HC 7995/01

MARGARET MASULANI
versus
FANUEL MASULANI
and
JAMES CHIKOBVU MUZANGAZA
and
THE MASTER OF THE HIGH COURT
and
R. J. CHIMBARI N.O.(In his capacity as the Executor in the Estate of the Late Lovemore Masulani)

HIGH COURT OF Zimbabwe
MAKARAU J
HARARE, 26 February and 30 April 2003

Opposed Application

Mr *Jairosi* for the applicant,
Ms *Soza* for the 1st respondent;
Mr Tomana for the 2nd respondent.

MAKARAU J: On 22 August 2001, the applicant filed this court application seeking an order setting aside the consent order granted in case No. HC 5814/01 on 9 July 2001. She also prayed that the first respondent pays the costs of the application on the scale that pertains between a legal practitioner and a client.

The first and second respondents opposed the application. The 4th respondent did not file any papers but wrote to the Registrar, undertaking to stand by the judgment of the court.

The facts giving rise to this application are as follows:

The late Lovemore Masulani passed away on 16 April 2000. At an edict meeting convened by the third respondent, the applicant was appointed Executrix Dative in the estate. The applicant then appointed the fourth respondent as her agent in winding up and representing the estate.

Meanwhile, the first respondent was also appointed as Executor

Dative in the same estate at the magistrates' court. This was in the absence of and without the knowledge of the applicant.

On 15 June 2001, the first respondent approached this court by way of an urgent chamber application under case No. HC 5814/01, citing as respondents, the applicant and the Deputy Sheriff, Harare. In the chamber application, the first respondent sought an order compelling the applicant to return to him a certain vehicle and, that, pending the finalisation of a distribution plan in the estate, he be allowed to retain the property belonging to the estate.

The application was opposed. In due course, it was set down before a judge in chambers.

Before hearing the matter, the learned judge referred the application to the third respondent, who wrote to the Registrar giving his opinion in the matter. The third respondent was of the view that he could not file a report in terms of the rules as he had neither been served with the application nor cited in the application as a party. In his letter to the Registrar, the third respondent however wished the following to be brought to the attention of the judge:

> "It is clear that there is a tussle between the spouse and relatives for the control of the estate. The impartiality of Fanuel Masulani is very much in doubt given the background of the matter and the general content of his affidavit. Whether Margaret was separated from her husband at the time of death or not was beside the point. She remained a wife of the deceased and was entitled to be consulted on matters of appointment and Administration of the estate. Whether Margaret was aware of the estate at the Magistrate Court or not remains to be seen.

From my own analysis both parties are not being honest to each other and I suggest that the court sets aside Fanuel's appointment after which I will call for another meeting at which a neutral executor will be appointed."

At the hearing of the chamber application, it was ordered by

consent that the appointment of Fanuel Masulani as Executor Dative in the estate of the Late Lovemore Masulani be set aside. It was also ordered by consent that the appointment of the applicant be set aside. The third respondent was directed to appoint forthwith one Richard John Chimbari of R.J.C. Executor Services, Harare, as Executor Dative in the estate. The costs of either party were to be paid from the estate.

The applicant now seeks to have that consent order rescinded on the basis that her legal practitioner did not have her authority to agree to the terms of the order.

In terms of r56 of the High Court Rules, 1971, a judgment given by consent under the rules may be set aside and the applicant given leave to prosecute or defend his claim. Such leave shall be granted on good and sufficient cause.

It is common cause that the consent judgment in the application before me was not granted in terms of the rules. The parties appeared before a judge in chambers and indicated the terms of the consent order to the judge orally. No formal document was signed and filed by the parties, embodying the consent order. Technically, the consent order in the application before me was not granted in terms of the rules. It was granted at common law. (*See Washaya and Washaya 1989 (2) ZLR 195(H) at p 199F).*

It would appear to me that the fact that a consent judgment was granted in terms of the rules or at common law is of no importance when considering an application to set it aside. This court and the Supreme Court have applied the same considerations to set aside a consent judgment granted in either circumstance. (S*ee Washaya v Washaya (supra) and Georgias and Another v Standard chartered Bank 1998 (2) ZLR 488 (S)).*

It does appear to me that to distinguish between a consent order granted in terms of the rules from one granted at common law is indeed to make a distinction without a difference. In both cases, the judge or court will only proceed to grant a consent judgment at the behest of the parties or their legal practitioners. The behest may be in writing and signed by the parties or their legal practitioners, or may be made orally during argument or during a trial. In both instances, the judge or court will be relying on the submissions of the parties or their legal practitioners that a settlement has been reached in the matter and a consent order may be granted. In this regard, it may be worth considering amending rule 56 so that it applies to all consent judgments, simply to put it beyond doubt that in both instances, the court may set aside a judgment given by consent on good and sufficient cause.

The law relating to the criteria that the court should take into account when considering an application to set aside a judgment given with the consent of the parties was, in my view, clearly set out by GUBBAY CJ (as he then was), in the case of *Georgias and Another v Standard Chartered Bank (supra).* Citing with approval the decision in *Roland & Another v McDonnell 1986 (2) ZLR 216 (S),* and rejecting the criteria used by Greenland J in *Washaya v Washaya (supra)* as being far too restrictive, this is what he had to say at page 492 H- 493A:

> "But, with respect, he erred in ruling that an applicant need show only that he did not consent to the order. Indeed, the contrary was decided by this court in *Roland & Anor v McDonnell* 1986 (2) ZLR 216 (S). It was there laid down that a judgment given by consent may be set aside on "good and sufficient cause"; an inquiry to be determined in accordance with the same principles as are applicable to the grant of the indulgence of rescission of a judgment given by default.

The adoption of those principles to an application to rescind a judgment given by consent enjoins the court to have regard to:

(a) the reasonableness of the explanation proffered by the

applicant of the circumstances in which the consent judgment was entered;

(b) the bona fides of the application for rescission;

(c) the bona fides of the defence on the merits of the case which prima facie carries some prospects of success; a balance of probability need not be established."

The learned judge proceeded to observe that as is the situation in an application for the setting aside of a default judgment, too much emphasis should not be placed on any one of the above factors. They must be viewed in conjunction with each other and with the application as a whole. A very strong defence on the merits may strengthen an unsatisfactory explanation. In considering the application before me, I shall be guided by this precedent.

Needless to say, the onus is upon the applicant to move the court to grant the indulgence sought. The judgment will not be set aside for the mere asking.

While this court in the case of *Georgias and Another v Standard Chartered Bank 1998 (1) ZLR 356 (H)* and the Supreme court in the same case on appeal, considered the approach taken by GREENLAND J in *Washaya v Washaya (supra)* as far too restrictive, I do not understand both courts to have been in material disagreement with GREENLAND J's approach as to the onus that rests on an applicant seeking to set aside an order granted with the consent of the parties. Regarding the onus that rests on such an applicant, GREENLAND J had this to say:

> "It seems to me that where the court is satisfied that a legal practitioner has the authority of his client to consent to judgment, the client will be bound by such consent and the court will visit on the client a heavy onus before rescinding the judgment."

By heavy onus, I do not understand the learned judge to have

meant that the applicant has to prove his case on any test other than on a balance of probabilities. In my view, the applicant bears the onus of proving that he or she is entitled to the indulgence sought, against the interests of public policy that there is need to see finality in litigation. In this regard, the applicant must show that the merits of his or her application far outweigh the interests of the public policy. This appears to me to have been the approach that that was adopted in the case of *Roland and Another v McDonnell (supra)* where at page 226G DUMBUTSCHENA CJ (as he then was) had this to say:

> "The court has also to consider the defendant's prospects of success at the trial and the question of public policy, that is, the need to reach finality in litigation. See *S v Franco & Another*; *S v Lasovsky Brothers & Ors* 1974 (4) SA 496 (R, AD) at 501E-F and Arab v Arab 1976 (2) ZLR 166 (AD) at 172E. In the instant case all that was required of the defendant in his application for rescission was to show that with the averments in his affidavits, if established at the trial, he would succeed. It was therefore important to establish whether his defence had any prospects of success. If he was unlikely to succeed because of the principle of public policy, then his application must fail."

Having laid out what I understand to be the law on how to consider applications such as the one before me, I now turn to consider whether the applicant is entitled to the indulgence she seeks.

Regarding the circumstances under which the consent judgment was granted, the applicant makes a bald statement that her legal practitioner had neither authority nor instructions from her to consent to the judgment on her behalf. She then goes on to show in detail, how the appointment of the first respondent as executor to her late husband's estate should not have been made in the first instance, as he is not the deceased's next of kin, being a half brother to the deceased. She proceeds to use the alleged in appropriateness of that appointment to show that her own appointment should not have been set aside.

I have some difficulty in responding favourably to the applicant's submissions in this regard. It appears to me that for an applicant to succeed in having a consent order set aside, he or she must place before the court the full circumstances leading to the consent order so that the court may determine whether or not the explanation is reasonable. In my view, the position of such an applicant is similar to that of an applicant applying for a judgment given in default to be set aside. The applicant in the latter application is required to give the details leading to the non-appearance or non-filing of a pleading resulting in the default judgment being granted. As it is has been held to be insufficient in the latter application to simply aver that one was not in willful default, so in my view, it is insufficient in the former to simply aver that the applicant did not give his or her consent to the order. The applicant needs to go further and place before the court facts upon which it can be found that that he or she did not consent to the order.

Despite the commendable efforts by Mr *Jairosi* in oral argument to persuade me otherwise, in my view, the applicant's case is deficient in that, in her founding affidavit, she does not place before me facts upon which a finding can be made that she did not consent to the order when it was entered into.

It is trite that an application falls or succeeds on the basis of the contents of the founding affidavit.

The second respondent has filed an opposing affidavit in which he explains the circumstances leading to the granting of the consent judgment. Implicit in his affidavit is the belief on the part of the second respondent that he was acting within the scope of his mandate in

representing the best interests of the estate when he agreed to the terms of the consent order. In the absence of facts placed before me by the applicant to the contrary, I cannot find that the second respondent exceeded his mandate.

I, however, wish to make an observation on the contents of the affidavit of the second respondent.

It is my view that the applicant erred in citing the second respondent as a party to the proceedings. While this may be so, it is my further view that the second respondent breached the duty of confidentiality between client and legal practitioners by deposing to the affidavit in the manner and in the detail that he did. Information highly prejudicial to the applicant was deposed to and/or attached to the affidavit and was made available not only to the court but to the other respondents.

The confidence of a client is absolute and must be preserved by the legal practitioner. Confidentiality between a client and his legal practitioner is much wider than privilege, which is a concept of the law of evidence. Thus, information that may not be privileged for the purposes of the law of evidence, must be kept confidential by the legal practitioner to maintain the integrity attaching to the office of the legal practitioner. The confidentiality reposing in a legal practitioner remains even after a client has withdrawn from the legal practitioner for whatever reason.[1]

There is no indication that the applicant consented to the disclosure of the confidential information by the second defendant. Even if the second respondent had been improperly dragged to court by the

[1] Lewis :Legal Ethics, p 297.

applicant, in my view, he went overboard in divulging information about the applicant that was not germane to his defence.

I merely point out this breach of ethics by the second respondent in the hope that legal practitioners will maintain the integrity and professionalism attaching to the office of the legal practitioner by observing the rules relating to confidentiality between a legal practitioner and a client.

Assuming that I were wrong in holding that there are insufficient facts before me upon which a finding can be made that the applicant did not consent to the granting of the order, I turn to consider the merits of her application.

The dispute between the parties is primarily over who should be appointed executor to the estate of the late Lovemore Masulani.

The applicant contends that her appointment as executrix dative was valid at law and should not have been set aside. That she was eligible to be appointed executrix in the estate and should have been preferred, cannot be doubted. It is however trite that the appointment of an executor dative in a deceased estate is in the discretion of the Master of the High Court. S25 of the Administration of Estates Act [*Chapter 6.01*], provides that where the deceased died without leaving a will or codicil in which he appoints an executor, the Master shall call for a meeting at which he appoints a fit and proper person to be executor in the estate. Section 29A prescribes the pool from which the Master can make the appointment but does not oblige him to make a specific appointment. Thus, the fact that the applicant is a surviving spouse in the estate simply makes her eligible for appointment but, does not grant

her an absolute right to be appointed.

In the matter before me, the clear opinion of the Master is that a neutral executor be appointed to the estate. In the premises, I find without merit, the contention by the applicant that her appointment should not have been set aside by virtue of her position as the surviving spouse in the estate.

On the basis of the above, I have reasoned thus: Even if were to rescind the consent judgment and grant the applicant leave to defend the proceedings in case No. HC 5814/01, the views of the Master have to be sought as to the appointment of an executor in the estate since one or both of the appointments has to be set aside. The Master has already made his views in the matter known, that he will prefer to have a neutral executor appointed in the estate. While the applicant should be preferred for appointment, a good reason exists for the appointment of a neutral executor in the estate. There is therefore no arguable case to refer back to a judge in chambers. To do so will only be to prolong litigation between the parties and the winding up of the estate. This will work against the interests of public policy on the need to see finalisation in litigation.

I find the applicant application weak on the merits.

For the above reasons, the application by the applicant cannot succeed. In the result, I make the following order:

The application is dismissed with costs.

Sawyer & Mkushi, applicant's legal practitioners;

F.O. Mzawazi & Partners, 1st respondent's legal practitioners;
Muzangaza & Partners, 2nd respondent's legal practitioners.