

SONENI NDLOVU
(In her capacity as the Executrix Dative of the Estate
Late Memory Ngwenya DRB 882/21)

Versus

BDP INVESTMENTS (PVT) LTD

And

TONDERAI BYRON RICE

And

NOMATHEMBA NCUBE

And

THE REGISTRAR OF COMPANIES

And

NEDBANK ZIMBABWE LTD

And

THE MASTER OF THE HIGH COURT

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 8 & 21 JULY 2022

T. Dube for applicant

D. Dube with P. Ngwenya & Ms Sezi for 1st, 2nd, & 3rd respondents

Urgent Chamber Application

MAKONESE J: The applicant is the Executrix Dative of the late Memory Ngwenya who died on the 18th of July 2021. The late Memory Ngwenya was a prominent business woman owning various immovable

properties in Bulawayo. A bitter struggle for the control of these properties and other business concerns has led to a flurry of cases being filed in this court.

This is an urgent application wherein the applicant seeks the following relief in terms of an amended draft order:

“Interim Relief Granted

1. 2nd respondents is hereby interdicted from representing 1st respondent as a Director or any other capacity pending the determination of case number HC 1067/22.
2. 2nd and 3rd respondents are hereby interdicted from disposing of immovable assets on behalf of 1st respondent pending the determination of case number HC 1067/22.
3. Applicant is hereby provisionally appointed as Director of 1st respondent pending the determination of case number HC 1067/22.
4. Alternatively, the court provisionally appoints a *curator bonis* as a Director of 1st respondent pending the determination of case number HC 1067/22.

Terms of final order sought

1. 2nd respondent is permanently barred from representing 1st respondent as a director or any other capacity whatsoever forthwith.
2. 3rd respondent is permanently barred from representing 1st respondent as a Director or any other capacity whatsoever forthwith.
3. Applicant in her capacity as Executrix of the Estate Late Memory Ngwenya DRB 882/21 is appointed as a director of 1st respondent until the said estate is wound up of which new directors of 1st respondent shall be appointed within 30 days of winding up.
4. 2nd and 3rd respondents pay the costs of suit on an attorney and client scale.”

The application is opposed by the 1st to 3rd respondents. Respondents raised several preliminary issues which they contend, if upheld would be dispositive of the matter.

The brief background to this matter is that the 2nd respondent was living with the late Memory Ngwenya up to the time of her death. Applicant's status as regards his relationship with Memory is a bone of contention between him and the late Memory's wife. Following Memory's death, applicant was appointed Executrix Dative on 18th July 2022. There is discord between 2nd respondent and the late Memory's wife. Applicant alleges that 2nd respondent and Memory were not married and that 2nd respondent was a live-in boyfriend. This is hotly disputed by 2nd respondent who avers that he was customarily married to the late Memory and had paid lobola. A number of cases are now pending in this court awaiting determination. These cases all relate to the battle for the control of the late Memory's estate. In this court, proceedings were instituted in case numbers HC 1158/22; HC 1967/22; HC 107/22 and UCA 42/22.

Points in limine

I shall proceed to deal with the preliminary objections before dealing with the merits.

Urgent

It is submitted on behalf of the respondents that that certificate of urgency filed together with the urgent chamber application is fatally defective and therefore not valid. It is contended that the legal practitioner who prepared the affidavit did not apply his mind to the issue of urgency of the matter. A casual examination of the certificate of urgency seems to give credence to the assertion that the legal practitioner did not in fact apply his mind to the issue of urgency. The legal practitioner avers that 2nd and 3rd respondents filed fraudulent annual returns between 4th February and 24th March 2022 but does not say when the need to act arose. It is always crucial to point out in a certificate of urgency

when and how the urgency arose. It appears that it is common cause from the papers on record that in the month of March 2022, applicant approached the police and reported a case of fraud with a reference number Bulawayo Central CR 404/03/2022 against 2nd and 3rd respondents. It is apparent that applicant has always known of the filing of the purported fraudulent criminal returns from March 2022. There is no explanation by the certifying legal practitioner as to why the applicant did not approach this court in March 2022 when the need to act arose. Further, and in any event, the legal practitioner does not give any explanation as to why after the filing of the court application under case number HC 1067/22 on the 20th June 2022, applicant did nothing until 1st of July 2022 when this urgent chamber application was filed. The certificate of urgency itself does not reflect that the applicant treated the matter as urgent. See *UZ-UCSF Collaborative Research Programme v Husaiwevhu & others* 2014 (1) ZLR 634 (H).

In this matter the legal practitioner in his certificate of urgency gives the impression that the need to act only arose after the filing and serving of the court application under case number HC 1067/22 on the respondents. This is not consistent with logic and common sense and demonstrates that the legal practitioner did not address his mind on the issue of urgency. The certificate of urgency is fatally defective and is invalid.

As regards the urgency of the matter, no reason is given by the applicants to why there was a delay in approaching the court. There must be a credible explanation for the delay and against reasons it must be given why the matter should be given preferential treatment ahead of other matters. Applicant herself, has not treated this matter as urgent. This is not the urgency contemplated by the rules. See – *Kuvarega v Registrar Gen & Anor* 1998 (1) ZLR 188 (H).

Applicant concedes in the following affidavit that she knew of the filing of the filing of the purportedly fraudulent criminal returns in March 2020 and made a police report. She only made a follow up on the report in June 2020. There is no explanation on what applicant was doing from the month of March 2020 to the month of July when this application was eventually filed. Applicant failed to exhibit any urgent reaction to the facts which purportedly gave rise to the alleged return. The matter is evidently not urgent and on this basis alone, the court would find that the matter not being urgent, this matter must be struck off and referred to the roll of ordinary applications. For the sake of completeness I have considered the other points *in limine*.

Material disputes of facts

Time and again the courts have warned legal practitioners that matters most not be brought on motion where there are material disputes of fact. Applicant raises allegations of fraud which is the foundation of the application. 2nd and 3rd respondents dispute these allegations. Such disputes of fact cannot be resolved on the papers without leading evidence. Applicant makes an allegation that the signatures of the deceased (Memory) were forged. There is need to lead oral evidence of a handwriting expert to prove this allegation. Applicant alleges that 2nd respondent was Memory's live-in boyfriend. This allegation is repeated in papers filed in this court in previous proceedings. This court would require evidence to be led to establish the exact nature of the relationship between the late Memory and 2nd respondent. Applicant wants this court to merely take her word and make an order on the basis that 2nd respondent was a mere boyfriend. A dispute of fact exists when material facts which are put by the applicant are disputed and traversed by the respondent in such a manner that the court is left with no clear answer in relation to the disputed facts

in the absence of further evidence. See *Supa Plant Investment (Pvt) Ltd v Chidavaenzi* 2009 (2) ZLR 132 (H).

See also *RioZim (Pvt) Ltd v Falcon Resources (Pvt) Ltd & Ors* SC-28-2022, where MALA CJ cited the case of *Pignons S. A de mecanique de Precasion vs Polaroid Corporation* 657 F 2d 482, where a material dispute of facts was defined in the following terms:

“A factual disputes is material if it affects the outcome of the litigation and genuine if manifested by substantial evidence going beyond the allegations of the complaint.”

In my view, there are real and substantial disputes of fact in this matter which and not capable of resolution without the leading of oral evidence. The point in imine does have merit.

The order sought is not competent

The respondents contend that the order sought by the applicant is incompetent in view of the fact that 1st respondent is a separate legal persona which is run by its own directors procedurally appointed into office in terms of the relevant Act. The applicant cannot in her capacity as the executrix in the Estate of the Late Memory Ngwenya take over and bulldoze her way into directorship. Applicant has used all manner of means to take total control of the affairs of the 1st respondents. In case number HC 1067/22, applicant has filed a court application, wherein inter alia, she seeks to be appointed director of 1st respondent. That matter is pending and is still to be heard. The relief sought in that court application mirrors the relief sought in this urgent chambers application. An executor is permitted to act in the best interests of the estate up until the estate is wound up. Applicant may not interfere with or seek to alter the directorship of 1st respondent unprocedurally. Applicant clearly intends to use this court to sanitize usurping power and control of 1st respondent on a

permanent basis from the directors, which is outside her functions and powers as executrix. Interference with the operations of 1st respondent is not in the interests of the beneficiaries of the estate. The order sought is final in nature. The order sought is final in its effect. The interim relief sought refers to the applicant in her capacity as executrix being appointed as director of 1st respondent pending the finalization of case number HC 1067/22. There is nothing interim about such an appointment. Once applicant obtains such an order there would be no need for her to argue the matter on the return date. These courts here discouraged applicants who seek final orders couched as interim relief. See *Blue Rangers Estate (Pvt) Ltd v Maduwurs* SC-29-09 and *Movement for Democratic Change & 2 Others v Timeos & 5 Ors* SC-9-22.

I am in no doubt that the order sought as amended is final in nature. It is not competent for this court to grant an order which purports to be interim in nature when its purpose and effect is final in nature.

For the afore-going reason I come to the conclusion that the matter is not urgent.

In the result, I make the following order:

1. The matter is not urgent.
2. The matter be and is hereby struck of the roll of urgent matters.
3. The applicant shall bear the costs of suit.

James, Moyo-Majwabu & Nyoni applicant's legal practitioners
Mathonsi Ncube Law Chambers 1st, 2nd, & 3rd respondents' legal practitioners