ESTATE LATE NGAVAITE JACK CHIKUNI
aka NGAVAYITE JACK CHIKUNI

And

GODFREY MUTSEYEKWA
In his capacity as the executor testamentary to
the estate of the late Ngavaite Jack Chikuni
aka Ngavayite Jack Chikuni

And

ZEMDY INVESTMENTS (PVT) LTD

Versus

JAMES CHIKUNI

And

TICHAONA CHIKUNI

And

TICHAFA CHIKUNI

And

MANASA CHIKUNI

And

TAURAI CHIKUNI

And

MAUDI CHIKUNI

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 1 JULY 2021 & 11 AUGUST 2021

Application to dismiss for want of prosecution

L. Nkomo, for the applicants
S. Siziba, for the respondents

DUBE-BANDA J: In this application the applicants seek the dismissal for want of prosecution of an application for condonation of the late filing of an application for review under cover of case No. 1513/20. The order sought is couched in the following terms:

It is ordered that:

1. The application be and is hereby granted with costs.
2. The court application filed by respondents under case No. HC 1513/20 of this Honourable Court be and hereby dismissed for want of prosecution in terms of rule 236 (3) (b) of the Rules of this Honourable Court.

This application is opposed by all the respondents.

At the commencement of the hearing, I enquired from Adv. *Nkomo,* counsel for the applicants, about the legal status of the 1st applicant, i.e. Estate Late Ngavaite Jack Chikuni A.K.A Ngavayite Jack Chikuni. Counsel conceded that there is no 1st applicant before court. The concession was well taken. This is so because the deceased estate cannot represent itself. In terms of Section 25 of the Administration of Estates Act [chapter 6:01] a deceased estate is represented by an executor or executrix duly appointed and issued with letters of administration by the Master. The executor/executrix must be cited by name in any suit where the estate is a party. Failure to cite the executor/executrix would be fatal to an action against the deceased's estate. See: *Nyandoro & Anor v Nyandoro & Ors* 2008 (2) ZLR 219(H); *Cosma Chiangwa v (1) David Katerere (2) Robert Adrian Campbell Logan (3) Israel Gumunyu (4) Registrar of Deeds (5) Edmond Chivhinge (6) Master of The High Court* SC 61/21. There is no legal entity at law answering to the name estate late Estate Late Ngavaite Jack Chikuni. Therefore, there are only two applicants before court, i.e. 2nd and 3rd applicants.

Factual background

This application will be better understood against the background that follows. On the 4th September 2020, respondents filed a court application for condonation for the late filing of an application for review (main application). The main application was served on the 1st applicant on the 7th September 2020, and was served on the 3rd applicant on the 14 September 2020. On the 21st September 2020, applicants filed and served a notice of opposition and opposing affidavit to the main application. As at the 4 November 2020, the date of filing of

this application, the respondents had neither filed an answering affidavit nor set-down the main application. It is against this background that applicant has launched this application seeking the relief mentioned above.

The law and the facts

This application has been filed in terms of Order 32 Rule 236(3) (b) of the High Court Rules 1971, which provides that:

> Where the respondent has filed a notice of opposition and an opposing affidavit and, within one month thereafter, the applicant has neither filed an answering affidavit nor set the matter down for hearing, the respondent, on notice to the applicant, may either—
> (*a*) set the matter down for hearing in terms of rule 223; or
> (*b*) make a chamber application to dismiss the matter for want of prosecution, and the judge may order the matter to be dismissed with costs or make such other order on such terms as he thinks fit.

In *Guardforce Investments (Private) Limited* v *(1****)*** *Sibongile Ndlovu* ***(2)*** *The Registrar of Deeds N.O. (3) The Deputy Sheriff* SC 24-18 the court said the discretion to dismiss a matter for want of prosecution is a judicial discretion, to be exercised taking the following factors into consideration – the length of the delay and the explanation thereof; the prospects of success on the merits; the balance of convenience and the possible prejudice to the applicant caused by the other party's failure to prosecute its case on time.

I now consider the length of the delay and the explanation of such delay. In the main application the applicants filed and served a notice of opposition and opposing affidavit on the 21st September 2020. This application was filed on the 4th November 2020. In terms of rule 263 (3) of the Rules, respondents had one month from the 21st September 2021, to either file an answering affidavit or set down the main application. The delay was approximately fourteen days out of time. My view is that he delay was not inordinate.

According to the respondents to delay in filing an answering affidavit or setting down the main application was caused by new developments, which respondents reasoned would resolve the dispute without the need for further litigation. It averred that the family sought to settle the matter amongst themselves. My view is that the attempt to settle the matter amongst family members negated the fact that the main matter included litigants who were not family members, i.e. the executor and Zemedy Investments (Pvt) Ltd. Further, a litigant cannot

unilaterally just stop prosecuting litigation, hoping that there would be an out of court settlement in the matter. In the result, I come to the conclusion that although the delay in this matter was not inordinate, but the explanation for it is not reasonable. However, the unreasonableness of the explanation for the delay cannot standing alone form the basis for the dismissal of the main application. The other factors should also have to be considered in determining whether or not to dismiss the main application. See: *Guardforce Investments (Private) Limited (supra).*

I now turn to the issue of the prospects of success of the main application. The 2nd applicant, Mr Godfrey Mutseyekwa, is a legal practitioner practising under the style of Danziger & Partners, and he is the executor of the estate of the late Ngavaite Jack Chikuni. In his capacity as the executor, he entered into an agreement of sale with 3rd applicant (Zemedy Investments (Pvt) Ltd) for the sale of estate property, being number 9 Old Bell Road, Kwe Kwe (the property). The respondents contend that the sale of the property was a nullity in that the Master of the High Court had not consented to the sale in terms of the law. Section 120 of the Administration of Estates Act [Chapter 6:01] (Act) says:

> 120 Sale of property otherwise than by auction
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> If, after due inquiry, the Master is of opinion that it would be to the advantage of persons interested in the estate to sell any property belonging to such estate otherwise than by public auction he may, if the will of the deceased contains no provisions to the contrary, grant the necessary authority to the executor so to act.

The argument is that the property was sold without the Master's authority in terms of section 120 of the Act. The executor accepts that the sale of the property was concluded without the Master's authority. It is however contended that the sale was subject to a suspensive condition, being the master's consent. Whether a suspensive condition in such an agreement of sale may sanitise the absence of Master's consent at the point of sale, is for the court hearing the main application to decide. I hold the view that the reason why the Master's consent is sought is neither fanciful nor ceremonious, it is because the Master is required to consider whether, among other things the proposed sale is in the interest of the estate. The consent is not for the taking. The master is enjoined to do an inquiry in order to be satisfied that the request to sell the property by private treaty would be to the advantage of the persons interested in the estate. Due inquiry connotes that the Master takes active or positive

steps to verify the contents of the application before granting consent. See: *Kudzanayi Frank Katsande* v *Raymond Katsande and Three Others* HH 113-2010 at page 7; *Maria Salome Katsiga v Hilda Tambudzai Charlie and Nyasha Lovemore Machakaire and Master of High Court and Registrar of Deeds* HH 6/09; *David Chigodora and Nelia Chigodora v Thomas C. T Rodrigues and Thomas C.T. Rodrigues (N.O) and The Registrar of Deed and The Master of The High Court and The Deputy Sheriff* HH 276/10. 2nd respondent has an explanation as to why he sold the property prior to obtaining the consent of the Master. Whether his explanation would render such sale lawful, is an issue I cannot resolve in this application. However, for the purposes of this application I hold the view that respondents have prospects of success in respect of the argument that the sale is a nullity because the executor sold the property by private treaty prior to obtaining the authority of the Master.

3rd applicant is in this case because it purchased the property. In his founding affidavit the executor avers that he is the 2nd applicant and executor testamentary of the estate, and the 3rd applicant's legal practitioner. It is in such capacities that he is familiar and has personal knowledge of this matter. It is the 3rd applicant which purchased the estate property. In this application the respondents aver that executor sought to benefit the 3rd applicant. Again, in the main application the respondents aver that the executor facilitated the sale of the property to 3rd applicant a company in which he has some interests. In applicants' heads of argument it is argued that respondents made unfounded accusations of impropriety and self-interests on the part of the executor, an officer of this court, and sought to rely on those allegations to seek the indulgency of condonation to file a court application for review setting aside the sale of the property. It is common cause that the executor, a legal practitioner of this court, sold the property to 3rd applicant. Again, it is clear that 3rd applicant, the purchaser of the property, is his client.

The main functions of an executor are to administer and distribute the estate legally, with due care and diligence pursuant to the provisions of the Administration of Estates Act [Chapter 6:01]. To this end, the Act empowers him to take possession of the deceased assets. The administration of the estate therefore vests solely in the executor. This is underpinned by the principle that once there is a duly appointed executor he assumes legal title to the estate, which he has to manage for the benefit of the estate. It is trite that an executor/executrix is the recognized legal representative of a deceased estate. He/she is appointed to administer the

estate and to ensure the estate is properly wound up with all assets and liabilities being accounted for. See: *Cosma Chiangwa v (1) David Katerere (2) Robert Adrian Campbell Logan (3) Israel Gumunyu (4) Registrar of Deeds (5) Edmond Chivhinge (6) Master of The High Court* SC 61/21.

The issue is whether the executor had a conflict of interest, i.e. between his duties as executor and the interests of his client, 3rd applicant the purchaser of the property. I take the view that the conflict of interest *might* have arisen from his duty as the recognized legal representative of a deceased estate, and his duty towards 3rd applicant, his client. The allegations by the respondents of self-interests against the executor cannot be rubbished as "unfounded accusations of impropriety," they have some substance. This is an issue that this court has to consider in the main application. The court may find that there was a conflict of interest or there was no such conflict. In essence it is a matter requires a consideration by this court. This is the reason I take the view that on this point the main application has prospects of success.

Again respondents contend that The First and Final Liquidation and Distribution Account (Account) contains some omissions and false declaration. The Account was confirmed. It lists the immovable property as the only asset of the estate. It is important to note that the Last will and Testament of the deceased bequeaths to James Chikuni the home in Zhombe and farm machinery. The home and the farm machinery are not listed in the distribution account. Respondents aver in the main application that "such omission and false declaration constitutes a serious irregularity." A distribution account must be honest and show all the known assets of the deceased. Again on this point, my view is that the main application has prospects of success. All in all I hold the view that the main application has good prospects of success.

I now turn to deal with the issue of prejudice. The founding affidavit to this application does not in any way speak to how the applicants would be prejudiced by the delay in the finalisation of the main application. It is an established principle of our law that an applicant's cause stands or falls on his founding affidavit and not in an answering affidavit. My view is that allowing the main application to proceed to finality will not be prejudicial to the applicants. Again, there is too much at stake for the respondents which mitigate against

the dismissal of the main application for want of prosecution. Respondent have a right to know whether the estate of their father has been administered in terms of the law. Equally important, the 2nd applicant must know whether his administration of the estate was conducted in terms of the requirements of the law. On the factual matrix of this case, the balance of convenience favours allowing the main application to proceed to finality.

In determining this application, I also factor into the equation the fact that the respondents have, though belatedly filed an answering affidavit, heads of argument and applied for a set-down in the main application. The main application awaits a set-down date.[1] This is a sign that the respondents are serious about prosecuting the main application to finality. Again, the vigorous opposition to the application for dismissal for want of prosecution also shows to some extent that the respondents really intend to prosecute the main application to finality.

In conclusion, it would be an injustice if respondents with good prospects of success on the merits are denied their day in court. Again, rule 236 of the High Court Rules, 1971 provides that when faced with an application for dismissal for want of prosecution, this court is enjoined to consider options other than dismissing the main application. In the circumstances of this case, the appropriate option is to allow the application for condonation to proceed to finality.

One last issue requires determination: costs. The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so. In this case there are good grounds to depart from the general rule. It is the inaction of the respondents in the main application that caused the filing of this application. Had respondents prosecuted the main application in terms of the timeline provided in the rules of court, this application would not have been filed. On another note, applicants seeing that this application was vigorously opposed, should have reflected on the propriety of prosecuting this application to the wire. This is a case where justice would be served with a no costs order.

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[1]In general the court is always entitled to make reference to its own records and proceedings and to take note of its contents. See: *Mhungu v Mtindi* 1986 (2) ZLR 171 (SC).

Disposition

In conclusion, applicants have not made a case for the relief sought, and in the result, I order as follows: this application is dismissed with no order as to costs.

Danzinger & Partners (Gweru), applicants' legal practitioners
Makonese, Chambati & Mataka, respondents' legal practitioners