

IN THE ESTATE OF THE LATE JULIUS NCUBE

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 23 NOVEMBER 2006

Judgment

NDOU J: The Additional Assistant Master seized with this estate has referred this matter to me in chambers under cover of a minute which is framed as follows:

“The late Julius Ncube died on the 8th of March 2006. This estate was registered by Cethi Nyathi the widow of the late who did not have children with the late. Relatives who deposed affidavits recommended that she be chosen as the sole beneficiary of the estate of the late. Subsequently an edict meeting was held whereupon Bongani Ndlovu (Professional Executor) was chosen as an executor by Cethi Nyathi and her relatives.

An application was made by the deceased’s second child from a relationship preceeding that of Cethi Nyathi ... She argued that Cethi Nyathi misrepresented the fact when she registered the estate. Firstly, she did not consult any family members about the registration of the estate and, secondly, she did not include all beneficiaries.

Evidence in the record from one Simangele Mpofu, another wife of the deceased was to the effect that the deceased was married to applicant’s mother Nkosilathi Ncube, and she Simangele is the second wife, whereupon she produced a marriage certificate in terms of the African Marriages Act Chapter 238. There was a 3rd who is late and the respondent Cethi is the 4th wife. She (Simangele) had 2 children with the late and one is late and the other one was not included as a beneficiary.

So from the evidence led, I came to the conclusion that Cethi Nyathi misrepresented ... She knew that deceased has other wives and had children but wilfully excluded them. From my view it will be in the best interests of the beneficiaries to have the proceedings quashed and all interested parties be afforded the opportunity to attend an edict meeting and thereafter appoint an executor of their own choice.

Because the initial appointment of the executor was made as a result of misrepresentation by Cethi Nyathi, it is my view that is it illegal hence it is on this basis that I refer this matter to the High Court Judge in terms of section 117(1)(a) of the Administration of estates Act [Chapter 6:01] ...”

I agree with the above suggestion. Section 117 provides:

- “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 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.
2. Where an executor, tutor or curator has been removed from his office the Master shall revoke any letters of administration or confirmation, as the case may be, which have been granted to such person.”
(emphasis added)

I enjoy wide discretion in terms of section 117(1) *supra*. I am satisfied that from the above mentioned facts of this case, the interests of justice will be served by the removing of first executor from office because he is there on account of misrepresentation of the facts by Cethi Nyathi. The best route in the circumstances is to allow all the wives of the late and his off spring to be involved in the destiny of the estate – *Master of Supreme Court v Stern* 1987(1) SA 756(T). The issuance of the letters of administration to Bongani Ndlovu entitles him/her to administer all the assets of the estate – *Klerck v Registrar of Deeds* 1950(1) SA 626 (T). The objection to the validity of his/her appointment was taken by the other wives and the deceased’s children who are obviously persons interests in the succession to the deceased’s estate – *Mills v Thwaites* 2 S 187 and *The Law and Practice of Administration of Estates*, D Meyerowitz (5Ed) at p 77-78.

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Accordingly, I remove Bongani Ndlovu of Chemsford Executors and Trust from office of Executor Dative and direct the Master to act in terms of section 117(2) of the Act. There shall be no order for costs.