded \$10 000,00 each from the Deceased's estate.
5. That all movable assets of the Deceased's estate, including motor vehicles at the property, serve [sic] for the personal effects, (that is to say clothing, books and the like), shall go to the widow absolutely.
6. That all the money and/or financial investments of the Deceased shall be shared so that the widow receives one third; Langalibalele Christopher Mkwanzani get one third while the said children shall share the remaining one third equally.

7. That the pension or part thereof which was payable to the Deceased, if transferable, shall accrue for the benefit of the widow.
8. In respect of the Deceased's livestock, one heifer shall go to Mathabane Sithole, (the Deceased's niece), the rest of the Deceased's livestock shall go to the said children in equal shares.
9. That while the widow remains in occupation of the said stand in terms hereof, she shall live in peace and shall not be subject to any harassment or disturbances from any person or organisation.
10. That stand number 61118 Pelandaba shall vest in the joint names of the said children in equal shares.
11. ...
12. ...
13. ...
14. The parties hereto hereby appoint Richard Moyo-Majwabu to be the Executor and Administrator of the estate of the Deceased, vesting all powers allowed by law on him.
15. The widow may construct a storeroom on the property for her own use provided that she first agrees the positioning and design of same with the children is being agreed that any such storeroom shall form part of the property for which no compensation shall be claimable. The widow shall have a right to use such a store room for her dressmaking business should rentals at her current shop become prohibitive.

Signed at Bulawayo ...” (emphasis added)

This agreement was concluded before the estate was registered. It was designed to reverse the statutory gains of the widow. The first issue here is that the parties purported to amend or vary the late Clement Mkwanzani's will. The legal position is that the will executed by the late Clement Mkwanzani on 27 August 1996 became void in 1999 when he married the 1st respondent. It became void by operation of section 16(1) of the Wills Act [Chapter 6:06]. This section clearly provides:

“16. Effect of Testator's subsequent marriage on Will

- (1) Subject to this section, a will shall become void upon the subsequent marriage of the testator ...”

The exceptions provided for in sub-sections (2) to (5) do not apply to the facts of this case. In simple terms there was no will to amend or vary. The issue is, whether standing alone, this agreement is binding. It is not, and with the benefit of legal representation, this must have been obvious to the applicants.

It is trite that in a contract, the reason for the promise must be a good and legitimate one, and not one contrary to law or morality or public policy – *Rood v Wallach* 1904 TS 187 at 212; *Froman v Robertson* 1971 (1) SA 115 (A) at 120 H and *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) at 8J.

The agreement in this case sought to bind the estate of a deceased person. At the time of signing none of the parties had been appointed an executor to the estate. No letters of administration had been issued as is required by law in terms of the Administration of Estates Act [Chapter 6:01], more particularly as provided for in section 23 which reads:

“... the estate of all persons dying either testate or intestate shall be administered and distributed according to law under letters of administration to be granted in the Form B in the second schedule by the Master of the testamentary executors duly appointed by such deceased person or to such person as shall in default of testamentary executors be appointed executor dative to such deceased person in manner hereunder mentioned.”

Further, in terms of section 41 of the said Act, any person who deals with the assets of a deceased estate will have himself personally liable for any debts arising from such dealing. The Act is quite clear therefore that without letters of administration the estate cannot be encumbered by a would be executor or any other third party - *Swart v Smuts* 1971 (1) SA 819 (A).

“An act that is made unlawful by statute is, it need hardly be said, unlawful, so whether or not on a proper interpretation of the statute a contract that is in itself the unlawful act is void as well as being criminally punishable, a contract to commit the unlawful act must be void, and so is a contract that facilitates or encourages the commission of the unlawful act even if only indirectly, provided the connection is sufficiently close” – *The Law of Contract in South Africa* – R H Christie at 348.

Generally, 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 effect – *Schierhout v Minister of Justice* 1926 AD 99 at 109. This is a general proposition, but it is not a hard and fast rule universally applicable, If, however, the court is satisfied in a particular case that the legislature did not intend to render the act invalid, it would not be justified in holding that it is – *Standard Bank v Estate Van Rhyn* 1925 AD 266 at 274-5. The express intention of the law giver is clear rendering the agreement in this case illegitimate by the provisions of sections 23 and 41 *supra* – *Maiswa v Kureba N O & Ors* HB-73-06. In any event, the order sought also seeks to usurp the powers of the Master in a material way. This is an application that should not have been made in the first place. The applicants should have allowed the estate to follow the natural consequences of intestate succession. They are not, after all, the testators, their late was. The 1st respondent was unnecessarily placed under pressure to defend the estate. They wrote demeaning and insulting letters to the 1st respondent for refusing to go along with their illegitimate actions. On 14 September 2003, the 1st applicant on behalf of 2nd applicant wrote to 1st respondent, *inter alia*, in the following terms:

“Ms Masuku,

You are being addressed as Ms Masuku because as of this you are no longer part of the Mkwanzani family. ...

Our father became very ill after he married you. We now strongly believe that his illness was induced by your “crafted” African skills that ultimately caused

his death. This is evidence by your “Recent” behaviour which I will explain ... You have LIED to our family members as to the proceedings leading to the registration of the estate in the High Court ... YOU ARE LIER [sic] ...

1. You married our father with the full intent of taking everything that belonged to him. The marriage was always calculated, thusly, [sic] his sickness and death. ... You never loved him.
2. You have deceived us and we now consider you an ENEMY ...
3. ...
4. ... You are an Evil women [sic] ...

In conclusion be assured of the following:

1. ... I stood in front of people at my father’s funeral and promised to take case of you ...
2. We will fight you both in court and in the public arena ...
3. You are EVIL
4. You need to VACATE the premises IMMEDIATELY. You have your own house. Go back to it. YAKE THIS REQUEST SERIOUSLY.
5. I repeat. YOU ARE NO LONGER A MEMBER OF THIS FAMILY. You are rebuked in the name of Jesus.”

This letter was copied to various persons, some evidently prominent politicians. It was faxed or sent from the United States where the applicants were at the time.

I agree with *Adv. Dube*, for 1st respondent that with such language accompanying a hopeless application, punitive costs are called for.

Accordingly, the application is dismissed with costs on an attorney and client scale.

James, Moyo-Majwabu & Nyoni, applicants’ legal practitioners
Webb, Low & Barry, 1st respondent’s legal practitioners